

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**Criminal Case No. HAC 047 of 2014**

Between

STATE

And

PENI YALIBULA (1<sup>st</sup> Accused)

MIKAELE TURAGANIVALU (2<sup>nd</sup> Accused)

RUSIATE TEMO ULIBAU (3<sup>rd</sup> Accused)

VILIAME ROCATIKEDA (4<sup>th</sup> Accused)

ULAIASI QALOMAI (5<sup>th</sup> Accused)

Counsel: Mr. J.Niudamu for the State

Ms. Juita Lagilagi for the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> accused

4<sup>th</sup> & 5<sup>th</sup> accused in person

**Dates of Hearing:** 18<sup>th</sup> to 26<sup>th</sup> May, 2015.

**Date of Ruling:** 28<sup>th</sup> May, 2015

**VOIR DIRE RULING**

- (1). The State seeks to adduce into evidence the cautioned interview statements of each of the five accused along with the answers to charge statements purportedly made by the accused to Nandi Police. The entire accused contest the admissibility of cautioned interview statements on the grounds submitted in their objections.

(2). First three accused object to the admissibility of his interview on the grounds that:

- I. That the accused statements were obtained in breach his right to Counsel before his arrest, before his caution interview and whilst on custody.
- II. That the accused was physically, emotionally and verbally abused and assaulted by the arresting officers at the time of his arrest.
- III. That the accused was beaten up several times at the time of his arrest, he was punched several times.
- IV. That the interviewing and witnessing officers were physically and verbally abusive during the interview.
- V. That the accused confessions were obtained involuntarily through pressure, physical and emotional abuse, intimidation, force and fear before and during the interview.
- VI. That the procedure in which the interview was conducted was against the Judges Rules and interview was conducted in an improper manner.

(3). Fourth accused objects to the admissibility of his interview on the grounds that:

- I. That the statement contained in the caution interview was indeed fabricated.
- II. That he signed the caution interview under duress.
- III. That the police officer took advantage of the atmospheric authoritative environment, they should have conducted the interview in a proper and fair manner.

(4). Fifth accused objects to the admissibility of his interview on the grounds that:

- I. That the accused was not properly cautioned at the time of arrest.

- II. That the accused was physically, emotionally and verbally abused and assaulted by the arresting officer.
  - III. That the accused was beaten with a police baton and kicked several times on hands and legs.
  - IV. That the interviewing and witnessing officers were physically and verbally abusive during the interview.
  - V. That the accused confessions were obtained involuntarily through pressure, physical and emotional abuse, intimidation, force and fear before and during the interview.
  - VI. That the procedure in which the interview was conducted was against the Judges Rules and interview was conducted in an improper manner.
- (5). It is for me to decide therefore whether these interviews were conducted freely and not as a result of threats, assaults or inducements made to the suspects by a person or persons in authority (in this case the Police). Secondly, if I find that there has been oppression or unfairness, then I can in my discretion exclude the statements in the interview and the charge sheet. Finally, if any accused's rights guaranteed under the Constitution have been breached, then that will lead to exclusion of the confessions obtained thereby, unless the Prosecution can show that the suspect was not thereby prejudiced. These rights include the right (i) to have a legal representative of his choice and (ii) to have access to family or next of kin.
- (6). The Fiji Court of Appeal in *Ganga Ram and Shiu Charan v R* 1983 (unreported) outlined the two-part test for the exclusion of confessions at p.8:
- "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 (sic) 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 – which has been picturesquely described as" the flattery of hope or the tyranny of fear" *Ibrahim v R* (1914) A.C. 599; *DPP v Ping Lin* (1976) A.C. 574.

Secondly, even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment. (R v Sanag (1980) A.C. 402, 436CE). This is a matter of overriding discretion and one cannot specifically categorise the matters which might be taken into account."

- (7). In relation to voluntariness, breaches of the Judges Rules are relevant but do not determine what is voluntary. The real question under principle (e) under the preamble to the Judges Rules is whether the statement is voluntary "in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority or by oppression". Oppression is something which "tends to sap and has sapped that freewill which must exist before the confession is voluntary".
- (8). The *voir dire* proceeding was conducted to ascertain whether the self-incriminating statements of each accused have passed the threshold tests in conformity with the legal requirements above mentioned. The inquiry originally planned for three days dragged on for one week to accede to the request of the defence in order to have all the charging and witnessing police officers subjected to cross examination. It's not the time that matters but the ascertainment of truth and ultimately the attainment of justice.
- (9). I am conscious of the fact that these proceedings are in respect of five accused and therefore the case against each must be looked at distinctly and separately. The evidence for or against one is not necessarily applicable to the other.
- (10). The burden of proving voluntariness, fairness, lack of oppression and of Constitutional rights in effect at the relevant times where applicable, and lack of prejudice (if there is) to the suspect, rests at all times with the prosecution. They must prove these matters beyond reasonable doubt. In this ruling I have reminded myself of that.

I summaries evidence led in the inquiry to satisfy myself that every important piece of evidence has been properly taken into account in coming to my conclusion.

## The Prosecution Case

- (11). The State called two lay witnesses, nineteen Police witnesses and three medical officers.

The case relating to the first accused

- (12). The Persecution witness Joeli Lotawa (PW.24) described the sequence of events that led to the arrest of 1<sup>st</sup> accused Peni Yalibula. On the 6<sup>th</sup> April 2014 around 3-4 a.m., he was having beer near the 'Early Shop' (earlier Daily Shop) opposite the Tandra Flowers in Nadi with his friends, Jona Toga, Josateki Sovau and Ilaitia Niusama. Whilst drinking, six 'boys' of whom he identified five of them in court as accused No.1-5 got off from a van and went inside the shop. They came to them and joined the drinking for about half an hour. Then they went inside the 'Early Shop' again whilst he and his friends were still drinking outside the shop. Short while after, he heard a scream (in Hindi) of a woman from the shop asking for help. Having armed with sticks to defend themselves, he and his friends went to the shop. They saw the boys robbing the shop. When they tried to stop the robbery, beer bottles were thrown at them. One boy followed Jona Toga and punched him. A fight broke out and it lasted nearly half an hour. They managed to apprehend one of them and stopped him from running away. Others escaped. He identified the boy who was apprehended as the 1<sup>st</sup> accused. He (1<sup>st</sup> Accused) had been badly injured in the fight. They then called the Police. Police arrived in twenty minutes. The 1<sup>st</sup> accused was handed over to the Police. He denied that the police assaulted the first accused at the time of the arrest.
- (13). Jona Toga, in his evidence, confirmed the story told by Lotawa. All the 'boys' who got off from the minibus were drinking with them for some time. They all went to the shop and were inside the Early Shop when the robbery was taking place. He clearly recognised the 5<sup>th</sup> accused Qalomai as they were schooling together. He confirmed that the group of boys confronted them and fight broke out in which he too was injured when a beer bottle landed on his face. He confirmed that Lotawa and Josateki Sovau managed to apprehend the 1<sup>st</sup> accused who was beaten up and later handed over to the police. He could not recollect the injuries of the 1<sup>st</sup> accused as he fell unconscious and lying on the ground.
- (14). Police witness Akariva Nanovu (PW.27) of Nadi Police station told about the arrest of the first accused. He told that on 6<sup>th</sup> April 2014 he was

picked by a police patrol vehicle driven by Constable Ilaitia around 3.40 a.m. and was told about a robbery at the Daily Shop near 'Tandra Flowers'. Then they arrived at the scene at Martintar where the robbery had taken place. They saw a suspect being apprehended by some members of the public. The person apprehended was later identified as Peni Yalibula. The suspect was badly injured with noticeable facial injuries and was driven to the Nadi Hospital for medical treatments. Then he was taken to the Nadi Police Station where questioning took place. The suspect, whom he identified as the first accused, was not assaulted at the time of the arrest by any police officer. He had already been injured before they arrived at the scene. He denied himself or other officers assaulting, swearing or punching the 1<sup>st</sup> accused. He however admitted his failure to caution the suspect at the time of arrest as he (the suspect) was not in a position to be cautioned. He was heavily drunk and injured. His priority was to save his life and to give him medical treatments at the hospital.

- (15). Police witness Saiasi Matarugu (PW.7) of Nandi Police Station spoke about the interview of 1<sup>st</sup> accused he conducted at the crimes branch of Nadi Police Station on 07.04.2014. The interview was in iTaukei dialect and was under caution. Crimes Sargent Nagatha was present witnessing the interview which lasted about 6 and ½ hours from 10.30 a.m. to 5 p.m. The 1<sup>st</sup> accused did not make any complaint at the interview. He was given the right to consult a lawyer which he did not exercise. Though he had bruises on his forehead and face he declined to go to a doctor. There was no threat, intimidation or pressure nor was there any inducement or promise held out to get the statement.
- (16). DC 3845 Jesse (PW.5) who charged the 1<sup>st</sup> accused was subjected to cross examination by the defense Counsel. He denied himself or any other police officer having assaulted or rubbed chilies on the 1<sup>st</sup> accused's body when the accused was being interviewed. He confirmed that the 1<sup>st</sup> accused had already been medically examined before the interview.
- (17). Dr. Salote Kataiwai (PW.19) of Nadi Hospital had examined the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> accused on 08<sup>th</sup> April 2014 when they were produced for medical examination by the police after the interviews. According to the clinical examination, 1<sup>st</sup> accused had bruises and swelling on his face, hematoma below the left eye and redness in both eyes. He also had multiple bruises on his left hand and on the back. They were not life

threatening and were consistent with the patient being punched several times on the face and attack on the back with a blunt object. She tendered the medical report relating to the 1<sup>st</sup> accused marked as PE.8.

#### 1<sup>st</sup> accused in defence

- (18). 1<sup>st</sup> accused said that he was arrested by members of public on 6<sup>th</sup> April 2014 beside the Daily Shop. When he was in the custody of members of the public, three police officers arrived in a vehicle and told to get in to the vehicle. When he refused, one civilian punched him on his head causing him to fell on the floor whereupon he was dragged in to the vehicle. Although he was explained the reason for arrest, he was not given an opportunity to contact a lawyer.
- (19). At the police station, he was severely assaulted by several police officers including the officer who interviewed, charging officer and the witnessing officer, with police batons for about an hour. They rubbed chilies and dropped a rock (about 1 ½ feet long) on his back.
- (20). In cross examination, the 1<sup>st</sup> accused admitted his presence at the Daily Shop when the robbery was taking place. He also admitted that he was assaulted by more than three iTaukei men when a fight broke out after his capture. He denied having been taken to the Nadi Hospital on the 6<sup>th</sup> by the police. He also denied that he was so drunk that he could not figure out anything happened.

#### Prosecution case against the 2<sup>nd</sup> and 3<sup>rd</sup> accused

- (21). Police witness Seruvi Caqusau (PW.26) described how he arrested the 2<sup>nd</sup> and 3<sup>rd</sup> accused on 7<sup>th</sup> of April 2014. 3<sup>rd</sup> accused Temo was first arrested at his home in Kaleli settlement by a team of three police officers and informed of the reason for his arrest and cautioned. At the time of the arrest he was at sleep and co-operated with the police. No assault took place. 3<sup>rd</sup> accused had some bruises on his face when he was arrested.
- (22). Having arrested the 3<sup>rd</sup> accused, the police team went to the 2<sup>nd</sup> accused's house in Vunato with the 2<sup>nd</sup> accused and arrested the 2<sup>nd</sup> accused who was also at sleep, following the same procedure. The 2<sup>nd</sup> accused was informed of the reason for the arrest and was properly

cautioned. No assault took place as he co-operated with the police. Nor was there any threat or intimidation. He had an injury on one of his ears.

- (23). Lavasani (PW.8) of Nadi Police conducted the interview of the 2<sup>nd</sup> accused in iTaukei dialect on 07<sup>th</sup> April 2014. SGT Atunasia ((PW.15) witnessed the interview. Right to consult a lawyer was explained to the accused and was cautioned. There was no complaint from the accused during the interview although some injuries could be seen on his body. No inducement or promise offered. Nor was there any threat, intimidation or coercion to obtain the statement.
- (24). The witness denied himself or other police offices having assaulted, poured water on an ear or dropped a rock on the accused. He however admitted the witnessing officer Atunasia's failure to counter sign the statement although he was present right throughout the interview. He also admitted some discrepancies between the original iTaukei interview statement and the English translation which he had done on the following day.
- (25). SGT Atunasia (PW15) the witnessing officer acknowledged his failure to counter sign the caution interview statement of the 2<sup>nd</sup> accused although he was present right throughout the interview. He was however unable to tell the court the exact time the interview was concluded.
- (26). WDC 4695 Edward Bibi (PW.4) who charged the 2<sup>nd</sup> accused denied having punched or poured water on one of the 2<sup>nd</sup> accused's ears when he was being interviewed.
- (27). Dr. Salote Kataiwi (PW.19) had examined the 2<sup>nd</sup> accused on 8<sup>th</sup> April 2014 around 9.20 p.m., right after the 1<sup>st</sup> accused. Elaborating on her medical examination, the Doctor described the injuries on the 2<sup>nd</sup> accused as 'life threatening'. Medical Report of the 2<sup>nd</sup> accused was tendered marked as PE.9.
- (28). The interview in respect of the 3<sup>rd</sup> accused was conducted by DC Gupta (PW.6) of Nadi Police Station on 7<sup>th</sup> April 2014 where DC 2019 Anil Kumar (PW17) participated as the witnessing officer. The right to consult a lawyer was explained to the accused and was cautioned before the interview. There was no complaint from the accused during the interview although some injuries could be seen on his body. No inducement or promise offered. Nor was there any threat, intimidation or coercion to



obtain the statement. The witness denied himself or any other police officer having assaulted or dropped a rock on the accused.

- (29). The charging officer of the 3<sup>rd</sup> accused WDC Shareen (PW18) attributed the impropriety of the charge statement to a typing error. She admitted having failed to correct the charge statement for so long. She denied police officers having assaulted the accused during the interview though she noticed injuries on 3<sup>rd</sup> accused's body at the time of charging. She neither asked nor recorded the injuries she saw on 3<sup>rd</sup> accused's body in her charge statement.
- (30). Right after the 2<sup>nd</sup> accused, Dr. Salote examined the 3<sup>rd</sup> accused and noted down all the injuries in her report that was tendered and marked as PE.10 in her evidence.

2<sup>nd</sup> and 3<sup>rd</sup> accused in defence

- (31). 2<sup>nd</sup> accused called his mother Laisa to give evidence and he himself gave evidence. Laisa described how her son was arrested when he was still at sleep in the house. He had no injuries and was quite well at the time of the arrest. She saw her son walking with great difficulty with injuries when she visited him in the Nadi Magistrate's court.
- (32). 2<sup>nd</sup> accused said that before being brought to the Nadi police station, he was taken to the Daily Shop and was assaulted by police officers. Shop owner's son also joined them in assaulting. At the police station, water was poured on his ears and a rock was dropped on his back. Police officers punched, and brutally assaulted until he signed the interview statement which he did not understand.
- (33). 3<sup>rd</sup> accused in his evidence described how he was awakened by a police officer in his bedroom and arrested. Having arrested, he was taken to the Crime Office of Nadi Police Station where he was brutally assaulted until he admits the charges.

Prosecution case against the 4<sup>th</sup> accused

- (34). Police witness Vereivalu who was attached to the 'Strike Back Unite' in Suva described how he managed to arrest the 4<sup>th</sup> Accused Viliame Rocatikeda. Upon information received from a reliable source, he went to Pander Apartments in Suva to arrest Viliame on 23<sup>rd</sup> May 2014. The

witness noticed a suspicious guy who was descending in the stair case and questioned him to ascertain his identity. He identified himself as Mataiasi Matakibau from Sulia. He had a black eye and bruises compatible with the information. When questioned, the witness had strong doubts about his identity and put him under arrest giving reasons for the arrest.

- (35). The 4<sup>th</sup> Accused was escorted to the Totogo Police Station for further questioning. At the Police station, Uliasi Qalomai (5<sup>th</sup> accused) who was already under arrest identified the suspect as his friend Viliame Rocetikeda who was involved in the robbery in Nadi. The suspect later admitted having given a false name to evade arrest and admitted that his true name was Viliame Rocetikeda. The 4<sup>th</sup> accused was not assaulted nor threatened at the time of arrest. He had a black eye and bruises on his face. On the following day, he was escorted by some other officers to Nadi along with the 5<sup>th</sup> Accused.
- (36). Police Constable Jona Toga interviewed the 4<sup>th</sup> accused at the Nadi Police Station on 24<sup>th</sup> May 2014. He did not notice any injury on the 4<sup>th</sup> accused's face during the interview. Neither was there any complaint nor request for medical treatments from the accused. Sufficient breaks were given during three and a half hour long interview to which the accused co-operated. No assault took place during the interview. No witnessing officer present. 4<sup>th</sup> accused, in cross examination, strongly contested the interview and drew the attention of court to the disparity between the starting time of the interview as recorded in the interview statement and the Station Diary of the Nadi Police Station.
- (37). Dr. Elenoa Naika gave evidence on the medical report she prepared after examining the 4<sup>th</sup> accused at the Nadi Hospital on 27<sup>th</sup> May 2014. The medical Report was tendered marked as PE.11

4<sup>th</sup> accused in defence

- (38.) The 4<sup>th</sup> accused described how he was arrested in Suva. He was brutally assaulted by police officers until he signed the caution interview statement. He showed the injuries to the Resident Magistrate when he was produced before the Magistrate's Court. Resident Magistrate made an order for medical examination. He strongly denied having been assaulted at a night club before the arrest.

Prosecution case against the 5<sup>th</sup> accused

- (39). Upon an information received, police witness CPL Alipate went to the Amusement Centre in Suva to arrest the 5<sup>th</sup> accused Quolomi on 23<sup>rd</sup> May 2014. He noticed a suspicious person descending the staircase who had a scratch mark on his face which conformed to the information. He identified himself as Suke Nase. Witness had strong doubts about the suspect's identity and escorted him to the Totogo Police station. On their way to the police station, the suspect apologised and admitted his real name to be Ulaiasi Qalomai. The suspect was cautioned on the arrest and was handed over to CPL Vereivalu of Totogo Police Station, who in turn escorted both 4<sup>th</sup> and 5<sup>th</sup> accused to Nadi Police on the following day. No assault took place on arrest or escorting.
- (40). Leone Vurukami of Nadi Police Station was the officer who interviewed the 5<sup>th</sup> accused. No witnessing officer present at the interview which took place through 10.15 -13.30 hrs. on 25<sup>th</sup> May 2014 at the interview room of Nadi Police Station. No inducement, threat or promise given to obtain a statement. Opportunity to consult a lawyer was given. The witness denied having assaulted the accused or sighted any injury on his face during the interview.
- (41). Dr. Terry of Nadi Hospital gave evidence on the medical report he prepared after examining the injuries on the 5<sup>th</sup> accused at the Nadi Hospital on 27<sup>th</sup> May 2014.
- 5<sup>th</sup> accused in defence
- (42). The 5<sup>th</sup> accused called two witnesses and gave evidence himself under oath. Witness Toga said that the 5<sup>th</sup> accused was arrested when he was plying billiard at an Amusement Centre in Suva. Witness Lebu was in the Nadi Police custody when the 5<sup>th</sup> accused was brought in. the 5<sup>th</sup> accused had no injuries at that time. In the afternoon he saw both the 4<sup>th</sup> and the 5<sup>th</sup> accused at the Police station with bleeding injuries.

### **Analysis**

- (43) I look at each of the five accused separately and assess the evidence relating to each entirely as it is relevant to him alone.
- (44). Except for the evidence in respect of the 1<sup>st</sup> accused, the evidence of the Police witnesses in respect of other accused was not consistent, reliable and believable. They all said that no assault took place prior to or during the interview. I do not believe their evidence which is not at all supported

by medical evidence. I have however formed a different view in respect of the prosecution evidence that dealt with the 1<sup>st</sup> accused and come to a different conclusion on the basis of my overall assessment of evidence.

- (45). The proposition maintained by the prosecution in respect of injuries observed at the medical examination was that they were the result of the brawl that took place during the robbery incident and not resulted at or after the arrest. With all due respect to the counsel for the prosecution, I am unable to subscribe to that proposition except of cause in regard to the 1<sup>st</sup> accused.
- (46). According to evidence of the police officers who arrested the accused, all except for the first accused, had only minor injuries or no injuries at all at the time of the arrest. When they were produced for medical examination soon after the interviews, they all had considerably serious injuries including, in one case, 'life threatening' ones. Even the Residence Magistrate before whom the suspects were produced made orders for medical examinations.
- (47). Under these circumstances, the inescapable inference that the court can draw upon hearing the evidence of doctors, coupled with that of the defence, is that the 2<sup>nd</sup> to 5<sup>th</sup> accused had been assaulted whilst they were in police custody.
- (48). Without prejudice to that inference, I am of the view that even if they had not been assaulted in the police custody, given the injuries and ailments they were suffering from at the time of the interview, it is unfair in all the circumstances to have statements of that nature been recorded by the police.
- (49). The police officers who were tasked to arrest the accused no doubt had been well briefed about the incident of robbery, brawl that ensued at the robbery and also the injuries some of the robbers might have had at the time of the incident. According to police evidence, some of the injuries even helped the arresting officers to trace the accused. Arresting officers of the 4<sup>th</sup> and 5<sup>th</sup> accused traced the accused merely by looking at the marks of injuries that matched the information.
- (50). If the police officers ever noticed any injury of that sort on the accused at the time of the arrest, all that could be expected of them as prudent police officers is a referral of the accused for an immediate medical examination, not only for their own safety but also to prove that the

injuries were in fact pre-arrest. Only the first accused had been so referred to such a medical examination after the arrest.

- (51). Evidence of such a timely medical examination would inevitably have bolstered their claim that no assault took place after the arrest and during the interviews. Unfortunately that is not the case before me.

I dealt with evidence in respect of each accused in coming to my final conclusion.

- (52). Police witnesses who arrested the 2<sup>nd</sup> and 3<sup>rd</sup> accused agreed that the accused had only minor injuries at the time of the arrest on the 7<sup>th</sup> April 2014. The 2<sup>nd</sup> accused had an injury on of his ears and the 3<sup>rd</sup> accused had some bruises on his face. Both of them were at sleep at the time of arrest. Mother of the 2<sup>nd</sup> accused testifying said that his son was well and had no injuries at the time of the arrest.
- (53). The doctor who examined them after the interview gave a detailed account of injuries she noted on the 8<sup>th</sup> of April 2014. 2<sup>nd</sup> accused had a swollen right ear, dried blood in the right ear, swelling, pain and obvious deformities in hands and fingers, pain and swelling at back of neck, and small laceration at the back of the head and multiple bruises on back. The doctor described some of the injuries on his head as 'life threatening'. The doctor had noted similar injuries on the 3<sup>rd</sup> accused also though they were not as serious as 'life threatening'. Doctor's evidence stood unchallenged.
- (54). I am of the view that If those injuries were present in them prior to the arrest, they would not have been able to have that good sleep only to be awakened by police officers in that late morning. I am also of the view that even If injuries of that sort were present at the time of the arrest, no prudent police officer would ever detain such a suspect without him first being medically examined.
- (55). According to prosecution witnesses, 4<sup>th</sup> and the 5<sup>th</sup> accused did not have any serious injuries at the time of the arrest. Police Constable Jona Toga who interviewed the 4<sup>th</sup> accused on 24<sup>th</sup> May 2014 did not notice any injury at all on the 4<sup>th</sup> accused's face during the interview. Police witness Leone Vurukami who interviewed the 5<sup>th</sup> accused also did not notice any injury on 5<sup>th</sup> accused. Then how come the injuries noted by Dr.Terry who examined both of them on 27<sup>th</sup> May 2014 came into being? Certain answer would be that they had been assaulted at the Nadi Police Station.

- (56). According to police prosecution witnesses, most surprisingly and quite unnaturally, both 4<sup>th</sup> and 5<sup>th</sup> accused had been arrested under almost similar circumstances in different places in Suva on 23<sup>rd</sup> of May 2014 that is after nearly two months after the robbery. Both the accused was descending staircases, had black eye and bruises on their faces and gave false names to mislead the police. Both the accused strongly contested the evidence of the prosecution witnesses in cross examination. Two witnesses called by the 5<sup>th</sup> accused whose credibility stood unshaken at cross examination successfully impugned prosecution evidence.
- (57). All the accused gave evidence under oath. Evidence of 2<sup>nd</sup> and 3<sup>rd</sup> accused corroborated each other and credibility of their evidence was not successfully impugned by the prosecution except on trivial matters. Dropping a rock, as large as the one they told about, on ones back must cause much more severe harm than what the doctor had noted on their body. Some kind of exaggeration filled with common sensational stories about police torture such as rubbing chilies cannot be ruled out in this inquiry also. Apart from that, larger part of the evidence adduced by the defence was supported by medical and other independent evidence.
- (58). Evidence of the 4<sup>th</sup> and the 5<sup>th</sup> accused also corroborated each other and was supported by medical evidence. Evidence of two witnesses called by the 5<sup>th</sup> accused bolstered the case for the defence.
- (59). History related by the accused to the doctors and the timely complaint to the Resident Magistrate at the first available opportunity bolstered the consistency of defence version.
- (59). I therefore accept the evidence of the defence and reject the evidence of the prosecution save as for the evidence in respect of the first accused.

I now turn to the case of the first accused and give reasons for my distinct conclusion

- (60). According to prosecution witnesses, Jona Toga and Lotawa's unchallenged eye witnesses account, first accused was first arrested by members of the public at the alleged place of robbery and was then handed over to the police officers who arrived at the scene in twenty minutes time. Fight ensued between two groups and it lasted for about half an hour. Lotawa was armed with a stick to defend himself when he approached the scene.

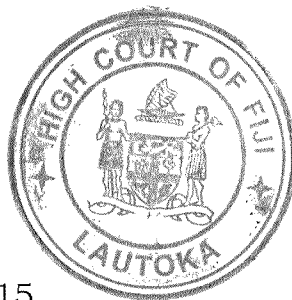
- (61). As a result of the fight, 1<sup>st</sup> accused was subdued and was apprehended by the members of the public while others escaped. 1<sup>st</sup> accused received injuries and was badly injured by the time police arrived.
- (62). Larger part of the evidence given by the 1<sup>st</sup> accused tallied with that of the prosecution eye witnesses account. First accused admitted in his evidence that he was assaulted; forehead injured and then dragged on to the police vehicle by members of the public.
- (63). The Doctor who examined the first accused did not rule out the possibility of those injuries having been received as a result of a gang fight.
- (64). 1<sup>st</sup> accused denied that he was taken to a hospital by the police soon after the arrest. He also denied that he was drunk at the time of the arrest.
- (65). Arresting Officer Akaraiva's evidence that the 1<sup>st</sup> accused was taken to the Nadi Hospital after the arrest was confirmed by Charging Officer Jesse.
- (66). Both the lay eye witnesses confirmed that the 1<sup>st</sup> accused was having alcohol with them for some time and was drunk at the time of the incident.
- (67). I do believe the prosecution evidence in this regard as being truthful and find that the 1<sup>st</sup> accused was not in a position to recollect whether he was taken to Nadi Hospital after the arrest as he was so drunk and injured.
- (68). Therefore, I find that the injuries observed by Dr. Kataiwai on 1<sup>st</sup> accused's body had been caused by the members of the public at the gang fight that ensued at the robbery and not a result of police assault.
- (69). I also find that no prejudice was caused to the 1<sup>st</sup> accused by not being properly cautioned at the time of the arrest as he was cautioned before the interview.
- (70). Each Police witness gave evidence of proper procedures being followed, of caution when appropriate, of the affording of constitutional rights to the 1<sup>st</sup> accused. He was given right to contact a legal representative and was held in custody separately from his co-accused. He was taken to Court as soon as reasonably possible.


- (71). I believe the 1<sup>st</sup> accused had all reasons to give a statement to police voluntarily if he was arrested at the scene of the crime.
- (72). I also believe that police officers are not tempted to take confessions by force when a strong case is made out by other sources.

### **Conclusion**

- (73). Therefore I find that the caution interview and the charge statement of the first accused to have been made voluntarily. There is nothing oppressive which would lead me to exclude them and as a result they can be lead in evidence at trial.
- (74) I also find that the caution interview and the charge statements of the 2<sup>nd</sup>, 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> accused to have been made involuntarily. Therefor I exclude caution interview and the charge statements of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused at the trial and hold that they are inadmissible.

The court is the final guardian of the rights of the people and we, as judges are there to ensure that. Torture, which is a crime against humanity, at the hands of police in the name of criminal investigation must at all cost be condemned and discouraged, especially in an era where more advanced *modi oparandi* are used in crime detection. This is not a Police State where functions of the police and that of the judiciary are fused together. Meting out punishment to offenders is the exclusive prerogative of the judiciary.



  
**Aruna Aluthge**  
**Judge**

At Lautoka

28th May 2015