IN THE HIGH COURT OF FIJI

AT SUVA

[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 019 – 022 OF 2022

[Consolidated]

BETWEEN	:	**JONA DAVONU**
		SEMISI NADUKA
		SANITA LAQENASICI
		PITA MATAIRAVULA
AND	:	**STATE**
Counsel	:	**Mr W Navuni for the 1st Appellant**
		Mr J Buakula for the 2nd Appellant
		Mr R Savu for the 3rd Appellant
		Mr T Varinava for the 4th Appellant
		Ms M Konrote for the State
Date of Hearing	:	**23 August 2023**
Date of Judgment	:	**6 October 2023**

JUDGMENT

[1] On 18 November 2012, Iowane Benedito (the complainant) while serving sentence escaped from prison with some other inmates.

[2] Ten days later, on 28 November 2012, the complainant was apprehended in Nabua and taken to Colo-i-Suva and physically battered by police and military officers.

During the assault, one of the assailants used an object and poked the complainant's anus.

[3] Three years later, on 21 October 2015, the appellants were jointly charged with sexual assault contrary to section 210(1) (a) and (3) (a) of the Crimes Act.

[4] Jona Davonu was a detective constable at the time of the alleged offence. Sanita Laqenisici and Semisi Naduka were police officers at the time of the alleged offence, but by the time the trial was heard, they had joined the Fiji Military Forces and had become military officers. Pita Matairavula was a military officer at the time of the alleged offence.

[5] The prosecution alleged that the appellants formed a common intention to assault the complainant and the commission of sexual assault was a probable consequence of carrying out the assault.

[6] All four appellants pleaded not guilty to the charge. They were all represented by the same private counsel of their own choice. In the course of the proceedings the learned magistrate held a voir dire and ruled a video of the alleged assault posted at YouTube inadmissible as the prosecution could not prove authenticity of the video.

[7] After numerous adjournments and almost six years later, on 8 December 2021, the trial commenced in the Magistrates' Court at Nasinu. At the trial, the prosecution led evidence from three witnesses - the complainant, a civilian and a police officer.

[8] The prosecution case was that the appellants took the complainant to a remote location in Colo-i-Suva to inflict physical punishment on him for escaping from prison. The prosecution led evidence that the appellants were involved in assaulting the complainant and while committing the assault one of them poked a metal rod

several times aiming at the complainant's anus over his underwear. While the complainant's anus was being poked with a rod, the appellants were passing comments and making jokes about his big anus. The prosecution alleged that the fact that the complainant was stripped to his underwear and the fact that one of the appellants poked a rod several times aiming at the appellant's anus while the rest joked about his big anus shows all of those inflicting physical assault on the complainant realized that the complainant was probably going to be sexually assaulted.

[9] The complainant's evidence was that two to five officers assaulted him after he was apprehended in Nabua. He overheard the officers saying 'let's take him to Colo-i-Suva'. He was taken to Colo-i-Suva in a twin cab. While travelling in the trunk of twin cab the officers swore at him and assaulted him. When the vehicle stopped they dragged him to the end of the trunk and started beating him. They pulled his feet, beat his ankle and legs with a baton and punched his face. The baton was like a baseball bat. They used a silver pipe and poked his back and made fun of him saying "cici levu". He couldn't see who was doing what. He was wearing boxes. His clothes had been thorn away. They tried to remove his boxes but he held on to it. They forced him sideways. They were targeting his anus. They poked him four to six times. He felt pain in his anus at the time of assault. There were plenty officers around assaulting him. He recognized Jona, Sanita, Filimone and Pita. He referred them as Suva officers. He knew them. They had arrested him before. Sanita was right in his face. Pita was yelling at his face. Jona was close to him. Jona was lying (sic) his leg on his leg. Jona was recording. The assault stopped after the other escapee by the name Opeti knocked out. From Colo-i-Suva he was taken to a station and locked up. He was not given medical attention until 4 December 2012.

[10] Aborama Rokotuitai was the complainant's friend. When the complainant escaped from prison the police contacted Aborama for information regarding the complainant's whereabouts. Aborama voluntarily assisted the police with

information and got the complainant arrested. Aborama accompanied the complainant to Colo-i-Suva in the twin cab. They sat in the tray of the twin cab with eight police officers. Four officers sat inside the twin cab. He saw the complainant being punched by the police officers while they were being driven to Colo-i-Suva. When they arrived at Colo-i-Suva around 1 pm, some other vehicles joined them. He saw the complainant being beaten up. They used a baton to hit his knees. They pulled down his pants. They shoved a black rod up his anus. The complainant was restrained – hands tired. They were assaulting him and laughing at his dick. They stopped the assault when the complainant jumped. He saw bruises and marks on the complainant. The complainant's body was swollen.

[11] Livai Ikanikoda was one of the police officers who was involved in the apprehension of the complainant. Four teams were involved. Each team had about ten officers. The instructions were given by Sgt Joape. Their instruction was to seal off Sukanivalu Road in Nabua. While they were in Nabua they received a call that the complainant had been arrested. They were instructed to go to Colo-i-Suva. When they arrived at Colo-i-Suva, he saw the complainant there. He saw three vehicles and more than ten officers. They were in civilian clothes. They were assaulting the complainant. He took a video of the incident. He saw the officers hitting the complainant with a baton, a timber and a pipe. He was standing about 2 meters away. The complainant was lying in the back tray of the vehicle. The complainant's hands were handcuffed. The complainant was screaming during the assault. They were poking the complainant on his ribs and anus. He knew the officers who were assaulting the complainant. They were Sanita, Jona, Semisi and Pita. He saw Sanita assaulting the complainant. He saw Jona poking the complainant's anus with a baton. He saw Semisi hitting the complainant with a pipe. He saw Pita hitting the complainant with a pipe.

[12] All four appellants gave evidence.

[13] Appellant Davonu's evidence was that in 2012 he was part of a unit within the Fiji Police Force called the Strike Back Team. This unit was established to address the increasing crime. On 28 November 2012, he was part of 10 police officers who were briefed by Sgt Joape about the complainant. He was in a vehicle with five officers – Pita, Semisi, Sanita, Neori and him. They went and searched around Nabua area. While they were at Nabua, Sgt Joape instructed them to go to Colo-i-Suva as two escapees were found there. They proceeded to Colo-i-Suva and when they arrived there, the complainant and one other escapee were already in custody. They separated the two escapees to extract information from them about the other escapee who at that stage had not been apprehended. He did not assault the complainant and he did not see anyone else assaulting the complainant either. From Colo-i-Suva the complainant was taken to Nabua Police Station.

[14] Appellant Matairavula's evidence was that on 28 November 2012, after briefing from Sgt Joape, they went to Colo-i-Suva. When they arrived there the complainant and another escapee by the name Opeti had already been apprehended. They interrogated Opeti but not the complainant. He did not see anyone assault the complainant. Nor did he assault the complainant.

[15] Appellant Laqenisici's evidence was that his team included Pita, Jona, Semisi, Temo and Filimoni. They did not go to Konave Road, Nabua. They were instructed to go to Colo-i-Suva to interrogate Opeti. Opeti was another escapee who was arrested in Nabua that day. They did not carry any weapons like baseball bat, timber, silver pipe or iron rod. They did not assault anyone at Colo-i-Suva.

[16] Appellant Naduka's evidence was that about five teams were deployed to arrest the escaped prisoners. He was in Sanita, Jona and Pita's team. They went to Nabua to search for the escapees but they did not arrest anyone. While they were in Nabua area, Sgt Joape instructed them to go to Colo-i-Suva to interrogate Opeti. When they arrived at Colo-i-Suva they saw plenty officers. His team interrogated Opeti.

They did not carry any weapon on that day. They did not assault the complainant as alleged by him.

[17] On 28 February 2022, almost ten years after the alleged incident, all four appellants were convicted of the charge, and on 8 August 2022, sentenced to 4 years imprisonment.

[18] The appellants appeal both their conviction and sentence. They have advanced common grounds of appeal.

[19] The grounds of appeal are:

APPEAL AGAINST CONVICTION

1. **THAT** the Learned trial Magistrate had erred in law and in fact by not adequately addressing the issue of inconsistencies in evidence of the three prosecution witnesses regarding the object used and how the complainant's anus was poked resulting in a miscarriage of justice.
2. **THAT** the learned trial Magistrate failed to address that there was no evidence to implicate the accused on the act of sexual assault and in those circumstances the direction on joint enterprise and common intention was erroneous and it caused a miscarriage of justice.
3. **THAT** the learned trial Magistrate erred in law and in fact in convicting the Appellant as the verdict is unreasonable and it is not supported by the totality of the evidence.
4. **THAT** the Appellant was unfairly represented by the defence counsel who did not adequately put his case across due to conflict of interest thus resulting in miscarriage of justice.

APPEAL AGAINST SENTENCE

5. THE learned Magistrate erred in law and in fact when he did not outline what constituted the objective view in selecting a starting point of the sentence.

[20] **Inconsistency in the evidence regarding the weapon used**

The initial charge alleged that the appellant used 'hard objects' to commit sexual assault. The charge did not specify any specific object. On 16 December 2021, the charge was amended before close of the prosecution case with the leave of the court. The amended charge alleged that the appellants used a metal rod to commit sexual assault. By the time the charge was amended to specify a specific weapon Aborama was half way through his examination-in-chief.

[21] The complainant's description of the weapon was 'silver pipe', 'metal rod, caste iron metal, not heavy metal rod, was 2 ½ meter, 1 ½ or 2 inch'.

[22] Aborama described the weapon as a black rod while Livai said it was a pipe.

[23] In his judgment, the learned magistrate did not make any finding regarding the specific weapon that was used to sexually assault the complainant. He found the weapon used was 'offensive' without specifying what that weapon was. In other words, he did not resolve the alleged inconsistency in the evidence regarding the description of the weapon given by the three prosecution witnesses.

[24] All four appellants denied being in possession of any weapon on the day of the alleged incident. The trial issue was whether the complainant was sexually assaulted by the appellants. The prosecution alleged that a metal rod was used to commit the assault. The prosecution witnesses said that a rod or a pipe was used. The witnesses were not completely off the mark regarding the weapon that was used. They were consistent that the weapon was like a rod or a pipe. Any discrepancy in the colour of the weapon was immaterial to the litigation issue. There were no material

inconsistency for the learned magistrate to resolve regarding the weapon that was used to commit the sexual assault. Ground one fails.

[25] **Joint enterprise to commit sexual assault**

The prosecution relied upon section 48 of the Crimes Act to impute criminal responsibility on the appellants for the offence of sexual assault.

[26] Section 48 of the Crimes Act states:

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

[27] For the appellants to be guilty of sexual assault under section 46 of the Crimes Act, the critical question is, in the particular circumstances of the case, was the commission of the offence of sexual assault a probable consequence of committing the offence of assault? (*Dutt v State* [2023] FJSC 4; CAV0006.2022 (27 April 2023)).

[28] Further, as the Court of Appeal said in *Talala v State* [2019] FJCA 50; AAU155.2015 (7 March 2019) at para [69]:

In my view for one to be liable under section 46:

a. There should be the involvement of 2 or more persons.
b. They should have formed a common intention to prosecute an unlawful purpose in conjunction with one another, and
c. In the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose.

d. Section 46 thus envisages a situation where an offence is committed which is distinct from the unlawful purpose the offenders had formed a common intention to prosecute in conjunction with one another. The sine qua non of liability under section 46 is that the offence committed should be of such a nature that its commission should have been a probable consequence of the prosecution of such purpose in the mind of offender sought to be made liable. In this context the word 'probable' means something more likely to happen than the use of the word 'possible'.

e. The rationale for joint enterprise liability rule is that one party, by intending to prosecute an unlawful purpose in conjunction with another, consciously accepts the risk that the other person might commit another offence. (per Fernando JA)

[29] The learned magistrate's direction on the law of joint enterprise in pages 9-10 of the judgment is correct. The complaint is that the learned magistrate misdirected himself on the evidence and that he did not explain the application of the joint enterprise to the facts of the case.

[30] In his analysis of the evidence, the learned magistrate first made a finding that the identification of the appellants had been established by evidence. This was not necessary because identification was not an issue in this case. All four appellants gave evidence admitting being at Colo-i-Suva at the time of the alleged offence.

[31] After making a finding on identification, the learned magistrate made a general finding that "PW1, PW2 and PW3 all witnessed that the PW1 was poked with an object', and 'that it was Pita Matairavula who poked PW1 in the anus' and 'even though the other accused did not poke him with the offensive weapon, section 46 of the Crimes Act applied' to others. The impugned paragraph of the judgment reads:

I also considered the evidence led by the accused. Each of them testify to being at the scene of the incident but not taking part in it. I compare these testimonies to the three prosecution witnesses who clearly identified the accused and were present at the scene. The evidence is clear that it was Pita Matairavula who poked PW 1 in the anus. Even though the other accused did not poke him with the offensive weapon, section 46 of the Crimes Act as discussed above is applied here. There is clear common intention in this case that stems from the evidence."

[33] With all due respect, the learned magistrate did not consider the issues correctly. The first step to the inquiry under section 46 of the Crimes Act did not require the learned magistrate to make a finding that a sexual assault had been committed. The proper inquiry should have been whether the appellants physically assaulted the complainant as part of their agreement? If the assault of the complainant was part of an agreement between the appellants then the next inquiry was whether the commission of sexual assault was a probable (highly likely) consequence of committing physical assault on the complainant?

[34] The learned magistrate did not explain how he came to the conclusion based on the evidence of the witnesses that the commission of sexual assault was a probable consequence of committing physical assault on the complainant in the circumstances of this case. The learned magistrate should have considered the case against each appellant separately in determining whether they were guilty or not guilty of the charge. Instead the learned magistrate lumped up all the appellants and made a general finding that 'there is a clear common intention in this case that stems from the evidence', without referring to what that evidence was, resulting in a miscarriage of justice. Ground two succeeds.

[35] **Whether the verdict is unreasonable and supported by totality of evidence?**

This ground is an extension of ground two. Counsel for the State concedes that the learned magistrate mistook the facts in convicting the appellants. The prosecution led evidence that the actual sexual assault, that is, poking the complainant in the anus with a rod was carried out by Jona Davonu. The evidence pointed to him as the principal offender. Others had a secondary role arising from a common intention to assault the complainant. The prosecution did not accuse Pita Matairavula to have carried out the sexual assault.

[36] The learned magistrate's express finding that Matairavula was the principal offender who carried out the sexual assault is not supported by evidence and is unreasonable. It follows that the learned magistrate's imputation of secondary criminal responsibility for sexual assault on other appellants is founded on the mistaken fact that Matairavula carried out the sexual assault. The evidence that the appellants assaulted the complainant as part of an agreement was strong but whether they realized that the complainant would be sexually abused by one of them when carrying out the assault was doubtful. It cannot be said that had the learned magistrate correctly directed himself to the facts he would have been satisfied of the appellants' guilt beyond a reasonable doubt. Ground three succeeds.

[37] **Conduct of Defence Counsel**

All four appellants were represented by Mr Raza. They are now complaining that Mr Raza had a conflict of interest in representing them all at trial, that he did not adequately put their individual case due to the conflict of interest and that he elicited incriminating evidence to strength the prosecution case when cross examining the complainant.

[38] All four appellants defence was that they were not part of the team that apprehended the complainant at Nabua. They did not go to Colo-i-Suva as part of any agreement between them to assault the complainant. They did not carry out any assault on the complainant as alleged by him. They went to Colo-i-Suva because a

superior officer ordered them to go there. There were some evidence that the appellants arrested the complainant and took him to Colo-i-Suva in the twin cab. But when Mr Raza cross examined the witnesses he did not put to them that the appellants were not involved in the complainant's arrest. Those questions should have been put to the witnesses because the appellants defence was that they were not part of any agreement to arrest and take the complainant to Colo-i-Suva to assault him.

[39] Mr Raza carried out a lengthy cross examination of the prosecution witnesses. However, his questions mostly reaffirmed the examination in chief. Some questions were prejudicial to the appellants. For example:

XX of the complainant
Q Assaulted by Accused 1 and Accused 4 punched you?
Sanita Laqenasici – punched you (sic) got pushed
Accused 2 – punched me on body and ankles
Accused 3 – bigger, punched me stepping my neck

Q Pita poked your anus with screw driver?
A 5 inch
Q Sharp?
A Not very sharp
Q Got injured?
A No

[40] There was not an iota of evidence that Pita Matairavula poked the complainant's anus with a screw driver or any object resulting in an injury. That was not what the prosecution alleged. Why Mr Raza asked these questions is best known to him. The answers were highly prejudicial to Pita Matairavula. The learned magistrate relied on the incriminating evidence to find Pita Matairavula guilty, although erroneously.

Whether Mr Raza displaced flagrant incompetency in conducting the cross-examination is not an issue. The issue is whether Mr Raza's conduct caused prejudice to the appellants and for the trial to miscarry. The trial did miscarry in this case due to the defence counsel's conduct.

[41] The conviction cannot stand. Given this conclusion it is not necessary to consider the ground of appeal against sentence.

[42] The final question relates to the relief that should be granted in this case. There is an unexplained pre-charge delay of three years. The post-charge delay is six years. The post charge delay is systemic and in breach of the constitutional right of an accused to be tried within a reasonable time. The appellants have already served about 12 months in prison. It is not in the interest of justice to order a retrial.

[43] **Result**

Appeal allowed.

Conviction and Sentence set aside.

No order of retrial.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Appellants