IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0005 of 2019
[Court of Appeal No. AAU 155 of 2016]

BETWEEN : **(1) VILIAME VEREIVALU**

(2) JONA DAVONU

(3) PITA MATAIRAVULA

Petitioners

AND : **THE STATE**

Respondent

Coram : **The Hon. Mr. Justice Anthony Gates**
Judge of the Supreme Court

The Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

The Hon. Mr. Justice Priyasath Dep
Judge of the Supreme Court

Counsel : **First and Second Petitioners in person**
Mr I. Fa for the Third Petitioner
Mr L J Burney for the Respondent

Dates of Hearing : **20 and 21 October 2022**

Date of Judgment : **27 October 2022**

JUDGMENT

Gates J

[1] I have had the advantage of reading in draft the judgment of Keith J. I agree with his Lordship's assessment of the evidence presented before us in a *voir dire*. I also agree with his findings, reasons, and with the orders proposed. I add a few words of my own, but I will not dwell on the evidence. Keith J has dealt with that in detail.

[2] The *voir dire* proceedings before us were ordered by a differently constituted panel in the April 2022 sessions. The proceedings were due to be heard in the August sessions but were adjourned to October, 2022.

[3] A spate of robberies had occurred and the police responded with immediacy and commitment. There had been an armed robbery in Nadi upon a money exchange outlet. Two suspects were discovered travelling in a mini bus to Suva which had stopped temporarily at Tagaqe. They were arrested and taken to Malevu hill, an isolated area off the Queens highway not far from Tagaqe. It appeared the police were trying to obtain the names of the other suspects involved.

[4] Nearly 30 police officers came to that place. There was a large contingent of officers from the Western division. A smaller group, the Suva Strike Back Team, also came. A 3rd group, the arresting officers, came from the local police station at Sigatoka. The improprieties, the police brutalities, were there inflicted on the 2 suspects at Malevu hill. Charges of rape and sexual assault were laid against the petitioners, along with 6 other petitioners not now before this court. They had all been convicted in the High Court of Lautoka. The 2 team leaders were also charged and convicted of defeating the course of justice.

[5] The 2 suspects, victims of the brutality, were injured. They had endured prolonged punching, beating, kicking, and finally the pain and indignity of anal penetration with chillies and with a stick. By any standard this was an appalling case of police misconduct. It was a gross departure from professionalism.

[6] The remaining petitioners in this case are from the Suva Team. In shortened form they were Viliame, Jona, and Pita. In the Court of Appeal two others from the original 9 convicted, were acquitted. Three others of the remaining 7 did not wish to continue with their appeals, and withdrew their petitions. One alas had died.

<u>The case against the Suva Team</u>

[7] Once the disclosures had been served on the accused or their lawyer Mr Khan, it would have been clear that his 9 clients were not telling the same story. They were not in unison. The Western Team blamed the Suva Team and the Suva Team blamed the Western Team.

[8] There was also a difference in the accounts they gave in their caution interviews. It was not the fact that there were 9 clients to be defended, it was the fact that the two teams made quite different attributions of blame. The conflict for a defence lawyer was obvious. How could he put to the prosecution witnesses the account given by the Western petitioners without incriminating his other clients, the Suva Team? And vice versa.

[9] The 3 petitioners, all from the Suva Team, who gave evidence before us said that they had been advised (not by Mr Khan) not to answer questions in their caution interviews. In this case, that advice appeared to be wrong. It would have been wiser to have given their side of the story at this stage. Depending on how trial counsel saw it, the fact that their story had been given at the interview, might have meant counsel did not need to call them to give evidence in their defence case, where they would have been subjected to cross examination. But in view of the evidence of 2 of the prosecution witnesses referring to the involvement of the 3 Suva petitioners in the assaults, if not the rapes, it would have made for a stronger case for the defence if still they had given testimony to demonstrate their non-involvement with the joint enterprise of serious crimes committed by the Western Team.

[10] The summary of the sworn evidence before us, given by the petitioners, was that they wanted their account of what had happened to come out. It had been agreed with Mr Khan that they were to give evidence. It came as a shock therefore, particularly after that

morning's discussion where Mr Khan had reassured them that they should give evidence, that a note was passed to the 3 in court. It had come from Mr Khan. The note said that they were to remain silent. This was contrary to the morning discussion prior to the Judge asking them individually what they wished to do in presenting their defences.

[11] Familiar they may have been with police procedures, investigations, and basic court procedures. But their grasp and understanding of High Court trials, appellate procedures, and evidence, would have been meagre at best. For instance, it was not understood that a co-accused's statement in a caution interview was not evidence against another co-accused unless the maker went into the witness box and repeated the statement or allegation on oath. From their evidence before us, it was obvious the sudden change in the direction of their cases at what was meant to be the commencement of their defence had been confusing and perplexing. They said they believed Mr Khan and thought he could still win their cases.

[12] This was a naïve, and an uninformed opinion. As the case stood at the close of all of the evidence, the court would still not have known what their defence was. Mr Khan had not put significant parts of what they had to say in their accepted plain statements to the witnesses who had identified them and accused them of punching, kicking and in Pita's case, of using a stick. There was no evidence, if they failed to give sworn testimony, to set against that of the 2 suspects, Boila and Soko, and the police officer Apete. Mr Khan could not put the case for the 3 Suva petitioners to those witnesses because their case involved naming the Western Team police officers responsible – who were also Mr Khan's clients in the trial. That was the reason also for him not allowing them at the last minute to give evidence, contrary to what had originally been communicated to them and agreed.

[13] At the time of the trial, Mr Khan had told the Suva petitioners that he was not worried about the Suva Team. But he was worried about the Western Team. The Western Team's caution interviews in which there were admissions of involvement in the crimes, were ruled admissible. Mr Khan then sacrificed the Suva clients in order to try to save his Western clients. He prevented the Suva petitioners from pointing blame at the Western clients, and

to some extent from confirming the admissions in the caution interviews of the Western clients.

[14] Given the opportunity to demonstrate the lack of conflict and the freedom that the waiver of privilege of the Suva clients had granted, Mr Khan failed in his affidavit either to address the requirements of the court's order or to deal with the issues raised in this part of the petition proceedings and the petitioners' affidavits.

[15] This was a most rare application to the Supreme Court. The court is alert to the lateness of the hour in raising such a case. If not skeptical, the approach must be one of extreme caution. Matters not raised at the earliest challenging earlier court proceedings often failed because the last minute application may undermine the sincerity and veracity of the approach being made to the final court. However on the key issues I believed the evidence of the 3 petitioners.

[16] Viliame and Jona, quite junior officers, in effect said they were trapped by the circumstances in which they found themselves. The choice of lawyer had come about from a recommendation through the Western Team. They would have been very familiar with Mr Khan, a senior lawyer of many years experience based in Lautoka. Being in the disciplined forces (Pita was a Warrant Officer No.1 in the army assigned to police duties), they would have been used to team work and following orders. Changing a lawyer at a late stage either during the High Court trial or for the Court of Appeal was not a realistic option. They were charged fees on the basis of $4,000.00 per charge against them in the information, a total of $8,000.00. This was a large sum of money not likely to be readily available considering their income level. They would have to find a similar sum, no doubt to carry the first appeal forward. They explained why they had stuck with Mr Khan until this very late stage. The explanation was plausible and was to be accepted.

[17] These circumstances, and the lengthy post trial proceedings, would not have occurred if Mr Khan at the pre High Court trial stage had kept to his primary clients, those in the Western Team, the Lautoka officers. He should not have continued with the Suva Team

because of the obvious conflict. He did them no service. Without their cases being put to the key identifying prosecution witnesses and without their accounts in sworn testimony being heard by the court at trial they had no chance of acquittal.

[18] Because of the conflict their lawyer was under in conducting their defence, and because of his failing to put their cases in cross examination and by failing to lead positive evidence to set against that of the prosecution, the trial miscarried. The miscarriage constituted a substantial and grave injustice, and pursuant to section 7(2) of the Supreme Court Act meets the criteria for the grant of leave to appeal. The petition must be allowed.

[19] As Keith J has already noted, an order for re-trial is no longer appropriate in view of the fact that the petitioners will have served the non-parole part of their lengthy sentences within the next 2 weeks.

Keith J

Introduction

[20] Not infrequently, defendants who have been convicted complain about their legal representation at trial. Such complaints are easy to make which is why an appellate court will often be sceptical about them. But they will usually be quite serious which is why the appellate court will look at them with care. A procedure was approved by the Court of Appeal in *Nilesh Chand v The State* [2019] FJCA 254 for determining such complaints. If there is a factual dispute between the defendant and their counsel at trial, it may be necessary for both of them to give evidence before the appellate court and be subject to cross-examination to enable the court to determine where the truth lies. That will not happen very often. It will only happen where the issue cannot be resolved in some other way, and if the determination of the issue is crucial to the outcome of the appeal. This is one of those rare cases where it was necessary for oral evidence to be given. What makes the case even more unusual is that the appellate court which heard the evidence was not the Court of Appeal but the Supreme Court. That was because it was only after the dismissal of the defendants' appeals by the Court of Appeal that the defendants first raised the complaints they now make.

The course of the proceedings

[21] The trial concerned the alleged mistreatment by nine police officers of two men who had been arrested for robbery[1]. The police officers came from two different teams. Six of them were members of a team from Lautoka. They were Manasa Talala, Seruvi Caqusau, Kelevi Sewatu, Penaia Drauna, Filise Vere and Senitiki Nakatasavu. Manasa was the ranking officer of the team. The other three were members of a team from Suva. They were Viliame Vereivalu ("Vili"), Jona Davonu and Pita Matairavula. Vili was the ranking officer of this team. As is the usual practice in Fiji, I shall refer to them all by the first names from now on. All nine defendants were represented at their trial by Iqbal Khan, the senior partner of Iqbal Khan and Associates, Barristers and Solicitors. They were all convicted of raping and sexually assaulting the two men who had been arrested. In addition, the ranking officers of each team were convicted of defeating the course of justice by instructing their officers to make false statements in connection with the investigation into the alleged mistreatment of the suspects. They all appealed against their conviction and sentence to the Court of Appeal. They were again represented by Mr Khan. The convictions of two of the defendants were quashed by the Court of Appeal[2], but the appeals of the other seven defendants against their conviction and sentence were dismissed.

[22] The seven remaining defendants applied for leave to appeal to the Supreme Court against their conviction and sentence. The petition was drafted by Mr Khan. It contained what I might call conventional grounds of appeal. For example, the grounds included complaints about rulings about the admissibility of evidence which the trial judge had made following a *voir dire*, and complaints about various aspects of the judge's summing-up to the assessors. However, on 20 May 2019, the three officers from Suva – Vili, Jona and Pita – wrote to the Court setting out in summary form their own grounds of appeal. It had clearly not been drafted by a lawyer. These home-made grounds of appeal are again what might be called conventional grounds. For example, they alleged that the law relating to the requirement for corroboration and the doctrine of joint enterprise had been misunderstood.

[1] One of the nine, Pita Matairavula, was an army officer who had been assigned to the police force. It is easier if I refer to all nine as police officers.

[2] The two defendants whose convictions were quashed, Kelevi and Penaia, were both members of the team from Lautoka.

[23] Mr Khan says that he had been unaware of the grounds of appeal filed by the officers from Suva. He heard about it for the first time during a hearing on 14 August 2019 when the appeal had been listed for mention before the Acting Chief Justice (as the Chief Justice then was). The hearing was adjourned until 16 August 2019 so that Mr Khan could clarify whether the officers from Suva still wanted him to represent them. When he met them, they told him that they had filed their home-made grounds of appeal only because they had not been sure whether Mr Khan had filed the petition seeking leave to appeal in time. In fact, the petition had been filed in time, and when Mr Khan showed it to them, they were, according to him, satisfied with it and were content for him to continue to represent them. That explains why, when Mr Khan filed his written submissions in support of the appeal on 10 September 2019, those written submissions were filed on behalf of all seven remaining defendants.

[24] It was then that the course of the proceedings changed. The hearing of the appeal was due to take place on 24 October 2019. However, on 10 September 2019, the officers from Suva filed a statement in the Supreme Court signed by each of them. In that statement, they expanded on their conventional grounds of appeal, but made for the first time serious allegations about Mr Khan's representation of them at the trial. Broadly speaking, two allegations were being made:

- They alleged that there had been a serious conflict between their cases and the officers from Lautoka. Their case was that the rapes and sexual assaults had been committed by the officers from Lautoka and not by them. They claimed that despite that Mr Khan represented all nine defendants at the trial (as well as on the appeal) when he should not have done so. They alleged that that seriously affected the way he represented them at their trial, and that his representation of all nine defendants tended to cast them in an unfavourable light when compared with the officers from Lautoka who were the defendants whose interests Mr Khan was really fighting for.
- None of the nine defendants gave evidence at the trial. The officers from Suva alleged that Mr Khan did not give them any advice about whether they should give evidence. Instead, he instructed them not to do so.

These allegations had not been made in the Court of Appeal. When the officers from Suva were asked at the hearing on 23 October 2019 why these allegations were being made for the first time in the Supreme Court, they said that that had been because Mr Khan had still been representing them in the Court of Appeal. It was only after their appeals had been dismissed that they realized that Mr Khan had not had their best interests in mind throughout the trial.

[25] In the light of the allegations, the officers from Suva could no longer be represented by Mr Khan, and at the hearing on 24 October 2019, Mr Khan represented only the four remaining officers from Lautoka. The three officers from Suva were representing themselves. The Court took the view that the allegations being made against Mr Khan, if true, were such as to make it possible that the convictions of the officers from Suva would have to be quashed. The Court then considered how it should determine whether the allegations being made by the officers from Suva were true. It concluded that hearing oral evidence was the only way to resolve the complaints. It decided to treat the officers from Suva's statement filed on 10 September 2019 as an application to call fresh evidence. Accordingly, at a future hearing of the appeal, in addition to hearing the grounds of appeal of the four remaining officers from Lautoka and the conventional grounds of appeal of the officers from Suva, the witnesses who could give relevant evidence on the allegations made against Mr Khan – the officers from Suva, Mr Khan and any other person they wished to call – could be examined and cross-examined on oath. On that occasion, the Court gave directions for

- the officers from Suva to file detailed statements setting out their complaints against Mr Khan
- Mr Khan then to file a detailed statement addressing those allegations
- the officers from Suva to file detailed statements in response if they so wished.

Pursuant to these directions,

- the officers from Suva filed their detailed statements setting out their complaints against Mr Khan on 31 October 2019, they having waived their legal professional privilege

- Mr Khan filed a statement dated 3 December 2019 purporting to address those allegations
- the officers from Suva filed detailed statements in response on 2 April 2020.

[26] Unfortunately, as a result of the Covid pandemic, the Supreme Court was unable to sit for a long time. The next hearing of the appeal did not take place until 7 April 2022. By then, three things had happened:

- Manasa had sadly died on 24 September 2021. Mr Khan did not object to his appeal not being proceeded with. That left only three of the officers from Lautoka – Seruvi, Filise and Senitiki.
- They were still represented by Mr Khan. However, on 24 February 2022 he had written to the Court informing the Court that they wished to withdraw their applications for leave to appeal. At the hearing on 7 April 2022, Mr Khan told the Court that they were withdrawing their applications for leave to appeal as their release date was very close. Accordingly, their applications were dismissed on their withdrawal. That left just the three officers from Suva – Vili, Jona and Pita. They had each been sentenced to terms totaling 9 years' imprisonment with a non-parole period of 6 years.
- One of the officers from Suva, Pita, had instructed lawyers to represent him. The other two officers from Suva, Vili and Jona, continued to be unrepresented. That was to remain the position.

Pita's legal team had only been instructed recently, and had not even had all the papers. They sought an adjournment of the hearing. In any event, it was recognized that the hearing would take some time. It would not be completed in the hour or so allotted for the hearing, and there was no other time available during that session of the Supreme Court for the case to be heard. The Court reluctantly ordered that it should be listed for hearing at the next session with two days set aside for it to be heard.

[27] Regrettably, Mr Khan's statement of 3 December 2019 had consisted of little more than denials of the allegations made against him. In order to determine whether there had been a conflict of interest between the three officers from Suva on the one hand and the six officers from Lautoka on the other, it was necessary for Mr Khan to set out what his

instructions from his two sets of clients had been concerning the events which gave rise to the charges which all the defendants faced. Only then could the Court decide whether there had been a conflict of interest which should have prevented Mr Khan from representing all the defendants. However, the Court recognized that in order to say what his instructions had been from the six officers from Lautoka, Mr Khan would have to ask them to waive their legal professional privilege, and they would have to agree to that. In the absence of any direct evidence of the nature of Mr Khan's instructions from the officers from Lautoka, the Court would have to infer what those instructions had been from, among other things, (a) the evidence of the officers from Suva in the Supreme Court and (b) Mr Khan's cross-examination of the prosecution's witnesses and anything else Mr Khan had said during the trial.

[28] Accordingly, following the hearing on 7 April 2022, the Court made various directions to ensure that the next hearing (which should be during the next session of the Supreme Court) did not have to be adjourned yet again. Among them were the following directions:

- Mr Khan was ordered to request the five surviving officers from Lautoka to waive their legal professional privilege to enable Mr Khan to inform the Court of their instructions to him about their and the officers from Suva's participation in the events which gave rise to the charges and the course of the trial
- Mr Khan was ordered to file an affidavit setting out his response to the allegations, in sufficient detail to enable the Court to understand his version of events, by reference to 12 topics which the directions identified
- the officers from Suva were ordered to file affidavits in reply to that of Mr Khan setting out, in sufficient detail to enable the Court to understand their version of events, their case on four topics which the directions identified.
- the officers from Suva were ordered to file such amended grounds as they proposed to rely on
- the officers from Suva and Mr Khan were ordered to attend the next hearing to be cross-examined on their affidavits.

[29] On 6 May 2022, Mr Khan wrote to the Court informing it that he had spoken to each of the five surviving officers from Lautoka. They had all given him written instructions not to

waive their professional legal privilege. As for the Court's directions about the filing of affidavits, Mr Khan's affidavit was filed on 27 May 2022, and the affidavits of each of the three officers from Suva were filed on 12 or 13 September 2022. Only two of the officers from Suva, Vili and Jona, the unrepresented ones, took up the offer to file amended grounds of appeal. They filed a joint statement on 15 July 2022.

[30] I regret to say that Mr Khan's affidavit was as inadequate as his previous statement. Two examples will illustrate what I mean. First, in order to identify whether there was a conflict of interest preventing him from representing both the officers from Suva and the officers from Lautoka, we needed to know what their respective instructions to him were. We appreciate that he could not tell us what his instructions from the surviving officers from Lautoka were because they did not waive privilege. But the three officers from Suva all waived privilege a long time ago, which was why two of the 12 topics we asked Mr Khan to give details about were the instructions he received from the three officers from Suva about (a) *their* participation in the events to which the charges related and (b) the participation of *the other six defendants* in the events to which the charges related. Mr Khan's response about the instructions which the three officers from Suva gave him about their participation in the events was merely that they "denied all of the allegations made against them relating to the charges". And his response about the instructions the three officers from Suva gave him about the participation of the other six defendants in the events was merely that they "made no incriminating statements against the remaining 6 defendants relating to the charges". This tells us nothing about what his instructions were from the three officers from Suva about what had actually happened.

[31] Secondly, it was obviously important to know what advice Mr Khan gave the three officers from Suva about whether they should give evidence. His response was to say that at all times they were advised of their rights , namely that they were not obliged to give evidence and that no adverse inference could be drawn from their not doing so, and were advised of the consequences of choosing to give evidence, namely that they could be cross-examined by counsel for the prosecution. This completely ignores what we needed to know, which was such advice as he gave them about whether they *should* give evidence.

[32] At a directions hearing on 23 August 2022, the Chief Justice fixed Thursday 20 October and Friday 21 October 2022 for the hearing at which the three officers from Suva and Mr Khan would be cross-examined on their affidavits. Mr Khan had not attended the hearing on 23 August 2022 as his clients had withdrawn their appeals by them. In the event, Mr Khan did not attend the hearings on 20 and 21 October 2022. We were not given any notice of that. When we came into court and saw that Mr Khan was not there, we asked for inquiries to be made about where he was. His office informed the Court that he had left for Australia the previous day. We decided to proceed with the hearing nevertheless. At the hearing the three officers from Suva were cross-examined by Mr Fa for Pita and by Mr Burney for the prosecution. This is the Court's judgment following that hearing.

[33] Following the hearing, a member of Mr Khan's firm wrote to the Court saying that Mr Khan had not known of the dates of the hearing. That was on Monday 24 October 2022. The letter was placed only before us yesterday in view of Diwali on Tuesday. He pointed out that Mr Khan would not have received notice of the hearing as he was not a party to the proceedings. We have been unable to check that, but we suspect that that is correct. But even if it is, the question remains whether Mr Khan knew of the hearing anyway. We are sure that he did. We say that for three reasons:

- This was an extremely important matter for Mr Khan. As his firm's letter said, Mr Khan knew that his professional reputation was at stake. He would therefore have been anxiously proactive in finding out the dates on which the hearing was due to take place. He would have made inquiries to find that out, especially as he knew that he would have to make arrangements to ensure that he had no other professional commitments on the relevant dates.
- Even if he had not made such inquiries, he knew that the case was overwhelmingly likely to be heard in the current session of the Supreme Court as the hearing in the August session of the Supreme Court had just been a hearing for directions. He would therefore have checked the cause list each week to see if the case was listed for that week. He would thus have seen that, in the cause list for the week beginning Monday 17 October, the case was due to be heard on the Thursday and Friday of that week.

- By coincidence, Mr Khan appeared in the Supreme Court in another case on Tuesday 11 October. Two of us, Gates J and myself, were among the judges for that case. Mr Burney, who appears for the State in this case, was appearing for the State in that case. An issue arose about the need for a defendant who is appealing against his conviction on the ground of incompetence of his counsel to give his previous counsel the opportunity to address the allegations being made against him. We have listened to a recording of that hearing. In the course of it, Mr Burney said that Mr Khan would "next Thursday be giving evidence to defend his reputation against erstwhile clients who said that he was professionally incompetent … in a very serious rape trial, a police brutality case". Mr Khan did not say that he did not know what Mr Burney was talking about.

[34] For these reasons, we have concluded that Mr Khan did indeed know about the hearing on Thursday 20 October 2022, but decided to use the fact that he had received no notification of that date *from the court* to pretend that he did not know about the hearing. His unwillingness to deal in his affidavit with what he must have known we wanted him to address has only reinforced our conclusion that he is reluctant to give us the assistance we need. We leave it to others to decide what action, if any, should be taken

<u>The facts in outline</u>

[35] Before I set out my findings on the allegations made against Mr Khan, I should give an outline of what the case was all about. On 15 August 2014 the police at Sigatoka were informed of an armed robbery by five masked men which had just taken place in Nadi. Different teams of police officers swiftly reacted to this news. Those teams did not just come from Nadi. Teams of officers from Sigatoka, Lautoka and Suva responded as well. There was information that the two of the suspects were in a mini-bus heading for Suva. The team from Sigatoka caught up with the bus, and arrested the two suspects, Senijeila Boila and Vilikesa Soko. The money the two suspects had with them was seized. They then headed back to Sigatoka. On the way, the vehicle they were in branched off towards Malevu, and stopped on the top of a hill.

[36] The prosecution's case was that this had been done on the instructions of Manasa, the ranking officer of the Lautoka team, and that the plan was to take the two suspects to an isolated spot where pressure could be put on them to reveal the names of their accomplices,

that at various stages all nine defendants arrived on the scene, and it was while they were all there that the two suspects had a stick shoved up their anus and chillies rubbed on their anus, as well as on other parts of their body. It was not disputed at the trial that the two suspects had been seriously mistreated. Indeed, Soko died from his injuries five days later. No charge of homicide – whether of murder or manslaughter – was preferred because it was thought that he might not have died if he had been treated properly when he was taken to hospital. However, tragic though that was, it is only part of the background to the case, and nothing turns on that for the purpose of resolving the issues which arise on this appeal.

[37] In these circumstances, the issue for the judge and the assessors at the trial was which of the nine defendants, if any, were criminally responsible for causing those injuries, either on the basis that they had assaulted the two suspects themselves, or on the basis that they were participants in a joint enterprise to mistreat the suspects in order to extract information from them. The prosecution relied primarily on the evidence of (a) Boila, the surviving suspect and (b) police officers who were there for some or all of the relevant time, and on the confessions of some of the officers from Lautoka when they were interviewed, though none of the three officers from Suva were alleged to have made any incriminating admissions: they said "no comment" to all relevant questions in their interviews In their case, the only admissible evidence against them was that of Boila and of one of the police officers who were not facing any charges, Special Constable Apete Nokolo, a member of the Suva team.

[38] *Apete's evidence*[3]. Apete's evidence was that he had gone with Vili, Jona and Pita together with another member of the team, Special Constable Keponi, to the hill near Malevu where the two suspects had been taken. All five of them got out of their vehicle. He and Keponi stood by the vehicle while the other three went to talk to the officers from Lautoka. The three of them then went into the truck where both suspects were being held. All three of them were kicking and punching Soko in the stomach while asking him questions. Apete heard Soko shouting in pain. While Vili, Jona and Pita were inside the truck, two of the officers from Lautoka were pounding chillies in a bottle. Two or three of the officers from Lautoka then went into the truck, and brought Soko out. They took off his clothes and

[3] A transcript of his evidence is at pages 949-969 of volume 4 of the Record of the High Court.

rubbed the chillies all over his body, his face and his genitalia, as well as his legs, hands, stomach and mouth. By then, five officers were doing that. When they had finished with Soko, they did to the other suspect (whose name Apete did not know) what they had done to Soko. He was on the ground beside the truck by then, and had already been injured.

[39] Apete had made four witness statements in 2014 prior to the trial. They were dated 21 August, 26 August, 9 December and 10 December[4]. In his first statement, he said that he had not seen either of the two suspects on the day in question. They had already been arrested and taken to Sigatoka Police Station. His team were engaged in searching for the other men believed to have taken part in the robbery. He changed his account in his second statement. On that occasion he said that he had gone to the hill where the two suspects were being held. When he first saw them, they were both in the back of a truck and had injuries on their face. When he saw them a little later, they had been taken from the truck and were naked on the ground. He said that he moved away because "none of us could stand the things being done to them", though he did not say who was doing anything to the two suspects, or what they were doing. However, a little later he saw one of the officers from Lautoka placing a stick dipped with chillies into the anus of the darker of the two suspects.

[40] In his third statement, he changed his account yet again. He said that his earlier statements had not been true, and what he had said in his second statement had been what Vili had told him to say. In this statement, he said that Vili, Jona and Pita had gone into the truck where the two suspects were, and had punched and kicked them. Shortly thereafter, the suspects were brought out of the truck and had to sit on the ground. Pita hit Soko on the back with a stick, and then three of the officers from Laukota took Soko's clothes off, and rubbed chillies over his body while Pita pulled Boila's leg up and hit his knee on the ground. The three officers from Laukota then did to Boila what they had done to Soko. In Apete's fourth statement, he said that Sgt Suli (presumably a more senior officer based in Suva) had told him to start thinking of his family.

[4] They are at pages 1146-1152 of volume 5 of the Record of the High Court.

[41] When Apete came to be cross-examined by Mr Khan, Mr Khan took Apete through these statements. Having done that, Mr Khan put to Apete that it was his second statement which was true, and that Vili had not instructed him to say what was in it. Apete denied both suggestions. No other positive case was put to Apete by Mr Khan. In particular, he did not put to Apete what the case of any of the defendants was.

[42] *Boila's evidence*[5]. I turn to the evidence of Boila. At the time of the trial, he was serving a sentence of 11 years' imprisonment for the robbery. In his evidence-in-chief, he described what had happened to him and Soko – how they had been assaulted both inside and outside the truck, and that chillies had been rubbed over their bodies and inside their anus using a stick of some kind. However, when he was asked which officers had done that, he said that it had not been any of the defendants. Instead he named four of the officers from Sigatoka who had arrested them. That resulted in Mr Burney, counsel for the prosecution, applying to the judge for Boila to be treated as a hostile witness. The basis of the application was that in saying that none of the defendants had been involved in the mistreatment of them, he was going back on witness statements he had previously given. The judge gave leave for Boila to be treated as hostile, and that enabled Mr Burney to put to him his previous statements which were said to be inconsistent with his testimony in court.

[43] There were three statements in all, but only two of them are important for present purposes. The first was dated 25 August 2014[6]. In that statement, he said that he and Soko were assaulted by the officers who had arrested them before they were taken to an isolated place. It was there that the officers from Suva assaulted them. They were then stripped and one of these officers tried to insert a torch light into his anus. They were then joined by other officers, and the assaults continued for about an hour. Chillies were put in their anus with a stick. The other statement which is important for present purposes was dated 22 September 2016, just before the start of the trial. In that statement, Boila said that at one

[5] A transcript of his evidence is at pages 918-934 of volume 5 of the Record of the High Court.

[6] This statement was not in the Record of the High Court which I was supplied with. Boila's other two statements were. They are at pages 568 and 570 of volume 3 of the Record of the High Court. However, I know what was in the statement of 25 August 2014 as it was read out by Mr Burney in the course of his cross-examination of Boila.

stage he saw Pita and other officers assaulting Soko, and then he saw Pita and officers from both Suva and Lautoka spreading Soko's legs and putting chillies into his anus with a stick.

[44] When these statements were put to him by Mr Burney, Boila denied that he had told the officer who had taken the later statement from him that Pita had been involved in the assault. He went on to say that what he had said in both of the statements had been true – apart, presumably, from the fact that Pita had been one of the officers who had assaulted him. Indeed, when Mr Khan cross-examined him, he said the later of these statements – the one which recorded him as naming Pita – had been written out for him to sign beforehand, that when he signed that statement he had not noticed that Pita's name had been there, and that the assaults had already taken place by the time Pita arrived. He was effectively exonerating the officers from Suva despite what the statements had said. And when he was reminded by Mr Khan of what he had said before Mr Burney had applied for him to be treated as hostile, he repeated that it had been the officers from Sigatoka who had assaulted him.

[45] *The interviews under caution of the officers from Lautoka*. Like the three officers from Suva, all of the six officers from Lautoka were interviewed under caution. Unlike the three officers from Suva, they chose to answer the questions they were asked. All of them save Manasa challenged the admissibility of the records of the interviews, and the judge held a *voir dire* to determine their admissibility. He ruled them all admissible save for that of Kelevi. With the exception of Kelevi, I have read the records of each of their interviews. Three of them – Seruvi, Filise and Senitiki – confessed to the involvement of some of the officers from Lautoka in the use of chillies on the two suspects, though what is important for present purposes is what they said about the officers from Suva. What follows is a brief summary of what each is recorded as having said:

- Manasa said that he did not see how the suspects got any of their injuries, save that he had been told when his team arrived on the scene that the injuries to the suspects' faces had been caused when they had been resisting their arrest.
- Seruvi said that the three officers from Suva had assaulted the two suspects inside the truck though not with chillies, nor did they put anything inside their anus at that stage, but Pita was kicking Boila while Kelevi was rubbing chillies over his face and in his

anus. One or more of them including Pita continued to assault Soko outside the truck, and it was in the course of that that Pita stuck something up Soko's anus.

- Penaia said that he saw the three officers from Suva questioning Boila on the other side of the truck, and he could not see what they were doing to him, but then they came to Soko, removed his pants and were kicking him while trying to get him to tell them who his accomplices were.
- Filise said that he saw Pita kick Soko in the chest and stomach and beating Soko with a piece of wood.
- Senitiki did not blame any of the officers from Suva when he was initially interviewed in August 2014. However, when he was interviewed the following November he said that Pita had inserted a stick into Soko's anus, and that Vili and Jona had held Soko's legs apart while one of the officers from Lautoka had put chillies into Soko's anus.

These records of the interviews of the officers from Lautoka were, of course, not admissible against the officers from Suva in the trial proper, unless the defendants who had made them gave evidence and repeated on oath what they had said when they had been interviewed.[7] As it was, after the prosecution had closed its case, and after the judge had ruled that there was a case for all nine defendants to answer on all the charges, none of the defendants elected to give evidence.

[46] In the interests of completeness, I should mention the two charges of defeating the ends of justice. Only Manasa and Vili, the ranking officers of the Lautoka and Suva teams respectively, faced those charges. The allegation was that they had put pressure on other officers not to tell the truth in the witness statements they were to give about the involvement of the officers responsible for the mistreatment of the suspects. The prosecution's case on these charges was based on the evidence of those police officers, and in the case of Vili, the evidence again was that of Apete. As I have said, his evidence was that his second statement had been based on what Vili had told him to say.

[7] Although what each interviewee had said in their interviews was not admissible against the other officers, it was thought sensible to redact the records of the interviews so that the assessors would not see which of the other officers the interviewee was incriminating. However, we have been provided with unredacted copies of the records of the interviews.

<u>The evidence of the three officers from Suva</u>

[47] When the three officers from Suva came to give evidence, their affidavits were treated as their evidence-in-chief. Their oral evidence was therefore what they told Mr Fa and Mr Burney in cross-examination, together with such questions as the members of the Court had for them. The evidence of the three of them was broadly similar. There were things which one or other of them said which the others did not say, but that may well have been because they were not all asked the same questions. In the summary of their evidence which follows, I have identified which of them said what where that is necessary.

[48] *<u>The events of the day in question</u>*. On the day in question, they got a call from Penaia. He said that his team were chasing two suspects who were thought to be from Suva. He wanted officers from Suva to identify them. When they arrived at the isolated spot where the suspects had been taken, there were police officers already there, including the team of officers who had arrested the suspects and a team from Lautoka. One of the officers from Lautoka was putting chillies into a bottle, and another was beating the two suspects with an iron rod. Vili told Penaia to stop whatever they were going to do, but Seruvi said something like "whatever happens in Suva stays in Suva. It's different in Western. These aren't our suspects." One of them asked the suspects whether they were ready for another round, and that was when the officers from Suva walked away. The officers from Lautoka then rubbed chillies onto Soko's body, and then did the same to Boila.

[49] *<u>The witness statements</u>*. After Soko died, they were interviewed by the team investigating his death. They each made witness statements. Vili and Jona are said to have made two statements. Pita made one. The first of the statements said to have been made by Vili and Jona on 20 or 21 August 2014 were almost identical to each other. They referred to the efforts they had made on the day in question to find the other three suspects. They did not say anything about having gone to the isolated spot where the two suspects had been taken to. Vili denied having made this statement. Jona accepted that he had made it, but claimed that he had just been told to make a statement about the arrest of the suspects and the recovery of the money. I am sure that Vili did make this statement. It is too similar to Jona's for him not to have made it.

[50] In the second of their two statements, which were made on 26 August 2014 and were again almost identical to each other and to Pita's only statement (which he made on 3 September 2014), all three of them accepted that they had indeed gone to where the two suspects had been taken. Soko was in a police truck. Boila was on the ground. Seruvi and another officer from Lautoka pulled Boila's legs apart, and a third officer from Lautoka rubbed chillies into his anus several times. The officers from Lautoka then did the same thing to Soko. All of them said they, the officers from Suva, had not mistreated the two suspects, and that what was in these statements was what they would have said in evidence had they given evidence at the trial.

[51] *The interviews*. On 5 December 2014, Vili and Jona were interviewed under caution. So too was Pita two days later. They all said "no comment" to the questions they were asked. Vili and Jona said that that was because they had already given a statement setting out their version of events (ie their statements of 26 August 2014), and Jona added that he did not want to "spoil" what he had previously said. For his part, Pita said that he had not answered the questions he was asked because the Director of Internal Affairs within the Police Service had told him not to.

[52] *The charges*. Not long after, the nine defendants were charged. The three officers from Suva would then have realized that someone had implicated them. They may not have known who – whether it was Boila, or any of the officers from Lautoka (who the three officers from Suva knew were the guilty parties if their evidence was true), or other officers who were there. When they first knew that it was the officers from Lautoka who were blaming them is important, though I should say that Pita acknowledged in his evidence that from very early on he had assumed that it was the officers from Lautoka.

[53] *Awareness of who had implicated them*. As I say, when each of the three officers from Suva became aware that it was the officers from Lautoka who were implicating them is important. The sooner it was, the sooner they might have felt uncomfortable about Mr Khan representing all nine of them, and the sooner they could have gone to a different lawyer. Vili and Jona both say that it was in the course of the *voir dire* that they knew for the first that the officers from Lautoka were blaming them, because that was when they heard what the officers from Lautoka were supposed to have said in their interviews under

caution. Vili's evidence on this topic was that Mr Khan never told them that the officers from Lautoka were blaming them. Indeed, when the three of them would meet Mr Khan, the officers from Lautoka would not be there. Because he did not know that the officers from Lautoka were blaming them, he did not mind Mr Khan representing all nine of them. He knew that the officers from Lautoka were the guilty ones and that the officers from Suva were innocent, but that did not make him concerned about Mr Khan representing them all. That was why he did not ask Mr Khan whether they should instruct different lawyers. In any event, Mr Khan's reputation was such that he thought that Mr Khan knew best. He would say to them that he was not worried about them. He was worried about the officers from Lautoka. Jona said much the same thing.

[54] Pita was in a different position. Bearing in mind that he had assumed very early on that it was the officers from Lautoka who were blaming the officers from Suva, and that Mr Khan knew that they, the officers from Suva, were blaming the officers from Lautoka, he asked Mr Khan how he could represent both sets of officers. Mr Khan told him that he would fix it. Pita's evidence was that he did not question that at the time because he was new to the system.

[55] *The defence strategy*. Vili's evidence was that at some stage before the trial, there was a joint meeting with Mr Khan and both sets of officers. A strategy for the defence was discussed. Vili did not say what that strategy was, save that Mr Khan proposed to call the officers from Lautoka to give evidence in the *voir dire*. Jona said that in so far as there was a defence strategy, it was for the officers from Suva to give evidence. After the *voir dire*, though, whether the officers from Suva should give evidence was discussed. Vili's evidence was that they were concerned that the officers from Lautoka were blaming them. Mr Khan told them not to worry as they would have the opportunity to give their evidence and tell their side of the story. Vili told him that they really wanted to do that. Jona and Pita said much the same thing, though Jona added that by this time he had thought that it was odd that Mr Khan could represent all nine defendants when they were blaming each other. He asked Mr Khan about that. Mr Khan told him that they would take things "step by step". Jona said that he trusted Mr Khan to do what was best for them.

[56] *The day of the defence case*. As I have said, following the prosecution's case in the trial proper, the judge ruled that all nine defendants had a case to answer. Vili's evidence was that on the morning on which the defence case was due to start, the three officers from Suva had a meeting with Mr Khan. They told him that they were ready to give evidence, and that they would be implicating the officers from Lautoka (although Mr Khan already knew that that was their case). Mr Khan did not tell them not to do that, or that it was a bad idea. On the contrary: he told them that he would be calling them to give evidence.

[57] The evidence of all three of them was that when they got into court, Mr Khan passed Manasa a note. He was the first of the nine defendants. Manasa passed it down to the line until it reached the three officers from Suva. There is uncertainty whether the note actually said that it was intended for the three of them, but it plainly was: the first five defendants did not read the note, and when Pita passed it to Senitiki, Senitiki just said "it's OK", suggesting that he already knew what it said. The officers from Suva say that it told them that when they judge asked them whether they wished to give evidence, they should say that they did not want to. Pita said that he was confused by the note. Why had Mr Khan changed his mind at the last minute? He let it go because Mr Khan was his lawyer, and he thought that Mr Khan knew best. Vili and Jona said much the same thing.

[58] When they asked Mr Khan later why he had instructed them to tell the judge that they were not giving evidence, he told them that he did not want them to damage Boila's evidence. I shall return to that later, but the three of them say that they accepted what he told them. Jona added that even if he had wanted to get another lawyer then, it was far too late. They had already paid him, and they had no option but to stay with him.

[59] *Subsequent events*. Following their conviction, all the defendants wanted to appeal. They continued to instruct Mr Khan because he told them that in the light of Boila's evidence their appeal would be allowed. Only Pita gave evidence about what happened thereafter. He said that they wanted Mr Khan to incorporate into their appeal what they said had happened on the day in question, and that they wanted to go through his written submissions to the Court of Appeal to make sure that their account of what had happened would be told. Mr Khan did not do that, which was why Pita said that after the dismissal of their appeal they had no option but to disengage from Mr Khan.

The prosecution's case

[60] In a powerful submission, Mr Burney contended that the defence strategy all along was that none of the defendants would be giving evidence. In that way, none of them would blaming each other. What the officers from Lautoka had said in their interviews could not be admissible as evidence against the officers from Suva. And to the extent that they had given evidence in the *voir dire* which may have implicated the officers from Suva in the mistreatment of the suspects would not have been evidence which the assessors would have heard or which the judge could have taken into account when considering the cases of the officers from Suva. So if none of the defendants gave evidence in the trial proper, there would have been no question of one team of officers implicating the other. They all had a much better chance of being acquitted if they did not run what is colloquially called a "cut-throat" defence. So although Mr Khan may have had conflicting instructions from each team of officers, he could still represent them all as they had all agreed on this common strategy.

[61] In that connection, Mr Burney argued that there were obvious advantages in them not giving evidence. They would not expose themselves to the risks inherent in cross-examination. If they chose to give evidence, and were therefore liable to be cross-examined, they ran a number of risks. Difficulties in their account could be probed. Take the first witness statements of Vili and Jona, for example. It was very likely that Vili would have been found to have lied when he said that he had not made that statement. And Jona's claim that he had not mentioned anything about what had happened to the suspects at the isolated spot to which they had been taken was because he had only been told to make a statement about the arrests of the suspects and the recovery of the money was also likely to have been rejected. The real reason why he did not deal with what happened to the suspects was because he did not want to get anyone into trouble – whether the officers from Suva or the officers from Lautoka. Moreover, if they gave evidence, inconsistencies in their accounts could be exposed. Let us assume that they would have given evidence along the lines of their affidavits. They could then have been cross-examined on the differences between that evidence and the witness statements in which they admitted going to where the suspects were being held. In their affidavits they said that both suspects were in the

truck when they arrived, and there was nothing in their statements about Vili having told Penaia to stop. I do not regard these differences as significant at all in the scheme of things, but they might have done.

[62] Mr Burney's argument, of course, can only get off the ground if the Court rejects the evidence of the officers from Suva (a) that all along they wanted to give evidence, (b) that Mr Khan told them that he was happy to go along with that, and (c) that his note to them on the day on which they were expecting to be called to give evidence was completely unexpected and contrary to everything they had previously agreed with Mr Khan. If the officers from Suva were telling the truth about that, Mr Burney's case falls like a pack of cards.

Analysis

[63] Appeals based on the incompetence of one's counsel rarely succeed. That is because the courts have set a very high bar for defendants to overcome. It will only be in cases of flagrant incompetence which results in the defendant being denied a fair trial that an appeal will be allowed. Adopting a particular defence strategy which many lawyers might not does not of itself amount to flagrant incompetence. A defendant who instructs a lawyer to represent them gives the lawyer the authority the run the case as the lawyer thinks best. You cannot subsequently turn round and say that the strategy was wrong. It is only if the strategy which was adopted was one which no sensible and prudent lawyer could possibly have adopted that you get into the territory of flagrant incompetence.

[64] With that introduction, I turn to Mr Khan's position. On any view, and whatever strategy he may have adopted, he was running a very real risk by representing all nine defendants. He must have known that there was, potentially at the very least, a conflict between the officers from Suva and the officers from Lautoka. In their witness statements the officers from Suva had blamed the officers from Lautoka. In their interviews, the officers from Lautoka had to varying degrees blamed the officers from Suva. Even without their instructions to him, he would have known from the disclosures that the potential for a conflict of evidence between them was very real.

[65] Moreover, I am sure that within a short time of being instructed Mr Khan would have known that such a conflict did indeed exist. I did not understand Mr Burney to suggest otherwise. Although I was sceptical of some aspects of the evidence of the officers from Suva (in particular when they first knew that the officers from Lautoka were blaming them), I am sure that they told Mr Khan early on that they were not responsible for what had happened to the two suspects but that the officers from Lautoka were. And I am just as sure that the officers from Lautoka told Mr Khan that they were blaming the officers from Suva. On that topic, Vili's evidence was that Mr Khan never told them that, but Jona's evidence was that after the *voir dire* he asked Mr Khan how he could represent the officers from Lautoka as well as the officers from Suva. I am sure that Jona's evidence about what he asked Mr Khan was true. His question to Mr Khan was exactly what I would have expected him to ask. The important point for present purposes is Mr Khan's response. Mr Khan simply told him that he would take things "step by step". He did not say that the officers from Lautoka were not blaming the officers from Suva.

[66] It goes without saying that to represent two defendants who are each blaming the other is an extraordinarily risky thing to do – even if they have agreed on a common defence strategy. One defendant may want to change that strategy in the course of the trial. If that were to involve blaming the other defendant, counsel could no longer represent both of them. If another legal team could not be found quickly, one defendant may be left without representation or the trial would have to be aborted. There is no getting away from it: representing two sets of clients who are blaming each other for what happened is a recipe for disaster.

[67] There is still a problem even if the defendants agree on a common defence stategy. They will have to be advised whether that is a sensible strategy to adopt. It may be that a particular defence strategy is beneficial to one group of defendants but not to the other group. That was particular so in this case, when the case against the officers from Lautoka was much stronger than the case against the officers from Fiji[8]: the officers from Lautoka were all alleged to have confessed in their interviews to their participation in the

[8] That explains why Mr Khan told the officers from Suva that he was more worried about the officers from Lautoka. That is what each of the officers from Suva say Mr Khan told them, and I believe that part of their evidence.

mistreatment of the two suspects. So even if there had been in this case a common defence strategy of the kind suggested by Mr Burney, it may well be that the officers from Suva would not have gone along with it if they had been separately advised and separately represented.

[68] The way of avoiding all the problems which could potentially arise when defendants have very different versions of the events which gave rise to the charges is for them to be separately represented. That does not, of course, prevent all the defendants from agreeing on a common defence strategy. But that will have been through the lawyers with both sets of defendants being advised independently about the advantages or disadvantages of the strategy.

[69] It follows that this was a case in which the defendants should not all have been represented by the same lawyer, even if all the defendants had a common defence strategy. Whether the defendants, though, in fact had a common defence strategy is something to which I shall come once I have dealt with a couple of other topics. The first is when was it that the officers from Suva first appreciated that the officers from Lautoka were blaming them for what had happened to the two suspects.

[70] Pita was the only member of the Suva team of officers to acknowledge that he had assumed from very early on that it was the officers from Lautoka who were blaming them. As I have said, Vili and Jona claimed that they only discovered that once the *voir dire* got under way. I regret that I do not believe them. They would have had an opportunity to read the disclosures, and would then have seen what the officers from Lautoka had said when they had been interviewed. Vili was not asked whether he had seen the disclosures after they had been served, but Jona was. He said that he had seen some of the disclosures but not all. He was not specifically asked whether the records of the interviews of the officers from Lautoka were among the disclosures which he had seen. I think it very likely that both Vili and Jona had seen those records, and knew from them that the officers from Lautoka were blaming them. But even if Vili and Jona had not seen those records, I am sure that somehow they would have known from fairly early on that they were being blamed by the officers from Lautoka for what had happened to the two suspects. Pita would inevitably have discussed the assumption he had made with them. And *if* there had

been a common defence strategy that none of them would give evidence, Mr Khan would have had to explain why. He could only do that by telling all the defendants that the two teams of officers were blaming each other.

[71] It is here that I want to say something about what I thought of the three officers from Suva. Vili and Jona may well have been familiar with police procedures, but I do not think that they would have understood court procedures, and Pita certainly would not, having been an army officer for most of his working life. For example, despite the number of years Vili and Jona had been police officers, I did not think that any of them appreciated that what the officers from Suva had said in their interviews was not admissible evidence against them. Nor did I regard them as particularly intelligent. I think that they were intelligent enough to wonder if Mr Khan could really represent them as well as the officers from Lautoka, but if Mr Khan was happy to do that, I do not think that they would have questioned that any further. Nor would they have questioned Mr Khan's explanation for not having called them to give evidence, namely that he had not wanted them to undermine the favourable evidence which Boila had given about them, which was why they were content for Mr Khan to continue to represent them on their appeal to the Court of Appeal. However, they were intelligent enough to understand that, in the light of the confessions made by the officers from Lautoka when they were interviewed, the chances of the officers from Lautoka being acquitted were far less than theirs.

[72] That is one of the things which has persuaded me that they were telling the truth when they said that all along they wanted to give evidence, that Mr Khan told them that he was happy to go along with them giving evidence, and that his note to them on the day on which they expected to give evidence was completely unexpected and contrary to what they had agreed. Knowing that they had a much better chance of being acquitted than the officers from Lautoka, and knowing that the officers from Lautoka were blaming them, it would, I think, be very surprising that they would have gone along with a suggestion that they should not give evidence. I really doubt whether they would have agreed that maintaining a united front and not giving evidence gave them a better chance of being acquitted. Putting all their eggs in the basket of putting the prosecution to proof was something which would

have been far too sophisticated a strategy for them to grasp, let alone appreciating the risks which it involved.

[73] In any event, there was a case which they had to meet. There was Apete's evidence. It is true that he only implicated them in assaulting the suspects, not in the rapes or the sexual assaults. But they would have heard Mr Burney saying in his opening that the prosecution's case against all nine defendants was that they were all parties to a joint enterprise. So it did not matter what each of the defendants may or may not have done himself. What mattered was whether there had been a plan which they all joined in to assault the two suspects. It is also true that Apete had to admit to having made previous inconsistent statements. But he had maintained that what he had said in his third statement had been true. Since he would not have wanted to blame members of his own team, it was a pretty brave thing for him to do. All the more reason for the officers from Suva to think that he could well be believed and therefore had to be challenged. And I do not believe that Vili would not have wanted to challenge Apete's evidence that he, Apete, had told lies in his second statement because that was what Vili had told him to do.

[74] I have not overlooked the fact that Mr Khan did not put a positive case to any of the prosecution witnesses. That is consistent with the common defence strategy for which Mr Burney contended. Because none of the defendants would be giving evidence, he was simply putting the prosecution to proof, and that meant that he could not put a positive case to them. But not putting a positive case to the prosecution witnesses was, I think, just as consistent with Mr Khan realizing that if he did, the fact that he had conflicting instructions from his clients would inevitably emerge. Indeed, I think that that is much the more likely reason for him not to have put the defendants' respective cases to the prosecution witnesses.

[75] Finally, I want to say something about the advice which the officers from Suva say Mr Khan gave them about Boila's evidence. Boila's claim that the officers from Sigatoka had been responsible for the mistreatment of him and Soko was, on any view, unlikely to be believed. To say that the officers from Suva should not give evidence because giving evidence would undermine Boila's account did not make sense. I believed the Suva officers when they said that that was the reason Mr Khan gave them for why he instructed them to tell the judge that they would not be giving evidence. The likeliest reason for him

to have given them that instruction was not because there had been a common strategy that none of them would give evidence. The likeliest reason for him to have given them that instruction was because it was likely to expose the difference between their case and that of the officers from Lautoka something which Mr Khan would not have wanted to be revealed.

[76] What impact did all this have on the right of the officers from Suva to a fair trial? In the light of my findings of fact, there can be only one answer. The prosecution witnesses' accounts were not sufficiently tested in cross-examination by the case for the officers from Suva being put to them. But fundamentally, the officers from Suva did not have the opportunity to give their own account on oath of what they say really happened to the two suspects. Whether you characterize this as flagrant incompetence or something else does not really matter. The fact is that the defence which they wanted to advance was not placed before the court. Their convictions cannot stand in that light. It is therefore unnecessary to address the other grounds of appeal, namely what I have referred to as their conventional grounds of appeal.

[77] It is important to emphasize that this case is very much a one-off. It should not be regarded by defendants who did not give evidence but who were convicted as the green light to allege that their counsel told them not to give evidence. Such an argument will rarely, if ever, succeed. It only succeeded in the present case because defendants with obviously conflicting accounts were represented by the same lawyer when they should not have been. The Court of Appeal will not look kindly on defendants who seize upon this judgment as an opportunity to make unfounded claims about the quality of their legal representation.

Conclusion

[78] For these reasons, I would give the three petitioners leave to appeal. In accordance with the Court's usual practice, I would treat the hearing of the application for leave to appeal as the hearing of the appeal. I would allow the appeal and quash the petitioners' convictions. Since they are all so close to their release dates, it would not be appropriate to order that they be retried.

Dep J

[79] I have read in draft the judgment of Keith J and I agree with his reasoning, conclusions and proposed orders.

Orders:

(1) Leave to the petitioners to appeal.

(2) The petitioners' appeal be allowed.

(3) The petitioners' convictions be quashed.

(4) There be no order for a retrial.

The Hon. Mr. Justice Anthony Gates
JUDGE OF THE SUPREME COURT

The Hon. Mr. Justice Brian Keith
JUDGE OF THE SUPREME COURT

The Hon. Mr. Justice Priyasath Dep
JUDGE OF THE SUPREME COURT