

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 35 OF 2009

STATE

-v-

ASESELA ROKODREU

Counsels : Ms Latu for State
Accused in Person

Date of Trial : 13 October 2014 – 17 October 2014
Date of Summing Up : 17 October 2014

SUMMING UP

Madam Assessors and Gentlemen Assessor:

1. We have now reached the final phase of this case. The law requires me – as the Judge who presided over this trial – to sum up the case to you on law and evidence. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the Judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.

5. The 1st Accused and counsel for Prosecution made submissions to you about the facts of this case. That is their duty as the Prosecution Counsel and the accused. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.
10. You must judge the case solely on the evidence that you heard in this Court room. There will be no more evidence and you are not to speculate on what evidence there might have been or should have been. You Judge the case solely on what you have heard and seen here.
11. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
12. As assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
13. In accessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he/she evasive? How did he/she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.

14. The information against the accused is as follows:

FIRST COUNT
Statement of Offence

ROBBERY WITH VIOLENCE: Contrary to Section 293 (1) (b) of the Penal Code, Cap 17.

Particulars of Offence

Asesela Rokodreu, Amena Dela and Dwayne Hicks on the 19th day of March 2009 at Ba in the Western Division robbed **Azaad Chandra Prakash** f/n Ghirau of one Inkk Mobile phone valued \$49.99, assorted jewelleries valued at \$6,500.00 and cash of \$1,000.00 of Fijian and overseas currencies to the total value of \$7,549.99 and immediately before the said robbery did use personal violence on the said **Azaad Chandra Prakash** f/n Ghirau.

SECOND COUNT
Statement of Offence

ROBBERY WITH VIOLENCE: Contrary to Section 293 (2) of the Penal Code, Cap 17.

Particulars of Offence

Asesela Rokodreu, Amena Dela and Dwayne Hicks on the 19th day of March 2009 at Ba in the Western Division robbed **Alini Prakash** of assorted liquor valued at \$5,000.00, assorted jewelleries valued at \$28,800.00, 12 pairs of canvas valued at \$2,000.00, cash \$3,700.00 of Fijian and overseas currencies and assorted liquor valued at \$5,000.00 all to the total value of \$39,500.00 and immediately before the said robbery did use personal violence on the said **Alini Prakash**.

THIRD COUNT
Statement of Offence

UNLAWFUL USE OF MOTOR VEHICLE: Contrary to Section 292 of the Penal Code, Cap 17.

Particulars of Offence

Asesela Rokodreu, Amena Dela and Dwayne Hicks on the 19th day of March 2009 at Ba in the Western Division unlawfully and without color of right but not so to be guilty of stealing took for their own use motor vehicle registration number DS 983, the property of **Arvind Chandra Prakash** f/n Azaad Chandra Prakash.

15. Firstly I must explain the legal basis of the charge. When charge is laid jointly against more than one accused-person in this manner, it brings into focus an important legal principle, which is known as the 'doctrine of joint enterprise'.

16. Usually, a person is liable in law for only acts committed by him and for his conduct and such acts or conduct attract criminal liability if they are unlawful acts or unlawful purposes. The doctrine of joint enterprise is an exception to that general rule, of course, for valid and sound reasons. The principle is explained under Section 22 of the Penal Code, which reads:

Offences committed by joint offenders in prosecution of common purpose

'When two or more persons form a common intention to prosecute an unlawful purpose in connection 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.'

17. Madam assessors and the gentleman assessor, if I am to site an example, this is how the principle works. Three people plan to rob a shop and one stands guard outside looking out for any police surveillance. One man goes inside and holds the security guard, while the other threatens the cashier with a gun and takes all the cash. All three men then make their get- away. Now you will see that only the third man did the actual act of offence, while the other two helped to execute the plan of robbery. Under the law, each one of them is held liable for the offence of robbery with violence irrespective of the individual roles played by each one of them under the doctrine of 'joint enterprise.' For the principle to work under the section, there should be evidence beyond reasonable doubt that:

- (i) There should be two or more persons forming a common intention to prosecute an unlawful purpose;
- (ii) In prosecution of that unlawful purpose, an offence/s should be committed; and
- (iii) The commission of such offence/s should be the probable consequence of the prosecution of that unlawful purpose.

18. In dealing with the principle, you must also consider the following factors as matters of law. They are:

- (i) The case of each accused must be considered separately. That is, you must find evidence as to what each accused did to demonstrate that he too had shared the intention in common to prosecute unlawful purpose;
- (ii) Each accused must have been actuated by that common intention with the doer of the unlawful purpose at the time the offence was committed and should have contributed in some meaningful way towards the prosecution of the unlawful purpose;
- (iii) Each one of them should have known that the commission of the offence is a probable consequence of the prosecution of that unlawful purpose;
- (iv) Common intention must not be confused with same or similar intention entertained independently of each other. Instead, it should clearly be distinguished from similar intention. That is, if you find no evidence to show a particular accused did not share the intention in common with others and that he was actuated by his own intention which was, however, similar to the intention of other, you can find the accused guilty only for what he has committed and not for anything else;

- (v) There must be evidence, either direct or circumstantial, or pre-arrangement or some other evidence of common intention. Sometimes, such common intention could occur on the spur of the moment;
- (vi) The mere fact of the presence of the accused at the time of the offence is not necessary evidence of common intention.

19. I will now deal with the elements of the offences. The offence of Robbery with Violence is defined under Section 293 of the Penal Code.

20. Accordingly, the elements of the offence of Robbery with Violence in the 1st and 2nd charges are:

- (i) A person,
- (ii) Committed Theft,
- (iii) At the time or immediately before committing theft uses or threatens to use any personal violence to any person.

21. The elements of the 3rd charge are:

- (i) A person
- (ii) Unlawfully and without colour of right but not so as to be guilty of stealing
- (iii) Uses any vehicle.

22. Apart from the elements of the offence, the identity of the person who alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person and connect them to the offence that they alleged to have been committed.

23. Evidence that the accused has been identified by a witness as doing something must, when disputed by the accused, be approached with special caution because experience has demonstrated, even honest witnesses have given identification which have been proved to be unreliable. I give you this warning not because I have formed any view of the evidence, but the law requires that in every case where identification evidence is involved, that the warning be given.

24. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed.

25. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. The search list for the 1st accused is an example in this case.

26. As a matter of law I must direct you on circumstantial evidence. In this case, the prosecution relies on certain circumstantial evidence. In circumstantial evidence, you are asked to piece the story together from witnesses who did not actually see the crime being

committed, but give evidence of other circumstances and the events that may bring you to a sufficiently certain conclusion regarding the commission of the alleged crime.

27. I cite the following situation as an example for circumstantial evidence. In a silent night, you hear cries of a man from a neighboring house. You come out to see that a man named 'A' is running away from that house with an object in his hand. Out of curiosity you go inside the house to see what really had happened. You see your neighbor 'B' lying fallen on pool of blood with injuries. Here you don't see 'A' committing any act on 'B'. The two independent things you saw were the circumstances of a given situation. You can connect the two things that you saw, and draw certain inferences. An inference you may draw would be that 'A' caused the injury on 'B'. In drawing that inference you must make sure that it is the only inference that could be drawn, and no other inferences could have been possibly drawn from said circumstances. That should be the inescapable inference that could be drawn against 'A' in the circumstances. Further in evidence one witness may prove one thing, and another witness may prove another thing. None of those things separately alone may be sufficient to establish guilt, but taken together may lead to the conclusion that the accused committed the crime.

28. Circumstances are not made by mere speculation or guesswork. They must be established beyond reasonable doubt and the proved circumstances must only be consistent with the accused having committed the crime. To find them guilty, you must be satisfied so as to feel sure that an inference of guilt is the only rational conclusion to be drawn from the combined effect of all the circumstances proved. It must be inference that satisfies you beyond reasonable doubt that the accused committed the crime and that inference should be irresistible and inescapable on the evidence. Before you can draw any reasonable inference, you must first be satisfied beyond reasonable doubt, that the evidence given by each witness relating to the circumstances giving rise to the issues of fact to be proved is credible and truthful.

29. In assessing evidence of witnesses you need to consider a series of tests. They are for examples:

Test of means of opportunity: That is whether the witness had opportunity to see, hear or feel what he/she is talking of in his/her evidence. Or whether the witness is talking of something out of pace mechanically created just out of a case against the other party.

Probability and Improbability: That is whether what the witness was talking about in his or her evidence is probable in the circumstances of the case. Or, whether what the witness talked about in his/her evidence is improbable given the circumstances of the case.

Belatedness: That is whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.

Spontaneity: This is another important factor that you should consider. That is whether a witness has behaved in a natural or rational way in the circumstances that he/she is talking of, whether he/she has shown spontaneous response as a sensible human being and acted accordingly as demanded by the occasion.

Consistency: That is whether a witness telling a story on the same lines without variations and contradictions. You must see whether a witness is shown to have given a different version elsewhere. If so, what the witness has told court contradicts with his/her earlier version.

30. You need to consider all those matters in evaluating the evidence of witnesses. You shall, of course, not limit to those alone and you are free to consider any other factors that you may think fit and proper to assess the evidence of a witness. I have given only a few illustrations to help what to look for to evaluate evidence.
31. I will now deal with the summary of evidence in this case.
32. Prosecution called Azaad Chandra Prakash as the first witness. He is living in Varadoli, Ba since birth with his family. On 18.3.2009 his brother's son had come to his house. They had a small basin of kava and dinner. They went to bed around 10.00 p.m. His wife was reading a book and he was still awake when he heard a dog barking. He could see someone outside. He had gone to the sitting room and had pulled the curtain. He had seen i-Taukei man standing at the window. He had asked him what he wants. That person had started shaking the door grill. He had called his son to bring a knife. Another man had come and kicked the door. The door was opened. He had closed the door. The door had a glass on top. They broke the glass with an iron rod. He was hurt in his forehead from that iron rod. A third person had joined when they said something in i-Taukei. They were trying to pull the grill gate. He was using the knife to stop them. He had hit the person in front with the knife and felt that he got injured in his left hand. All three entered the house. One of them hit him on the lap and fell down.
33. Then one of them grabbed the knife from his hand and the other one who had a rope tried to strangle him. One also tried to hit him with a stool and it missed the target and hit the wall lights breaking them. He was thrown to the other side. He hit his head on the step and fell down. He thought he will die. They went inside the house. His head was bleeding. He was just lying down with his face facing down. Then he was dragged up in the passage. He was kicked and punched. They broke all the photo frames. Then they kicked the door of the other room and went inside. They put everything in a sack and went away in the Pajero. His son was sent to call the neighbors and report the matter to the police. One of the men was 5' 6" tall. The second man was tall and tuff guy. The 3rd man was almost the height of the 1st. He could not identify them as the light was facing opposite side and he was really tired fighting with them. He could not see their faces clearly. Tall guy was wearing a jacket and mask. His wife and daughter-in-law were in the back of the house.
34. The 1st and 3rd accused did not cross examine this witness. Under cross examination by the counsel of the 2nd accused he told that his eye sight was not good now, but not at the time

of the incident. Liquor, jewelry, cash and shoes were stolen from the house. A mobile phone too was taken.

35. You watched him giving evidence in court. What was his demeanor like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of this witness beyond reasonable doubt then you have to consider any elements of the charges are proved by this evidence.
36. The next witness was Arvind Chnadra Prakash. He is the son of the first witness. When he was sleeping, he had heard his mother calling, saying people are coming to rob their house. Then he just woke up and ran to the main door with a knife. He heard a loud sound at the main door, people trying to break in. His father asked him to go and get help. He went through the back door to neighbor. When they were coming back they were stoned. He could not come back. Then he heard his vehicle being started. He came back and found the glasses were broken, his daughters are crying and his father's forehead was full of blood. They have taken jewelries, liquor including Red label, Black label, Gordon's Gin and Chives Regal. Twelve pairs of canvas and cash AU\$2000, NZ\$1000 & FJ\$500 were also taken. Four of his chains, two bracelets, pendant and four rings were stolen. He identified these items at the Ba police station on 20.3.2009. His wife and mother were present there.
37. He identified the pendant with his name Prakash and tendered it marked P2. A gold plated watch marked P1, handmade pendant marked P3, handmade bracelet marked P4, handmade pendant with bracelet marked P5, handmade ring with Yellow colored stone marked P6, two engagement rings marked P7 A & B, bracelet marked P8, 9 carrot chain marked P9, Gold plated chain marked P10, ring with letter M marked P11 and a ring with Black stone marked P12 were identified by him in Court and tendered as evidence. The stolen vehicle was Green and Silver colored Pajero with number plate DS 983. One of the robbers was a huge guy. Other was a short. They were wearing masks and he could not identify them. His vehicle was recovered later.
38. There was no cross examination from the accused.
39. You watched him giving evidence in court. What was his demeanor like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of this witness beyond reasonable doubt you have to decide whether the elements of the charges of Robbery and Unlawful use of Motor vehicle are proved except for the identification of each accused.

40. The third witness for the prosecution was Alini Prakash. She is the wife of the second witness. Her mother-in-law passed away on 19th June 2014. On 18.3.2009 her mother-in-law came and woke her up. She was told that thieves are inside the house. She had run to the door to see father-in-law arguing and pushing the door. There was a man in front of her. She had told him in i-Taukei to take whatever they want and not to harm them. He had replied in English that they want Gold and cash. She went to the bed room, grabbed her jewelry box and gave it to him. That person had entered the room and asked her to bring a sack. When she brought a 10Kg empty sack that person had told her to bring a bigger sack. He was looking at the canvases. Then he told her to pack all the liquors in the empty bag. She had done that. Then she had come to the sitting room. She had seen her father-in-law fallen. One man came and opened the washing machine and broke the mirror on the wall. She could not identify the man who came to her room as he was masked. She identified the man who opened the washing machine as a person who is short with a round face. He took the bangles she was wearing. Three persons came and the last man came and asked for the keys of the Pajero. He was tall and built.
41. Her jewelry box was made of shells and her necklaces, bracelets and some of her husband's jewelry was inside it. Some loose Black pearls, 'Mangla Sutra', rings, bracelets, pendants, liquor, canvases and money were stolen. Liquor included Black label, Red label, Sivas Regal, Vodka, Bounty Rum and Gordon's Gin. These were her husband's liquor. Ten canvases, about 7000 worth AU\$ and NZ\$ were also stolen. On 20th she identified jewelry at the Ba police station. Her mother-in-law and her husband were also present. She identified and tendered 8 bangles marked P13 A-H, 'Mangla Sutra' of her mother-in-law marked P14, 7 ear rings marked P15 A-G, two rings marked P16 A & B, two pendants marked P17 A & B, shell jewelry box marked P18, 'Mangla Sutra' of her marked P19, three bangles marked P20 A-C, loose pearls marked P21, five chains marked P22 A-E, two bracelets marked P23 A & B and another 'Mangla Sutra' marked P24. All the items of jewelry stolen were recovered.
42. She was not cross examined by any of the accused.
43. You watched her giving evidence in court. What was her demeanor like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of this witness beyond reasonable doubt you have to decide whether the elements of the charges of Robbery are proved except for the identification of each accused.
44. The next witness for the prosecution was Aisea Bani. On 18.3.2009 night he was having grog with Maciu and Qio. When they finished they put in some money to buy beer and they were drinking beer. It was around 3.00 a.m. Asesela came with others and joined them. They continued putting money to buy beers. He can't properly recognize the persons who came with Asesela as he was drunk. They were not from his area. He identified the 1st accused as Asesela. They were brought down to police station while drinking. The 1st

accused came when they finished grog and drinking beer. They were drinking beside Maseki's house.

45. This witness was not cross examined by any accused.
46. Prosecution called Maciu Lagibalavu as the next witness. He was later called as adverse witness for the prosecution. Court allowed that application. In other wards prosecution is not relying on his evidence. Defence did not cross examine this witness.
47. The next witness for the prosecution was Taione Vitau. On 19.3.2009 around 8.00 a.m. when he came down to go for work he had met some youth of Kaleli drinking. Bani and Qio had invited him to join them. Semioni, Maciu and Asesela were also there. There were few others. They were i-Taukei men. He identified the 1st accused as Asesela. Police had come there and taken all of them to the station around 11.00 a.m. He was not cross examined by any accused.
48. Police Inspector Iakobo Vaisewa was called as the next witness for the prosecution. On 19.3.2009 he was called early to the station and briefed about a report of robbery with violence at the house of Azaad in Varadoli. He had proceeded to the scene with other officers around 6.00 a.m. They have received information that the stolen vehicle was found in Wairabetia. They have proceeded to that area. There were blood stains in the steering wheel and driving seat. The vehicle was brought to Lautoka police station. Then they had received information that group of youth are drinking in Kaleli settlement. They had proceeded to Kaleli settlement. There were 7 youths drinking. The 1st accused was wearing a chain with Prakash initial pendant. The 2nd accused was also there with five other boys. He had searched the 1st accused. He was holding a Blue bag. Jewelries were found inside the bag. Cpl. Tamani had searched the 2nd accused. Some cash and two Gold rings were found from his possession. Other five were also searched and nothing was found from them. He took possession of the bag of jewelries. The first accused was verbally questioned by him, arrested and brought to Lautoka police station.
49. At the station he took a count of all the jewelries and noted those down in a search list. All the suspects were locked in the cell as they were drunk. The five boys were questioned, interviewed and their statements were recorded and they were released. The two accused were brought to Ba police station. He signed the search list. He was shown a photocopy of the search list. He said carbon copy was given to the 1st accused and the original was put to the prosecution file. Original was photocopied and given with the disclosures. The original is now misplaced. There are 29 items listed in the search list. Items were in his possession till those were handed over to Investigating Officer PC Belo. He identified and tendered the Blue carry bag marked P25. There was a mobile phone and wrist watch also in the bag. All the items were identified by the complainants following morning. FJ\$ 87.60 was taken from the 2nd accused. He identified the money and tendered the same marked P26.
50. Under cross examination by the 1st accused he stated that other officers too had made statements that these items were recovered from the 1st accused. No photos were taken at that time. He had not written the items in his note book with signature of the other

officers. Under cross examination by the counsel of the 2nd accused he admitted that there should be a search list for every search. He had seen the 2nd accused being searched. He denied that there is no search list for the 2nd accused and said copy of that should be in prosecution file.

51. This witness was called again as the original search list was found and the 1st accused wanted to cross examine this witness again. The original search list was tendered marked as P27. Under cross examination he denied that he wrote it again yesterday.
52. It is up to you to decide whether you could accept this evidence beyond reasonable doubt. If you accept this evidence beyond reasonable doubt there is evidence that the 1st accused was in recent possession of the jewelry items stolen from the complainant's house. You must be satisfied so as to feel sure that an inference of guilt is the only rational conclusion to be drawn from this evidence. It must be inference that satisfies you beyond reasonable doubt that the accused committed the crime and that inference should be irresistible and inescapable on the evidence.
53. Prosecution called Cpl. Ilaria Belo as the next witness. He is a police officer with 17 years' experience. At about 1.40 a.m. on 19.3.2009 report was received from Arvind Prakash through phone, their house was broken and entered. He had proceeded to the scene with DC Sanjay. Along the way he had met the complainant and gone with him in search of the stolen vehicle in complainant's Land Cruiser. They could not locate the vehicle. They have gone to the complainant's house. The family members were still in shock. There were fresh knife marks of grill door and blood stains. Clothes were scattered inside the house. The drawers were pulled out. He had comfort the family members and stayed there guarding the scene. He had recorded the statement of Arvind Prakash at 4.00 a.m. At 6.00 a.m. the officer in charge and the crime officer arrived at the scene. They have received information that the vehicle was abandoned at Lautoka. Inspector Iakobo and his team had proceeded to Lautoka. Crime Scene Unit from Lautoka had come and dusted the scene. The statement of Alini Prakash was recorded at 12.00 noon. Then they received a call some youth were arrested in Lautoka. He had uplifted a pinch bar from the scene which was used by suspects to force open the wooden door.
54. In the evening at Ba police station Inspector Iakobo and his team had returned. He handed over a Blue bag containing some jewelries, mobile phone, wrist watch and shell made jewelry box. A partly burned wooden box with two passports was also handed over. Those were passports of Azaad Chandra Prakash and Aswin Prakash. Original search list was also handed over. He had also received some cash and two rings from DC Tamani with a search list of the 2nd accused. He had kept these items in his custody. The next date he had caution interviewed the 1st accused who refused to answer all the questions put to him. The complainant and family had come and positively identified all the recovered items. Then all the items were exhibited with exhibit crime writer for safe keeping. He had escorted the 1st accused to Court on 20.3.2009. He identified the 1st accused in Court. He identified and tendered the pinch bar marked P28. The mobile recovered was released to Azaad Chandra Prakash on his request.

55. The 1st accused did not cross examine this witness. Under cross examination by the counsel for the 2nd accused he stated that search list for the 2nd accused is now misplaced.
56. After the prosecution case was closed the 2nd and 3rd accused made applications for no case to answer. This Court upheld those applications and 2nd and 3rd accused were acquitted and discharged.
57. Then you heard me explaining 1st accused his rights in defence. He elected to give evidence.
58. He stated that he doesn't know anything about this. On that day he was drinking with his old boss at whose place he was working in 2009. He finished drinking around 1.00 a.m. On his way home he had met those people who were drinking. They called him. He went and sat beside them and they were drinking. They were putting money to buy drinks. They continued drinking till police arrived. All of a sudden they pick up a bag on the ground, arrested him and told him it was his bag. From many youths there, they just marked him. There was nothing found on him. The police just came with a bag and they are saying that it is his bag. The reason he didn't give a statement was they were forcing to admit that it's his bag. He really didn't know anything about the bag.
59. Under cross examination he admitted that whatever he told Court he didn't tell police. He had not made any complaint to anyone thereafter that police were forcing him to admit. He said if someone does something bad to him he will report that. The reason why he didn't complain was that he was in the cell for a week. He had not told the Magistrate when he was produced in Court on 20.3.2009. He was not given opportunity to talk and he was taken back to cell for one week. He denied the allegation when it was put to him. His boss was Narendra Michael. He had not given any affidavit or statement. He doesn't know how to drive and doesn't have a driving license. He denied stealing the vehicle.
60. You watched the accused giving evidence in court. What was his demeanor like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? It is up to you to decide whether you could accept his version and his version is sufficient to establish a reasonable doubt in the prosecution case. If you accept his version the accused should be discharged. Even if you reject his version still the prosecution should prove its case beyond reasonable doubt.
61. The accused's defence is one of alibi. He says that he was not at the scene of crime when it was committed. As the prosecution has to prove his guilt so that you are sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. Even if you conclude that alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a defence.
62. Before the Criminal Procedure Decree came into force in 2009, the legal position regarding alibi was in Section 234 of the Criminal Procedure Code. Section 234 provides that:

'On a trial before the Supreme Court the defendant shall not without the leave of the Court adduce evidence in support of an alibi unless, before the end of the prescribed period he gives notice of particulars of the alibi.

In this section "prescribed period" means the period of fourteen days from the end of the preliminary inquiry before the magistrate.

63. Criminal Procedure Decree in Section 125 provides that:

'On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.

A notice under this section shall be given-

- (a) Within 21 days of an order being made for transfer of the matter to the High Court (if such order is made); or
- (b) In writing to the prosecution, complainant and the court at least 21 days before the date set for trial of the matter, in any other case.

64. No notice was given of alibi in this case. The accused is not represented in this case. However, according to above legal position accused cannot take a defence of alibi without giving a proper notice. That requirement is there for the prosecution to investigate the truthfulness of the alibi. Therefore you have decide what weight can be given to this alibi evidence.

65. I must remind you that when an accused person has given evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

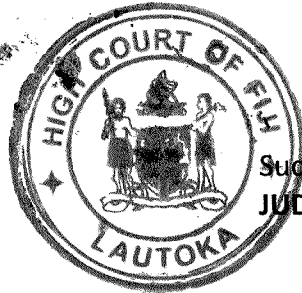
66. You will generally find that an accused gives an innocent explanation and one of the three situations then arises:

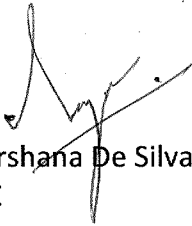
- (i) You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offences.
- (ii) Alternatively without necessarily believing him you may say 'well that might be true'. If that is so, it means there is reasonable doubt in your minds and so again your opinion must be Not Guilty.
- (iii) The third possibility is that you reject his evidence as being untrue. That does not mean that he is automatically guilty of the offences. The situation then would be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offences then the proper opinion would be Guilty.

67. The accused called Narendra Michael as a witness. He stated that the accused was working with him on 19.3.2009 at a garage. On this day they worked till 10.00 p.m. He had few bottles of beer. After closing the garage he had come with three of his employees, one of them is the accused. They have bought a carton of beer and drank at his house. He asked his wife to prepare food for them. Around 12.00 beer was finished. He went back and bought another carton. Around 2.00 a.m. they were asked to leave. He had come to know that the accused was taken to police next day. He did not come to work thereafter. He heard that he is in police custody.
68. Under cross examination he admitted that he know the accused for a long time. He had come to Court to tell the truth. He doesn't know what happened when the accused was arrested. He was working with him for three months. He had met the accused after few months. He came to know the allegation against him. He did not make a statement to police as no one asked him. The accused had asked him to come to Court when the case comes.
69. This witness is giving evidence in 2014 about something happened in 2009. He had not made any statement to police. It is up to you to decide whether his evidence creates a reasonable doubt in the prosecution case. If so accused should be discharged.
70. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should be reminded yourselves of all that evidence and form your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.
71. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt.
72. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt of each charge you must find him guilty for that charge. You have to consider evidence against each charge separately. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of accused's guilt, you must find him not guilty as charged.
73. Your possible opinions are as follows:
- | | |
|---|--|
| 1 st Charge of Aggravated Robbery | 1 st Accused Guilty or Not Guilty |
| 2 nd Charge of Aggravated Robbery | 1 st Accused Guilty or Not Guilty |
| 3 rd Charge of Unlawful use of Motor Vehicle | 1 st Accused Guilty or Not Guilty |

74. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

75. Any re-directions?




Sudharshana De Silva
JUDGE

At Lautoka
17th October 2014

Solicitors : Office of the Director of Public Prosecutions for State
Accused in Person