

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 153 OF 2013

BETWEEN : STATE

AND : NACANI TIMO,
FILIPE WAQATA

Counsel : Ms Kiran for State
The First Accused is in person
The second accused in absence

Date of Hearing : 25th- 28th of May 2015
Date of Summing Up : 1st of June 2015

SUMMING UP

Madam Assessors and Gentleman Assessor.

1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.
2. Our functions are different. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.

3. You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.
4. I may comment on the facts if I think it will assist you in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion. I say so because you are the sole judges of the facts.
5. You must reach your opinion on the evidence, and only on the evidence itself. The evidence is what the witnesses said from the witness box, and the documents and other materials received as exhibits. A few things you have heard during the course of the hearing are not evidence. This summing up is not evidence, and statements, arguments, questions and comments made by the counsel or accused person are not evidence either. The purpose of the opening address by the learned counsel for the prosecution was to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the accused are not evidence too. They were their arguments, which you may properly take into account when you evaluating the evidence, but the extent to which you do so are entirely a matter for you.
6. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. Have regard only to the testimony and the exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. As judges of facts you are allowed

to talk, discuss and deliberate of facts of this case among yourselves only. However, each one of you must reach your own conclusion or form your own opinion. You are not required to give reason for your opinion, but merely your opinions themselves. Your opinion need not be unanimous, though it would be desirable if you could agree on them. I must emphasise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I form and deliver my judgment.

7. Moreover, I must caution you that you should dismiss all feelings of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.
8. Matters which will concern to you are the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
9. You have seen how the witnesses presented in the witness box when answering questions. Bear in mind that many witnesses are not used to giving evidence and may find the different environment distracting. Consider the likelihood of the witness's account. Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and

the opportunity, the witness had to see, hear, or know the things that the witness testified about. Another point may be; has the witness said something different at an earlier time? These are only few general considerations which I assumed will assist you in your deliberation. It is, as I have said, up to you to assess the evidence and what weight, if any, you give to a witness's evidence or to an exhibit.

Burden and Standard of Proof

10. I now turn to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocent is in force until you form your own opinion that the accused is guilty for the offence based on the evidence presented during the course of this hearing.
11. The burden of proof of the charge against the accused person is on the prosecution. It is because the accused person is presumed to be innocent until he is proven guilty. Accordingly, the burden of proof rest on the prosecution throughout the trial and it never shifts to the accused person. In other word, there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
12. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused person's guilt. If there is a riddle in your mind as to the guilt of the accused person after deliberating facts based on the evidence presented, that means, that the prosecution has failed to satisfy you the guilt of the accused person beyond reasonable doubt. If you found any reasonable doubt as to the

commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

The Information

13. The two accused persons are charge with one count of aggravated robbery contrary to section 311 (1) (a) of the Crimes Decree. The particulars of the offence are that;

“NACANI TIMO and FILIPE WAQATA with another, in company of each other on the 4th June, 2013 at Lautoka in the Western Division, robbed VINESH KUMAR of 1 Dell Laptop valued at \$3800.00, 1 Toshiba laptop valued at \$2100.00, 1 Panasonic camcorder camera valued at \$1800.00, 1 Blackberry mobile phone valued at \$1000.00, 1 Samsung mobile phone valued at \$500.00, 1 ZTE tablet valued at \$300.00, 2 Nokia mobile phones valued at \$560.00, 1 Sony digital camera valued at \$875.00, 1 Hard drive valued at \$300.00, 2 Gold chains valued at \$2000.00, 1 Wedding ring valued at \$400.00, 1 pair earrings valued at \$500.00, \$394.00 cash, 2 x 40oz Finland liquors valued at \$240.00, 2 kitchen knives valued at \$10.00 and 2 towels valued at \$10.00 all to the total value of \$14,789.00.

14. Section 311 (1) (a) of the Crimes Decree states that;

*“A person commit an indictable offence if he or she –
a. commits a robbery in company with one or more other persons,*

15. The offence of robbery has defined under section 310 of the Crimes Decree, where it states that;

“A person commits an indictable offence (which is triable summarily) if he or she commits theft and –

(a) Immediately before committing theft, he or she—

(i) uses force on another person; or

(ii) threatens to use force then and there on another person —

with intent to commit theft or to escape from the scene; or

(b) at the time of committing theft, or immediately after committing theft, he or she—

(i) uses force on another person; or

(ii) threatens to use force then and there on another person—

with intent to commit theft or to escape from the scene.

16. It appears that the offence of robbery is an aggravating form of theft. Accordingly the main elements of the offence of aggravated robbery that the prosecution is required to prove beyond reasonable doubt are that;

- i. The two accused persons with another,
- ii. In accompany of each other
- iii. Dishonestly appropriates the properties as mentioned in the information belong to Vinesh Kumar,
- iv. With the intention of permanently deprive it,
- v. And used force or threaten to use force on Mr. Vinesh Kumar immediately before or after stealing those properties,

17. It appears that the prosecution has alleged that the two accused persons have acted together to commit this offence. If a criminal offence has committed by two or more persons, each of them may have played a different part, but if they acted together as part of a joint plan or agreement to commit the offence, they are each guilty. The words "plan" and "agreement" do not denote that there has to be any formality about it. An agreement to commit an offence

may arise on the spur of the moment. Nothing needs to be said at all. It can be made with a nod and a wink, or knowing look or it can be inferred from the behaviour of the parties. The essence of joint responsibility for a criminal offence is that each accused shared a common intention to commit the offence and played his or her part in it as to achieve that aim.

18. I now kindly request you to draw your attention to the agreed facts which are before you. I do not wish to reproduce them in my summing up. You are allowed to consider these agreed facts as proven facts beyond reasonable doubt against the accused person by the prosecution.

19. It is important to note that proof can be established only through evidence. Evidence can be presented in the forms of:

- i. Direct evidence,
- ii. Circumstances evidence,
- iii. Documentary evidence,
- iv. Expert evidence.

20. I now draw your attention to summarise the evidence presented by the prosecution during the hearing.

21. The first prosecution witness is Mr. Vinesh Kumar, who is the complainant of this action. He stated in his evidence that he suddenly woke up in the early morning of 4th of June 2013, as he felt that someone has switch on the light in his bed room. He was sleeping with his wife in their bed room at that time. Once he woke up, he found three people were inside his bedroom. All of them have covered their faces with towels, so he couldn't see their faces. He has noticed that one of them was standing close to his bed with a knife and

guarding them, while other two were trying to open the wardrobes in the room. All of them were armed with knives, pinch bars and iron rods.

22. He tried to shout, but they threatened him not to do so. Having heard the commotion, his wife got up and tried to scream. The man who was carrying a knife went to her and pushed the pillow on her face. She struggled to escape. Mr. Vinesh thought that she might suffocate. He saw the man who was pushing the pillow on her face was just next to him and tried to punch him on his face. He fell down, with that other two came to him and started to beat him up. He was dragged on the floor. He stated in his evidence that while the man with the knife fell down, the towel that covered his face slipped away. At that point Mr. Kumar saw the face of the man who was carrying the knife for about 30 seconds or a minute. He notices that person got a tattoo on his arm.

23. Mr. Kumar further stated that he saw his elder son came to the door and started crying. He pleaded with them to leave them alone and take whatever they wanted. They asked money from them. Two of them pushed him to the living room while pointing a knife to his neck. They ransacked the house. They have stolen two laptops of him, both are Dell brand, one is his personal lap top and other one is his official one. Moreover, they stole his video camera, took the money in his wallet and his wife's, jewellerys, and bottles of liquor. After that they asked them to stay in the room and fled away. He then tried to call the police emergency number, but with no avail. He then called his neighbours. Once the neighbours arrived, he went to the nearest police post in his car, but found that there were no police officers. Meantime, his neighbours have called the police. The police came later.

24. He identified the photos of his two stolen laptops and the video camera with their respective serial numbers.

25. Mr. Kumar further stated in his evidence that he saw the same person, whose face he saw in that night at Savala Road, month after this incident. Mr. Kumar stated that he never forgets that face as he got big lips and a board forehead. He tried to call the police post, but no one pick the phone. He then drove to the police post and brought a police officer. By the time he returned, that person has gone. He then saw this person only in the court house while giving evidence. Mr. Kumar identifies the first accused in the dock as the person who invaded his house on the 4th of June 2013 with two others. He stated that he got an injury on his left leg and scratches on his neck. He had pain in his body due to the beating by the robbers.
26. In his cross examination, he stated that all of them were in "three quarter" jeans. One of them has a jacket and other two were in t-shirts. Answering about his statement to the police, he stated that he had so many issued soon after this incident and only answered the questions asked by the police officer who recorded his statement.
27. The second prosecution witness is Kavita Kumar, the wife of Mr. Kumar. She stated in her evidence that she woke up in the early morning of 4th of June 2013 as she heard her husband, who was sleeping with her, was shouting. She then saw three men were inside their bedroom. All of them have covered their faces. One of them was guarding them near the bed, while other two were opening the wardrobe. When she started to shout, one of them came to her and put a towel on her face and pushed a pillow against her face. At that time, others dragged her husband to the floor and started beating him up. Their two sons were also come to the room after hearing this commotion. She then pulled the pillow away and jumped from the bed. They pushed her husband to the living room, while one of them was guarding them in the room with a knife. That person pulled her gold chain from her neck and tried

- to pull her ear rings too. She stopped him and removed them and gave it to him. She explained in her evidence the items they have stolen from them. She stated in her evidence that she couldn't identify any of the robbers as they had covered their face.
28. The next prosecution witness is Visha Latchmi. She stated in her evidence that on 22nd of July 2013, the police came to her shop and asked for a laptop. They took the laptop brought by her employee Anare.
29. The fourth prosecution witness is Cpl Semitiki Nakatasaru, who has arrested the second accused person on 22nd of July 2013 at Tavakubu Village. He went to the house of second accused with D/ Cpl Peneia Darua. He saw an injury on the left eyebrow of the second accused. Upon inquiring, he found that the accused had sustained that injury at a scuffle he had with his friends. Cpl Semitiki stated that he cautioned the second accused. He was not assaulted, forced, threatened, or induced at the time of arrest and also on his way to the Lautoka police station. At the Lautoka Police station he was handed over to the charge room personal and informed him about the injury on the left eyebrow of the second accused.
30. D/Cpl Mario Daurewa is the fifth prosecution witness. He was the charging officer of the second accused. He charged him on 23rd of July 2013 at the crime office of Lautoka Police Station at the presence of witnessing officer D/Cpl Arvind. Accused was properly cautioned. The charging was done in English language. It was recorded in question and answer format. D/Cpl Mario stated that the accused was not assaulted, threatened, forced, or induced before or during the recording of his charging statement. He tendered the charging statement as a prosecution exhibit 2.

31. The sixth prosecution witness is Detective Inspector Asesela Tuitai, who is the interviewing officer of the second accused person. He has interviewed the second accused on 23rd of July 2013 at the Lautoka police station. He stated that he couldn't recall that he saw any injuries on the accused. Accused was given his rights to consult a lawyer or any family member. He was given his breaks and rest during the recording of the caution interview. It was recorded in English language. Accused was not assaulted, intimidated, threatened, forced or induce before and during the recording of caution interview. D.I. Tuitai read the caution interview of the second accused during his evidence.
32. The seventh prosecution witness is Dr. Kerera Tabuanaqali. She has examined Mr. Kumar on 4th of June 2013. He was referred to her by the police. According to the information received from Mr. Kumar, he was assaulted by three youth on his back, legs and knees with metal rod. She tendered the medical report that she prepared for Mr. Kumar as prosecution exhibit 4 during her evidence.
33. Cpl. Alipate Matai is the eighth prosecution witness. He escorted the first accused to Lautoka from Suva with seven other police officers on 22nd of July 2013. He stated that upon reaching Lautoka, they went to Vomo street to recover some of the stolen items. The accused showed them the house. They have recovered two Dell laptops, one black case, and one black camera. During his evidence, Cpl Alipate identified the photos of one of the laptops and the camera as the items he recovered at Vomo Street.
34. During his cross examination, he was questioned by the first accused about the dates and times stated in his statement given to the police. He admitted the date in his statement was a mistake. However, in his re-examination he

stated that he made this statement in the night of 22nd of July 2013 and handed over the recovered items together with the search list on the same night.

35. The last prosecution witness is Cpl Arvind, who is the investigation officer of this case and also the witnessing officer of the charging of the second accused person. He stated in his evidence that he visited the scene of the incident on 4th of June 2013. He found the complainant's house was a mess and the occupiers were shocked.
36. He came to contact with the second accused on 23rd of July 2013 and noticed some injuries on his left eyebrow. He was handed over some recovered items by Cpl Alipate. They were two dell laptops with charges, one bag, and one camera with its case. He further recovered a laptop from one Anare for which he prepared a search list. However, he did not produce that search list as a evidence.
37. Cpl Arvind stated that he handed over the two of the laptops which they recovered together with the camera to Mr. Kumar. Mr. Kumar provided the receipts and serial numbers of these items. Cpl Arvind has photographed those items before handing them over to Mr. Kumar.
38. In respect of the charging statement of the second accused person, Cpl Arvind stated that the accused was treated fairly and was not assaulted, forced, intimidated or induced before and during the charging.
39. At the conclusion of the prosecution case, the first accused person was explained of his rights in his defence. The first accused gave evidence on oaths and called one witness for the defence.

40. The first accused denied this allegation and stated that he was at his brother-in-law's place in Ba, participating his sister's child birthday on 4th of June 2013. He stated that his brother-in-law came to Lautoka to pick his wife and child. He left to Ba with them in the evening of 3rd of June 2013. He did not return with his sister and child on 5th of June 2013 and stayed there for a week to assist his brother-in-law at his farm.
41. He stated in his cross examination that he has been residing at Savala place for 13 years. He further admitted that he did not tell the magistrate about his alibi defence. However, he stated that he advised his legal aid counsel about his alibi defence.
42. Mr. Joshua Waka is the first defence witness. He stated in his evidence that he came to Lautoka to take his wife and child to his parent's home in Ba on 3rd of June 2013. When he returned with his family, the first accused also accompanied them. They had a family celebration for his child's birthday on 4th of June 2013. On the following day his wife and child went back, but the first accused stayed with him for a week to help him at his farm.
43. I have summarised the evidence presented during the course of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.
44. The prosecution case against the first accused is founded on the evidence of identification of the first accused and the recovery of some of the stolen items. The case against the second accused person is founded on the confessional statement made by him in his caution interview. The first accused took a defence of alibi and call a witness during the hearing.

45. The prosecution's case against the first accused person is substantially depends on the correctness of the identification of the first accused by Mr. Kumar. According to the evidence given by Mr. Kumar, he saw the face of the first accused person in that night, when the towel he used to cover his face fell down for a while. He admitted that he saw his face only for about 30 seconds or a minute. He then identifies the accused from the witness box, which is referred as dock identification. No evidence of identification parade of the first accused before the dock identification.
46. I now draw your attention to the concept of dock identification and its application in this instant case. Dock identification is unreliable evidence in the absence of proper and prior foundation of identification, such as an identification parade or photograph identification. You have to give very little weight to the evidence of dock identification, if you are not satisfy that the prosecution provided a proper foundation of identification prior to the evidence of dock identification.
47. The complainant, Mr. Kumar has not seen or known the first accused before this incident. He only saw his face about 30 second or a minute at the heights of this alleged robbery. According to his evidence, Mr. Kumar was shocked to find three persons inside his bedroom when he suddenly woke up at the early morning of 4th of June 2013. He further stated that the first accused fell down as he tried to punch on the first accused's face. At that time the first accused was pushing a pillow on his wife's face. Once the first accused fell down, other two robbers came to him and started to beat him. That was the time; Mr. Kumar claims that he saw the face of the first accused. He further admitted that he was busy with the things happened to them while he was giving his statement to the police on that date. When Cpl Arvind visited the place, he

found that Mr. Kumar and his family were still shocked from the incident they had in the early morning.

48. In view of these evidences of identification, it is your duty to consider whether you can satisfy this evidence as reliable and safe evidence of identification. You have to bear in your mind, that not only identification, but also the recognition of a known person by a witness can sometimes be mistaken considering the circumstance or the nature of the situation the witness in. You have to consider how long did the witness have the accused under observation, at what distance, in what light, was the observation impeded in any way, how long elapsed between the original observation and subsequent identification. Having considered all these facts, if you are satisfied that the evidence of identification of the first accused given by Mr. Kumar is reliable and safe, you can then move to consider the next evidence of identification given by Mr. Kumar.
49. He saw the first accused at Salava road, a month after the incident, while he was driving back home from work. He saw the accused was standing with two other males. However, when he brought the police, the person whom he suspected as the first accused has gone. Again you have to consider the facts I already mentioned you in order to form your opinion on this evidence of identification.
50. I now draw your attention to the issue of recovery of some of of stolen properties. The prosecution tries to prove that the first accused had given those stolen items to one of his relatives who reside at Vomo street. However, the prosecution did not call that particular person from whom they have recovered some of the stolen items. Moreover, they did not call Anare to give evidence about the manner he got the possession of one of the stolen laptops.

51. The prosecution's case against the second accused person is founded on his confessionary statement made in his caution interview. You are allowed to take into account the contents of the caution interview and the charging statement of second accused person, if you believe and satisfy the truthfulness and the correctness of his statements in the caution interview and the charging statement. You can then consider contents of the caution interview with the other evidence presented by the prosecution. You are allowed to consider the contradictions, contraventions not only within the caution interview, but also with the evidence of other witnesses of the prosecution in order to form your opinion.
52. If you accept the caution interview and/ or charging statement of second accused person, then there is a further direction I must give you. The caution interview of an accused is only admissible against the maker of the statements. What the second accused said in his caution statements and/ or charging statement are evidence against him only. If he implicates the first accused person in his caution statements, that is not evidence against the first accused. When you come to consider the case against the first accused, you must disregard everything the second accused said in his caution statements against the first accused. The second accused's caution statements can only be used against him.
53. The defence of the first accused person is based on the alibi. The accused person stated in his evidence that he was with his brother-in-law and sister, attending their child's birthday party in Ba at the time of this alleged offence took place. He called his brother-in-law to substantiate his defence of alibi.

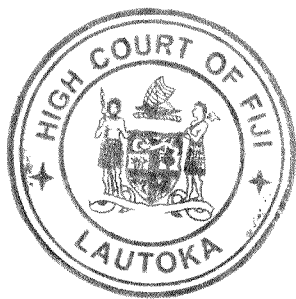
54. At this point, I must remind you that there is no onus on the accused person to prove his alibi defence. Still, it is the onus of the prosecution to disprove the defence of alibi.
55. According to section 125 of the Criminal Procedure Decree, the accused is required to give notice of his alibi within 21 days of the transfer of the case to the high court. The learned magistrate making an order for transfer to the High Court shall inform the accused person of such requirement if he wishes to take up a defence of alibi.
56. However, in this instant case, the first accused has not given his notice of alibi within 21 days of the transfer order pursuant to the section 125 of the Criminal Procedure Decree, nor the learned Magistrate has informed him about this requirement. He filed his notice of alibi only on 15th of April 2015. The accused in his evidence stated that he informed his legal aid counsel about his alibi defence, but she failed to give notice on time. You are allowed to take into account the late notice of alibi in deciding what weight to give the alibi raised as well as the explanation of the accused person as to why he did not give alibi notice within the stipulated time.
57. You watched that all the witnesses gave evidence in court. It is your duty as judges of facts to consider the demeanour of the witnesses, how they react to being cross examined and re- examined, were they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you must consider the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness, not only with his/her evidence, but also with other

evidence presented in the case. It will assist you in assessing the evidence presented in the case and forming your decision to accept or refuse the evidence or witnesses or part of them.

58. You have heard the evidence presented by the first accused, where he denied this allegation, if you accepted the version of the first accused person that he did not commit this offence, and then the prosecution case fails. You must then acquit the first accused from this charge.
59. If you neither believe nor disbelieve the version of the first accused person, yet, it creates a reasonable doubt in the prosecution case. You must then acquit the first accused person from this charge.
60. Even you reject the version of the accused person that does not mean that the prosecution has established that the two accused persons are guilty for this offence. Even though the second accused was not present in the hearing, that does not automatically make him guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the two accused person have committed this offence together with another in company of each other as charged in the information.
61. Upon consideration of all evidence, if you believe that the count of aggravated robbery is proved beyond reasonable doubt, you can find the two accused person are guilty of the charge. If you believe that that charge is not proved beyond reasonable doubt, then you must find the two accused are not guilty.
62. Madam and gentleman assessors, I now conclude my summing up. It is the time for you to retire and deliberate in order to form your individual opinions on the charge against the accused person. You will be asked individually for

your opinion and are not required to give reasons for your opinion. Once you have reached your opinion, you may please inform the clerks, so that the court could reconvene.

63. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



R. D. R. Thushara Rajasinghe

Judge

At Lautoka

1st of June 2015

Solicitors : Office of the Director of Public Prosecutions
The accused in person