

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 254 of 2016

[CRIMINAL JURISDICTION]

STATE

V

1. SHAVNEEL PRASAD
2. PRASHNIL KUMAR

Counsel : Ms. S. Navia and Ms. W. Elo for State
Mr. J. Uludole for 1st Accused
Mr. A. Chand and Mr. I Rakaria for 2nd Accused

Hearing on : 25th September – 05th October 2017

Summing up on : 06th October 2017

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused are guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibits tendered. As I have told you in my opening address, your opinion should be based only on the evidence

presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
5. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
6. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes we honestly forget things or make mistakes regarding what we remember.

7. In this case you heard witnesses being cross examined on what is mentioned in their police statements. A police statement of a witness can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.

11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
13. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of an offence against a particular accused, then you must find that accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.
15. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused are charged with and

matters that will enable you to decide whether or not the charges are proved against each accused.

16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
17. Let us now look at the Information. The Director of Public Prosecutions has charged the accused persons for the following offences;

FIRST COUNT

Statement of Offence

BURGLARY: contrary to section 312(1) and 2(b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

SHAVNEEL PRASAD on the 9th day of July 2016 at Suva in the Central Division entered into Shivani Nandani Priyanka Fiji Limited Office as a trespasser with intent to commit theft.

SECOND COUNT

Statement of Offence

THEFT: contrary to section 291(1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

SHAVNEEL PRASAD on the 9th day of July 2016 at Suva in the Central Division dishonestly appropriated \$19,003.73 cash and 1xBlack H264 Network DVR CCTV Video Decoder valued at \$1,800.00 all to the total value of \$20,803.73, the property of Shivani Nandani Priyanka Fiji Limited with the intention of permanently depriving Shivani Nandani Priyanka Fiji Limited of the above mentioned properties.

THIRD COUNT

Statement of Offence

RECEIVING: contrary to section 306(1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

PRASHNIL KUMAR on the 9th day of July 2016 at Makoi in the Central Division dishonestly received \$3,571.90 cash belonging to Shivani Nandani Priyanka Fiji Limited knowing or believing the property to be stolen.

18. Though there are two accused persons in this case, you should remember to consider the evidence against each accused separately. In the event you find one accused guilty of a charge, you must not simply assume that the other accused must be guilty as well.
19. You would also note that the 1st accused is charged with two counts. Please remember that you should consider each count separately. You must not assume that the accused is guilty of the other count just because you find him guilty of one count. You must be satisfied that the prosecution has proved all the elements of each count separately.
20. To prove the above first count, the prosecution should prove the following elements beyond reasonable doubt against the 1st accused;
 - (i) the accused;
 - (ii) entered a building as a trespasser;
 - (iii) with intent to commit theft of a particular item of property in the building.
21. The first element involves the identity of the offender. The prosecution should prove beyond reasonable doubt that it is the accused who committed the offence.
22. To prove the second element the prosecution must prove beyond reasonable doubt that the accused entered a building as a trespasser. A trespasser is a person who intentionally and without any right, lawful authority or permission enters into another's property, not in performance of any duties to the owner but merely for his own purpose.
23. To prove the third element, the prosecution should prove beyond reasonable doubt that the accused had the intention of committing theft of a particular item of property in the building. The elements of the offence of theft are explained under the second count. When it comes to the intention of the accused, it is not

possible to look inside the accused's mind to ascertain what intention he had at the material time. Therefore, you will need to examine the evidence in relation to the accused's conduct and ask yourselves whether it is proved beyond reasonable doubt that the accused entered the building with the intention of committing theft of a particular item of property in that building.

24. To prove the second count, the prosecution should prove beyond reasonable doubt that the 1st accused committed the offence of theft. The elements of the offence of theft are as follows;
 - a) the accused;
 - b) dishonestly;
 - c) appropriated the property belonging to another;
 - d) with the intention of permanently depriving the other of that property.
25. Again, the first element involves the identity of the offender. The prosecution should prove beyond reasonable doubt that the 1st accused committed the offence.
26. The element, 'dishonestly' is again about the state of mind of the accused. So is the element, 'intention to permanently deprive'. Inferences may be drawn from the conduct of the accused, with regard to his state of the mind as I have explained before.
27. 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. In law, property belongs to a person if that person has possession or control of the property.
28. In the event you find the 1st accused not guilty of the second count you may consider whether he is guilty of the offence of receiving.

29. To prove the third count where the 2nd accused is charged with the offence of receiving, the prosecution should prove the following elements beyond reasonable doubt;
 - a) the accused;
 - b) received stolen property;
 - c) dishonestly and knowing or believing the property to be stolen.
30. The 2nd accused does not dispute the first element which is based on identity.
31. To prove the second element, the prosecution should prove beyond reasonable doubt that the 2nd accused received stolen property.
32. To prove the third element, the prosecution should prove beyond reasonable doubt that and the accused received the stolen property dishonestly and he knew or believed that the property is stolen property.
33. Again, you will need to examine the evidence in relation to the 2nd accused's conduct to ascertain his state of mind at the relevant time.

Evidence

34. First prosecution witness was Mr. Ramesh Singh. He said that;
 - a) *He is the managing director of SNP Fiji Ltd for the last 12 years. This company is located at 159 Foster Road, Walu Bay, Suva. On 11/07/16 when he was on his way to work the HR Manager Chandar Kiran informed him that there had been a break-in. When he went to the HR office he saw the pair of pliers tendered as PE 1 on the table. He said about \$19,000.00 that was kept in HR Manager's drawer was missing. He called the police. He said the decoder camera was also missing. He recognized a black decoder shown to him as the one that went missing and it was tendered as PE 2.*
 - b) *He suspected that an internal worker may have done this. Then he went to the houses of the employees who were absent. He met the 1st accused's mother at the 1st accused's house and he noticed that the 1st accused's daughter was having a toy which had the price tag \$79 on it. He said after his visit to the 1st accused's house he suspected that it was 1st accused who stole the money. He asked the 1st accused after he returned to the office and the 1st accused was lost for words. Then he called*

the police again and informed the police about his visit to the 1st accused's house and that his suspicion about the 1st accused. Thereafter a police officer questioned the 1st accused and the 1st accused was again lost for words and did not know what to say.

- c) The police officers took the 1st accused away. Thereafter they brought the lost decoder, the money and a set of keys for him to identify. He said the keys are his office keys which he used to keep inside his vehicle. This vehicle is normally driven by either him or the 1st accused. He identified the set of keys showed to him as the set of office keys he had with him and was tendered as PE 3. He said he used to keep those keys inside his office vehicle that was either driven by him or the accused. He identified the accused in court.
- d) During cross examination on behalf of the 1st accused when he was questioned about identifying the decoder tendered as PE 2 he said he identified the decoder because after the police brought it to him he played it and then he saw the footage where the 1st accused was using the pliers to cut the wire. He could also identify the surroundings. Then it was suggested to him that what he saw was an old record. He said the footage contains the time and the date. When he was questioned about the account records for the \$19,000.00 he said it is in a file with the HR Manager.

35. The second prosecution witness was Chandar Kiran. She said;

- a) She works as the Human Resources Manager at SNP Fiji Limited for the last 04 years. She was also handling the company cash. On 11/07/16 when she opened the drawer in her office in the morning, she noticed that the lock is broken on the side. When she pulled the drawer out she saw that the container was opened and the cosmetic bags containing \$19,111.54 were missing. One bag was light blue and the other one was grey and black. There were coins and notes. She knew the amount because she had put a paper with the amount inside each bag.
- b) She said apart from the money, the black CCTV camera recorder was also missing. Value of the said recorder was \$1800.00. She identified PE 2 as the lost recorder. She identified two bags as the cosmetic bags she referred to and tendered them as PE 4A and PE 4B. Then she opened the bags and pulled out plastic bags containing coins and notes. She counted the notes and the coins in each bag and tendered each bag in evidence. There were eleven bags which contained a total amount of \$8953.55 that were tendered as PE 5A to PE 5K. PE 5A contained notes amounting to \$5375. She said those cosmetic bags and the plastic bags were shown to her by the police after 11/07/16.
- c) During cross examination on behalf of the 1st accused she said all the printouts on the amount that was stolen were given to the police and all the records are in the shop with the Finance. She said she gave a breakdown that was recorded in an A4 paper. When she was asked about the pieces of paper she referred to in her evidence she said the police showed her those pieces of paper with the cash.

36. The third prosecution witness was Detective Constable John Tuinakelo.

- a) *He was the investigating officer in this case. He conducted the caution interview of the 1st accused. He tendered the original handwritten caution interview record of the 1st accused as PE 6A and the typed version as PE 6B. He said the 1st accused did not make any complaint to him before, during or after the caution interview. He said the 1st accused was not assaulted, threatened and no false promise was made and no force was used for the 1st accused to admit the allegations. He said the 1st accused gave the answers voluntarily and on his free will. He recognized the 1st accused in court.*
- b) *He said he went to conduct a search at the 1st accused's house on 12/07/16 with the 1st accused and other police officers. The 1st accused's mother and his daughter were present in the house. When they went inside the house the 1st accused informed him that the he wants to have a bath. Though he told the 1st accused to wait, the 1st accused went straight to his bedroom. He followed the 1st accused because he thought that the 1st accused might run away. As he was about to enter the room the 1st accused came out and he noticed that the 1st accused was not walking properly and something was in between his legs. Then he searched the 1st accused and he found bags containing money under the 1st accused's pants. When he asked the 1st accused the 1st accused informed him that the money was kept under his bed.*
- c) *He said the money was in the form of notes and he recorded all the serial numbers of the notes in the search list. He tendered the relevant search list as PE 7. He said the total amount of money recovered from the 1st accused was \$5375.00. He said apart from the money, one 8-chanelled video recorder was found near the Waila Bridge and one set of keys was found in Koronivia as recorded in PE 7.*
- d) *He said he found the items on the last page of the search list after the interview was suspended for the second time. He identified PE 2 as the video recorder he recovered near Waila Bridge. He also recognized PE 3 as the bunch of keys he recovered from Koronivia. He also identified the notes in PE 5A as the money he recovered.*
- e) *During cross examination on behalf of the 1st accused he said when he was conducting the cautioned interview of the 1st accused there were about five other officers who were present inside the room who were attending to other work. He denied the suggestion that the accused was threatened and assaulted by other police officers in the office. He denied the suggestion that the 2nd accused and another suspect by the name Shalvin were there during the time the cautioned interview of the 1st accused was conducted. He denied assaulting the accused on the stomach. He said that the accused's rights were explained only on the first day. He agreed that there was no witnessing officer present during the caution interview.*
- f) *During cross examination on behalf of the 2nd accused he agreed that he was part of the search team that conducted the search at the 2nd accused's residence. He agreed that the bunch of keys were recovered with the cosmetic bag that had money during that search. He agreed that one Shalvin was also interviewed in respect of this case*

and was cleared after the investigation. He admitted the suggestion that the 1st accused was untruthful in respect of how the burglary happened.

- g) He agreed that there was no need to obtain a search warrant when he went to the 2nd accused's place because the 2nd accused voluntarily gave the bag of money and keys to the police officers.
- h) During re-examination he said that the rights should be given only on the 1st day. He said a witnessing officer was not present during the caution interview of the 1st accused because the other officers were engaged in their own investigations as there were other cases.

37. The fourth prosecution witness was Richard Suwanmanee.

- a) He said he is a police constable based at the Totogo Police station. He said he recorded the charge statement of the 1st accused and he also took part in the search that was conducted at the 1st accused's residence. When he recorded the charge statement there were other officers but they were doing their own work. He said the 1st accused did not make any complaint to him before, during or after the charge statement. The original handwritten charge statement of the 1st accused was tendered as PE 8A and the typed version as PE 8B.
- b) He said the questions in the statement were asked by him and the 1st accused gave the answers recorded therein. He said he did not assault and he did not witness any other police officer assault the 1st accused. He said the 1st accused was not forced to give the answers recorded in the charge statement. No false promise was made to the 1st accused. He said the 1st accused was very cooperative and was remorseful during the charging. He recognized the 1st accused in court.
- c) During cross examination on behalf of the 1st accused he denied that the 1st accused complained to him about being assaulted by the interviewing officer. When he was asked whether the 6th and 7th items in the search list PE 7 were found at Rarama Place he said 'no'.

38. The fifth prosecution witness was Detective Constable Napolioni Nakibo.

- a) He said he was the team leader and also the supervisor of the investigation in this case. He was also the officer who recorded the caution interview of the 2nd accused. He tendered the original handwritten caution interview of the 2nd accused as PE 9A and the typed copy as PE 9B.
- b) He said he suspended the interview after question 71 for reconstruction of the scene. They were accompanied by the scene of crime team led by Sgt. Viliame Napoto. Two other officers and the accused also went. He said he found the money that was buried. The first search was conducted at the residence of the 1st accused. He said during that search cash was recovered from the 1st accused's room.
- c) He tendered the search list he prepared in relation to the 2nd accused as PE 10. He said the notes that were listed in the search list were recovered inside the house while the coins, the money bags and the bunch of keys were dug from the farm where they were buried. He said the 2nd accused's house was located at Koronivia and \$3571.90 was recovered. He said Sgt. Napoto was tasked to take photographs during scene reconstruction. He was shown two photographic booklets. He said the booklet titled 'Assorted Cash and Coins in plastic bags/ bunch of keys/ CCTV recorder' contains the photographs of the items seized by him and his team. This

booklet was marked for identification as MFI 1. The booklet titled 'Scene Reconstruction at Koronivia and Waila Bridge' was marked for identification as MFI 2.

- d) He said the photographs 3 and 4 in MFI 2 shows the 2nd accused pointing to where the bunch of keys and the money was buried. Those photographs were marked for identification as MFI 2A and MFI 2B. He said the 6th photograph in MFI 2 shows the Waila Bridge where the decoder was recovered from. This photograph was marked for identification as MFI 2C. The photograph 7 he said shows the 1st accused pointing to the place where the recorder was thrown. This was marked for identification as MFI 2D. The photograph 8 was marked for identification as MFI 2E and he said that it shows the place where the decoder fell after it was thrown.
- e) During the cross examination on behalf of the 1st accused he said he would have seen if the 1st accused was threatened or assaulted during the cautioned interview because the 1st accused was interviewed in an open room. When he was asked the amount of money that was recovered he said he can't recall.
- f) During cross examination on behalf of the 2nd accused he admitted that after the search was conducted at the residence of the 1st accused he received information about other money at the 2nd accused's residence. He agreed that when the 2nd accused was questioned, the 2nd accused voluntarily showed the place where the money was buried. He said what was buried were two cosmetic bags, bunch of keys and only the coins and not the notes. When he was questioned on the 3rd page of PE 7 he said though the documents indicate that the search was conducted at the 1st accused's residence, the decoder was found at Waila Bridge and the keys were recovered from Koronivia. He said they may have overlooked when they included those items in that search list.
- g) When he was questioned on the search list tendered as PE 10 he denied that all items listed therein were found inside the dwelling house. He agreed that when he took the 2nd accused for the scene reconstruction the 2nd accused willingly showed where he had taken the 1st accused after picking the 1st accused from the house and the 2nd accused did this willingly. He agreed that the search list PE 10 suggests that everything were found inside the dwelling house but he said that he may have overlooked. He agreed that there is no photograph to show the place where the cash was recovered inside the dwelling house. He said the house was locked.

39. The sixth prosecution witness was Detective Sgt Viliame Napoto.

- a) He said he is attached to the Crime Scene Unit. The booklets marked for identification as MFI 1 and MFI 2 were prepared by him and the photographs in the said booklets were taken by him. The two booklets were tendered as PE 11A and PE 11B respectively. He said that PE 11A contains the photographs of the exhibits. He tendered the photographs marked for identification as MFI 2A, MFI 2B, MFI 2C, MFI 2D and MFI 2E as PE 11B-1, PE 11B-2, PE 11B-3, PE 11B-4 and PE 11B-5 respectively.
- b) During cross examination on behalf of the 1st accused he said when he took the photographs the decoder had already been uplifted by the police officers. He said, during the reconstruction he was working under the indications given by the suspect and not the police.

40. That was the case for the prosecution. At the end of the prosecution case you heard me explain several options to the accused persons. They had those

options because they do not have to prove anything. The burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. Both the accused chose to give evidence on oath.

41. The 1st accused said in his evidence that;

- a) *His daughter does not own a \$79.00 toy and the toy was \$45.00. When he was taken to the CID office which was an open room there were about seven other police officers. When he was interviewed by an officer named D/Cp John the other police officers who were present assaulted him and swore at him. He said the interviewing officer also assaulted him during the interview by punching him on his stomach. He said he was really frightened of the police officers' approach. He said the way they spoke was not right. He said his rights were not read on all the three days he was interviewed but only on the first day. He requested that his father to be allowed to be present during the interview but the interviewing officer ignored it.*
- b) *After he was interviewed he was charged by another officer. He informed the charging officer about him being assaulted by the interviewing officer and the other police officers. The charging officer did not do anything about it. He said he also complained to another police officer who brought food for him at the cell. Apart from those two police officers he informed his lawyer about the assault and the lawyer advised him that the police officers will be charged during the trial.*
- c) *During cross examination on behalf of the prosecution he denied the suggestion that the vehicle he drove at SNP Fiji Limited was only driven by him and Mr. Ramesh. But he agreed that he knew everything that was kept in that vehicle because he used to drive it. He said he earned more than \$160 a week because he did overtime. His pay would be around \$180-\$195 a week. He would also earn about \$70-\$80 by driving a taxi on Sundays. He would give \$50 per week to his father and would save about \$60 per week. When it was suggested that his savings within the 8 months he worked at SNP Ltd would be about \$2,000 he said he is not sure. When it was suggested that he gave a different story when the interview proceeded on 12/07/16, he said it was the right story.*
- d) *He admitted that he didn't tell the police that the money was at his house. He agreed that he asked the officer whether he can have his shower. He said D/Cp John allowed him to have his shower but D/Cp John came behind him when he went to his room. Then D/Cp John followed him to the bathroom and stood there until he finished his shower. Then he was escorted to the room to get dressed. He denied that the money bag was recovered when it was hidden between his thighs. He said the money was given to D/Cp John in the sitting room. When it was suggested that his story changed when the interview recommenced that evening, he said the things that are written in the statement are incorrect.*

- e) *He denied the suggestion that he only told the truth to the police when the money was recovered from his house on 12/07/16. He denied that he showed the police where he threw the decoder. He agreed that he did not complain to any superior officer at Totogo Police station and did not lodge a complaint with the Police Headquarters even after he was granted bail. He agreed that he did not complain about being assaulted when he was produced before the magistrate court and the high court. He denied giving the 77 answers in his caution interview. He said he was just told to sign at the places where it was marked.*
- f) *During re-examination he said the police did not search his bedroom in his presence because the money was given to the police in the sitting room. He said that money was his savings.*

42. The 2nd accused said in his evidence that;

- a) *He knew the 1st accused because he worked as a base boy of a taxi service where the 1st accused used to drive a taxi. He went to the 1st accused's house at Kalokalo Crescent to pick him up around 9.00pm on 09/07/16 on the request made by the 1st accused over the phone. That time he used to drive a private car as a taxi. The 1st accused got into the vehicle and told him to go to Walu Bay.*
- b) *The 1st accused got off the vehicle in front of Pacific Buses Limited in Walu Bay. The 1st accused did not tell him where he was going. He parked near Avondale and started using his phone. The 1st accused came back after 10 to 15 minutes holding a carton and a bunch of keys. The 1st accused then sat in the front seat and placed the carton in front of the seat. No one else was with the 1st accused. Then he was told to go towards Princes Road. He said he did not know where the 1st accused got the carton from and the 1st accused did not tell him what was inside.*
- c) *They left Walu Bay around 10pm. When they reached Waila Bridge the 1st accused threw something out of the vehicle. When he asked, the 1st accused told him that it was rubbish that his boss wanted him to throw. He did not see what was thrown out as he was driving.*
- d) *Then the 1st accused asked him whether he wants to drink beer. He agreed and then they went to a bottle-shop in Nausori. Thereafter they went to his brother's place in Koroniwia to have the beer. The 1st accused gave him \$50 for the hire when they stopped at the bottle-shop.*
- e) *They drank the beer in the sitting room at his brother's place. His brother also drank with them. The 1st accused kept the carton beside the settee. After finishing*

the beer he went with the 1st accused and brought more drinks and started drinking again. His brother did not join this time since he had to go to work. After they finished three bottles the 1st accused took out a cosmetic bag from the carton and told him to keep it somewhere in the house and that he will take it on Monday. When he asked, the 1st accused told him that it is money that belongs to his boss. He told the 1st accused that he can't keep money in the house because the house had been robbed three times. Then 1st accused told him to bury the bag behind his brother's house and then he buried it with the 1st accused.

- f) He said the hole was already there, they just put the bag inside. He noted that the bag was heavy and therefore he thought that coins are inside. After that they sat down and finished the left over drinks. They slept there as they were drunk. He dropped the 1st accused at his home next morning around 9am. 1st accused told him that he will give a call when he needs the money.
- g) The 1st accused called him the next Monday afternoon and told him that he the 1st accused is in the brother's house at Koronivia and that he wants the bag. When he received this call he was at his house in Caulevu. When he went to his brother's place at Koronivia and parked the car, he saw the Totogo Police van at the side of his house and the officers came out. The 1st accused then told him to show the bag the 1st accused gave him on Saturday. He went with the officers and showed them the bag.
- h) Thereafter he was taken to the police station and he was told that he will be released after the interview. He said the police officers who were present in Koronivia that day did not enter his brother's house. He was interviewed on the next day. He said the 1st accused and also another suspect named Shalvin were in the police station when he was there. But he was not interviewed together with the other suspects. He came to know that a decoder and money were stolen when he was been interviewed. He said he saw the bunch of keys for the first time at Walu Bay. He said he did not know that the money was stolen.
- i) During cross examination on behalf of the 1st accused, he denied the suggestion that the 1st accused only gave him the bag with the coins but did not go with him to bury it. When he was asked why it was necessary for the 1st accused to call him to show the bag if the 1st accused knew where the bag was buried, he said both of them were drunk and it was night.

- j) *During cross examination on behalf of the prosecution he denied that he received stolen money from the 1st accused before burying it. He admitted that he did not tell his brother about burying the bag. He denied the suggestion that \$50 would be more than the usual fare from Makoi to Walu Bay and then to Koroniwia. He agreed that he did not mention about a carton in his caution interview. When it was suggested that he lied in court in saying that he did not see the items when he picked 1st accused from Walu Bay because his caution interview indicates otherwise, he denied and said that when he was interviewed the coin bag and the decoder were already on the table.*
- k) *The prosecution highlighted his answers given in questions 49 and 50 of his caution interview where he had said that he went to pick the 1st accused in front of SNP shop and it was suggested that he is lying in court to save himself. He denied this suggestion.*
- l) *During re-examination he said Pacific Bus Company Limited and SNP are on the right hand side towards Lami and Avondale is on the right side coming towards Suva. The distance from where he parked near Avondale and where he picked the 1st accused is from where he was sitting to where the assessors are sitting. He said, because the coin bag and the decoder were already placed on the table, he thought those may be the items that were stolen and that is why he mentioned those items in the caution interview.*

43. That is a summary of the evidence. You may have noticed that I have not reproduced the entire evidence that was led. I have reproduced the evidence which I consider necessary to explain the case and the applicable legal principles to you. If I did not refer to any evidence which you consider important, you should still consider that evidence and give it such weight you may think fit. As I have already explained, it is entirely up to you to decide which evidence you accept. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
44. Now let me direct you on how to deal with the cautioned interview statements and the charge statement that were tendered as exhibits. The 1st accused's

cautioned interview was tendered as PE 6 A (original handwritten) and PE 6 B (typed). The charge statement was tendered as PE 7A (original handwritten) and PE 7B (typed). The 1st accused challenges the voluntariness of these statements. He says that he was sworn at and assaulted by the police during his cautioned interview and therefore he was frightened. He says that he wanted his father to be present but was not allowed. According to the 1st accused he complained to the charging officer but the charging officer did not do anything. The prosecution denies the allegations made by the 1st accused and says that the 1st accused gave the answers recorded in PE 6A and in PE 7A voluntarily. Prosecution also points out that the 1st accused had not complained to anyone about the alleged assault even after he was granted bail.

45. In dealing with this cautioned interview statement tendered as PE 6A and the charge statement tendered as PE 7A, you must decide the following in respect of each statement;
- a) Did the 1st accused make the statement in question? If you are not sure that he made it, the matter ends there. You should disregard the statement.
 - b) If you are sure that the accused made it, then you should consider whether the statement was made voluntarily. You have to be sure that the statement was not obtained with oppression and it was not obtained in an unfair manner. If you are not sure that the statement was made voluntarily, then you should disregard it.
 - c) If you are satisfied that the statement was made voluntarily, then you should decide whether you are sure that the statement is true. Which means that you should consider the statement as you would consider the evidence given by a witness. You may accept the entire statement to be true or a part of it is true or you may consider the entire statement is not true. You may rely only on what you would consider to be true.

46. The 2nd accused's cautioned interview statement was tendered as PE 9A (original handwritten) and PE 9B (typed). The 2nd accused does not challenge the voluntariness of his cautioned interview. However, you should still decide whether the 2nd accused made the admissions in his cautioned interview statement and whether those admissions are true. As I have said before you may rely only on what you would consider to be true.
47. You should also remember that the contents in the cautioned interview statement of one accused cannot be used as evidence against the other accused. The admissions made in a statement can be used as evidence only against the accused who made that statement.
48. In this case you also heard the two accused persons giving evidence concerning each other. Unlike the aforementioned statements made outside court, the oral evidence given by one accused in court is admissible against the other. I have explained to you that you should examine the case of each accused separately. When you are considering the case of the 1st accused, the evidence of the 2nd accused will be relevant. When you are considering the case of the 2nd accused, the evidence of the 1st accused will be relevant. You must assess the truth of each accused's evidence as you would the evidence of any other witness but, when you do that, bear in mind that each of them has his own interest to consider when giving evidence in his own defence.
49. In this case the prosecution is relying on circumstantial evidence apart from the admissions made by the accused persons to prove its case. Circumstantial evidence is evidence of various circumstances that may lead to the conclusion that an accused committed a particular offence, when taken together. However, it is not about mere speculation or guesswork. It is not sufficient that the proved circumstances are merely consistent with the relevant accused person's guilt. To find an accused guilty on circumstantial evidence, you must be satisfied beyond reasonable doubt that the inference of guilt is the only rational conclusion to be drawn from the circumstances you consider as proven when taken together.

Before you draw any inference you must first be satisfied beyond reasonable doubt that the evidence given by witnesses relating to the circumstances is credible and truthful.

50. It is important that you examine circumstantial evidence with care as with all evidence and consider whether the evidence upon which the prosecution relies on to prove its case is reliable and whether it does prove the guilt of the accused, or whether on the other hand it reveals any other circumstances which cast doubt upon or destroy the prosecution case.
51. When the first prosecution witness gave evidence, you would remember him testifying about a conversation he had with the 1st accused's mother. 1st accused's mother was not a witness in this case. Therefore, you cannot consider the first prosecution witness' evidence of what the 1st accused's mother told him to decide whether what he was told by the 1st accused's mother is true. As an example, you may remember the first prosecution witness saying that the 1st accused's mother told him that the 1st accused took the daughter for shopping. This evidence is not admissible in deciding whether or not the 1st accused in fact took the daughter for shopping.
52. On the first count the prosecution alleges that the 1st accused committed the offence of burglary by entering into Shivani Nandani Priyanka Fiji Limited (SNP Fiji limited) office as a trespasser with intent to commit theft. On the second count it is alleged that the 1st accused stole \$19,003.73 cash and a CCTV Video Decoder valued at \$1800. As I have informed you earlier, in the event you find the 1st accused not guilty for the second count, you should consider whether he is guilty for the offence of receiving.
53. The 1st accused challenges the voluntariness of his cautioned interview and the charge statement. The 1st accused had taken up the position that the prosecution has failed to prove the amount that was stolen and had failed to prove that the decoder tendered as PE 2 is a decoder stolen from the SNP Fiji limited.

54. According to the particulars of offence in the first two counts the prosecution alleges that the 1st accused committed the offence by himself. However, the cautioned interview statement of the 1st accused which the prosecution is relying on indicates that the two offences were committed with another. The third prosecution witness had admitted during cross examination by the counsel for the 2nd accused that the 1st accused was untruthful in his cautioned interview and this answer was not clarified during re-examination.
55. In the second count it is alleged that the cash stolen is \$19,003.73. The first prosecution witness said that the amount stolen was about \$19,000. However he said that the records are with the HR Manager. The second prosecution witness who is the HR Manager said that the amount stolen was \$19,111.54. In this regard you should remember that variance between the figure mentioned in the particulars of offence and the evidence is not material.
56. On the third count it is alleged that the 2nd accused dishonestly received \$3571.90 which is stolen property, knowing or believing that it was stolen property.
57. The 2nd accused though accepts that the 1st accused showed him a bag and that it was buried in the farm behind his brother's house; denies receiving that bag with the money from the 1st accused and says that he did not know that it was stolen property. He says that bag was given to him by the 1st accused to keep in a safe place and he was told that the 1st accused will collect it later. He denies the evidence led by the prosecution to the effect that the notes were recovered inside the house and says that both the notes and the coins were buried with the bag.
58. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case against each accused beyond reasonable doubt.

59. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
60. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
- (i) You may believe the explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject the accused's evidence. But if you disbelieve the accused, that itself does not make him guilty of the offence charged. The situation would then be the same as if the accused had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.
61. Any re-directions?
62. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against each accused. You may peruse the exhibits if you wish to do so. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

63. Your opinion should be as follows;

1st count - guilty or not guilty

2nd count - guilty or not guilty

If not guilty

alternative offence of receiving - guilty or not guilty

3rd count - guilty or not guilty



A handwritten signature in blue ink, appearing to read "Vincent S. Perera".

Vincent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.

Solicitor for the 1st Accused : Colavanua Law, Suva

Solicitor for the 2nd Accused : Legal Aid Commission, Suva.