

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 291 OF 2016S

STATE

vs

1. LUKE SENICEVA
2. VILIAME MOTOKAINAVA

Counsels : Ms. M. Chowdhury for State  
Ms. N. Mishra for Accused No. 1  
Ms. S. Daunivesi for Accused No. 2

Hearings : 20, 21, 22, 25, 26 February, 4 and 5 March, 2019  
Summing Up : 6 March 2019

---

### SUMMING UP

---

#### A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels in this case.

Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

## **B. THE BURDEN AND STANDARD OF PROOF**

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accuseds. There is no obligation on the accuseds to prove their innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.

5. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accuseds' guilt, before you can express an opinion that they are guilty. If you have any reasonable doubt so that you are not sure about their guilt, then you must express an opinion, that they are not guilty.

6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accuseds or the victims. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

## **C. THE INFORMATION**

7. You have a copy of the information with you, and I will now read the same to you:

*... [read from the information] ...*

## **D. THE MAIN ISSUES**

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:

- (i) On count no. 1, did Accused no. 1 and 2, in company of each other, between 1 and 4 July 2016, at Nasinu in the Central Division, broke into Tamavua Primary School, with intent to commit theft?
- (ii) On count no. 2, did accused no. 1 and 2, in company of each other, between 1 and 4 July 2016, at Nasinu in the Central Division, steal Tamavua Primary School's properties, as itemized in count no. 2?

**E. THE OFFENCES AND THEIR ELEMENTS**

9. The two accuseds were charged with, first, "aggravated burglary", contrary to section 313(1)(a) of the Crimes Act 2009 (count no. 1); and second, "theft", contrary to section 291 (1) of the Crimes Act 2009 (count no. 2). It was alleged that the two accuseds, in company with each other, between 1 and 4 July 2016, at Nasinu in the Central Division, broke into Tamavua Primary School, and stole the properties itemized in count no. 2.
10. On count no. 1, for the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused;
  - (ii) in company with one or more persons;
  - (iii) enters or remains
  - (iv) in a building;
  - (v) as a trespasser;
  - (vi) with intent;
  - (vii) to commit theft
11. The key word in the above offence is the word "trespasser". A trespasser is someone who does not have permission, express or implied, to be in a building. In other words, if you don't have permission to enter or remain in a building, but nevertheless entered or remained in the building, you are a trespasser. You don't have authority to enter or remain in the building. For example, a thief who enters or remains in a building, to steal, is a trespasser.



12. Likewise, another key word in the offence is the word "building". A "building" includes 'a part of a building', "a structure (whether or not movable), a vehicle, or a vessel, that is used, designed or adapted for residential purpose". A building also included buildings that are not used for residential purpose, for example, a school building. A school building is therefore a building.
13. It must also be noted that for "aggravated burglary", when the accused enters or remains in a building as a trespasser, with intent to commit theft, he must do the same in cohort with one or more persons. In other words, when he enters or remains in the building as a trespassers, with intent to commit theft, he must do the same with the assistance of one or more persons.
14. Count No. 2 involved the offence of "theft", contrary to section 291(1) of the Crimes Act 2009. For the accused to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused
  - (ii) dishonestly
  - (iii) appropriates
  - (iv) property belonging to another
  - (v) with the intention
  - (vi) of the permanently depriving
  - (vii) the other of the property
15. "Theft" is another word for "stealing". "Stealing" is basically to take something away, without the owner's permission, and with the intention of permanently depriving the owner of ownership of that property. For example, I saw \$1,000 in your wallet. I took your wallet, got the \$1,000 and spent it on myself, without your permission. What I did above is basically called "theft" or "stealing".
16. You will notice in count no. 1 and 2 of the information that, the prosecution, in their particulars of offence, began with the phrase, "LUKE SENICEVA and VILIAME MOTOKAINAVA, in company of each other, ..." The prosecution is alleging that the accuseds committed the above offences, as part of a group. To make them jointly liable, the prosecution appear to be relying on and running its case, on the concept of 'joint enterprise'.

17. "Joint enterprise" is "when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence" (Section 46, Crimes Act 2009). In considering the accuseds' cases, you must ask yourselves the following questions: Did they form a common intention to trespass Tamavua Primary School's buildings, with intent to commit theft, at the material time? If so, did they act together in trespassing into the school's buildings, with intent to commit theft, at the material time? And did they commit theft therein? Was this a probable consequence of the trespass, with the intent to commit theft? If your answer is yes for the accuseds, then they are guilty as charged in counts no. 1 and 2. If otherwise, they are not guilty as charged. It is a matter entirely for you.
18. Furthermore, in this case, there are two accuseds on trial. Each of the accused is entitled to be tried solely on the evidence that is admissible against him. This means that you must consider the position of each accused separately, and come to a separate considered decision on each of them. Just because they are jointly charged, does not mean that they must all be guilty or not guilty. Most evidence in this case are admissible against both accuseds. However, regarding their police caution interview statements, which may contain their alleged confessions, the statements therein are only admissible against the maker of the statements, and on no other. In other words, in each of the accused's police caution interview statements, you must totally disregard what the accused said about his co-accused on the commission of the offences, because these are inadmissible evidence. You can only take into account what he said about himself, regarding his role in the commission of the crime, because this is admissible evidence against him.
19. There are two counts in the information. When considering them, you must treat and consider each count separately, and apply the whole evidence to each count separately.

**F. THE PROSECUTION'S CASE**

20. The prosecution's case were as follows. Mr Luke Seniceva (Accused No. 1), at the time of the alleged incident between 1 and 4 July 2016, was 23 years old. He was living with his parents and



siblings at Tacirua Village. He reached Form 5 education at Ratu Sukuna Memorial School and was working as a night club bouncer at the time. Mr. Yiliame Motokainava (Accused No. 2), at the time of the alleged incident in July 2016, was 19 years old. He reached Form 6 level education at Marist Brothers High School. He was residing with his defacto wife and 2 month old son at Uru Settlement, Tacirua Village. He was unemployed at the time.

21. According to the prosecution, Accused No. 1, in the company of Accused No. 2 and others, between 1 and 4 July 2016, at Nasinu in the Central Division, broke into Tamavua Primary School, as trespassers with intent to commit theft (count no. 1). According to the prosecution, Accused No. 1 and 2 and others, in company of each other, broke into the school's canteen, tool room and school office, and stole the items mentioned in count no. 2 (count no. 2).
22. The matter was reported to police. An investigation was carried out. Accused No. 1 and 2 were caution interviewed by police at Valelevu Police Station, between 6 and 8 and 29 July 2016. Both accuseds allegedly admitted the offences to police. They later appeared at the Nasinu Magistrate Court in July and August 2016 charged with "aggravated burglary" and "theft" at Tamavua Primary School. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find both accused guilty as charged on both counts. That was the case for the prosecution.

#### **G. THE ACCUSED'S CASES**

23. On 25 February 2019, the first day of the trial proper, the information was put to both accuseds, in the presence of their counsels. They pleaded not guilty to both counts. In other words, they denied the allegations against them. When a prima facie case was found against them, at the end of the prosecution's case, wherein they were called upon to make their defence, both accuseds choose to give sworn evidence on their own behalf. Accused No. 1 became DW1 and Accused No. 2 became DW3. Accused No. 1 called his mother as his other witness, and she became DW2. What the accuseds did above were their rights.
24. The two accuseds' cases were very simple. Both denied the allegations against them on oath. They said, they neither broke into Tamavua Primary School as trespassers with an intention to commit theft, at the material time, nor stole the items mentioned in count no. 2. Accused No. 1 said,

he was with his mother and family between 1 to 4 July 2016, and never set foot into Tamavua Primary School. Accused No. 1's mother, DW2, confirmed the above, on oath. Accused No. 2 also said, he was with his family, at the material time, and never set foot into Tamavua Primary School.

25 As to their alleged confessions to the police, when caution interviewed at Vaeilevu Police Station in July 2016, both accuseds asked you, as assessors and judges of fact, to disregard the above, as they said, the police forced the same out of them. They said, they never gave their police caution interview statements voluntarily, and the same were given without their own free will. They also alleged that most of their statements were fabricated by police. As a result of the above, they ask you, as assessors and judges of facts, to find them not guilty as charged, on both counts. That was the case for the defence.

#### H. ANALYSIS OF THE EVIDENCE

##### (a) Introduction:

26 In analyzing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the state's case against each of the accused; then the accuseds' cases, and finally, the need to consider all the evidence.

##### (b) The State's Case Against the Accuseds:

27 Ms. Hamidan Haniff (PW1), the Head Teacher of Tamavua Primary School at the date of the alleged incident gave evidence. She recalled the 4 July 2016, a Monday. She said, when she came to school on Monday morning, the 4<sup>th</sup> July 2016, all the teachers and students, were waiting outside the school. She was advised and saw that the school had been broken into and countless school properties stolen. She said, the school canteen, the front office and the main office were broken into. She itemized the properties mentioned in count no. 2 as been stolen.

28 She said, the police recovered the empty school safe and a laptop for identification. Mr. Ritesh Kapoor (PW2), a school teacher from Tamavua Primary School, identified the above laptop as



belonging to the school. Ms. Mereoni Nawaitabu (PW3), the school's typist, identified the safe as belonging to the school. The safe and the laptop were kept by police as exhibits. During the trial, Accused No. 1 and 2, did not dispute that Tamavua Primary School was burgled by others between 1 and 4 July 2016, and did not dispute that the properties itemized in count no. 2, were stolen by others, at the material time. However, they said, they did not burgle the school, at the material time, nor did they steal the items mentioned in count no. 2.

29. The prosecution did not produce any eye witness to say that he or she saw Accused No. 1 and 2 breaking into Tamavua Primary School between 1 and 4 July 2016 and stealing the items mentioned in count no. 2. This was obviously a difficulty for the prosecution. There was no prosecution eye witness to connect the two accuseds to the crimes alleged in count no. 1 and 2. How then did the prosecution overcome the above difficulty? The prosecution relied on the two accused's alleged confessions to the police, when they were caution interviewed by them in July 2016.
30. PC 4663 Taitusi Luaiala (PW5) cautioned interviewed Luke Seniceva (Accused No. 1), at Valelevu Police Station on 29 July 2016. PW5 said, the interview started at 9.57 am and concluded at 5.05 pm. There was no witnessing officer. There was a break from 10.29 am to 10.48 am. There was another break from 1.27 pm to 4.29 pm for lunch and scene reconstruction. Total interview time was approximately 3 hours 37 minutes, and total break time was approximately 3 hours 31 minutes. According to PW5, he asked Accused No. 1 132 questions, and he said, Accused No. 1 gave 132 answers. PW5 said, Accused No. 1 and himself, signed the interview notes after questions and answers 6, 9, 15, 116 and 132. Accused No. 1's caution interview notes were tendered in evidence, as Prosecution Exhibit No. 2. You must read this interview notes carefully. The interview notes gives you a background of Accused No. 1, and the kind of life he lived. He reached Form 5 level education at Ratu Sukuna Memorial School, was 24 years old at the time, lived with his parents and siblings at Tacirua Village and had been employed as a nightclub bouncer two months prior to the offence. Tamavua Primary School is near to Tacirua Village.
31. According to PW5, he gave Accused No. 1 his legal rights and his right to counsel. He also gave him breaks as mentioned above. He said, he also formally cautioned him. He said, he did not



assault, threaten or made false promises to Accused No. 1, while he was in his custody. PW5 said, Accused No. 1, at first, denied count no. 1 and 2. However, as the interview continued, PW5 said, Accused No. 1 began to admit the allegations against him. Please, refer to questions and answers 46 to 126, 131 and 132. PW5 said, in the above questions and answers, Accused No. 1 admitted the allegations in count no. 1 and 2. PW5 said, he admitted being part of the group that broke into Tamayua Primary School, at the material time, and stole the items mentioned in count no. 2.

32. As for Viliame Motokainava (Accused No. 2), PW5 said he also caution interviewed him at Valelevu Police Station, between 6 to 8 July 2016. PW5 said, the interview started on 6 July 2016 at 3.36 pm and concluded at 5.14 pm (1 hour 38 minutes). It recommenced on 7 July 2016, at 10.05 am and concluded at 12.10 pm (2 hours 5 mins). It recommenced again on 8 July 2016 at 7.30 am and concluded at 9.30 am (2 hours). PW5 said, Accused No. 2, himself and witnessing officer DC 4647 Pita Gaunatale were present throughout the interview, and they all signed the interview notes. PW5 said, Accused No. 2 was given all his legal rights, his right to counsel, was formally cautioned and was given the standard rest and meal breaks. PW5 said, he asked a total of 219 questions and Accused No. 2 provided 219 answers. PW5 said, he and DC Pita did not assault, threaten or made false promises to Accused No. 2, while he was in their custody. PW5 said, he saw no police officer assault, threaten or made false promises to Accused No. 2, while he was in their custody.

33. PW5 tendered Accused No. 2's caution interview statements as Prosecution Exhibit No. 1. Please read the same carefully. The interview statements gives you a background information of what type of person was Accused No. 2. He was aged 19 years old at the time. He reached Form 6 level education at Manst Brothers High School. He resided with his defacto-wife's house at Unu Settlement at Tacirua Village, with their two month old son. He was unemployed at the time. At times, he resided at his parent's house at Vunileba Settlement, Tacirua Village. Tamayua Primary School is near to the village. He liked to earn some money at the Union Nightclub by playing billiard. PW5 said, at the beginning of the caution interview, Accused No. 2 denied the allegations against him. However, PW5 said, from questions and answers 113 to 219, Accused No. 2 admitted the allegations against him. PW5 said, Accused No. 2 described in detail how he and others broke

into Tamavua Primary School, and stole the items mentioned in count no. 2. PW5 said, Accused No. 2 gave his caution interview statements voluntarily and out of his own free will

34. If you accept the two accuseds' above confessions, you will have to find them guilty as charged. If you reject the two accuseds' above confession, you will have to find them not guilty as charged. It is a matter entirely for you. However, in approaching the two accuseds' alleged confession, I must direct you as follows as matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution interview statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If it's otherwise, you may give it less weight and value. It is a matter entirely for you.
35. The voluntariness of the above alleged confessions by the two accuseds was hotly contested during the trial. You have heard DC 2659 Eliki Kaumaitotoya (PW4) and PC 4663 Taitusi (PW5) give evidence in this trial. You heard PW4 on 25 February 2019 (Monday) and PW5 on 26 February (Tuesday), and 4 March 2019 (Monday). They were the only two police officers, who gave evidence. In this case, PW5 cautioned interviewed both Accuseds. PW4 said, he had nothing to do with this case. Both police officers said, they did not assault, threaten or made promises to either accused, when the two were at Valelevu Police Station or elsewhere. Pw5 said, both accuseds gave their statements voluntarily and out of their own free will, and he never saw any police officer assault or threaten the accuseds, while they were in police custody.
36. Both Accuseds said exactly the opposite. They said, the police repeatedly assaulted and threatened them, while they were in their custody. Accused No. 1 gave evidence on 4 March 2019



(Monday) and Accused No. 2 gave evidence on 5 March 2019 (Tuesday). I am sure their evidence are still fresh in your mind, and I will not bore you with the details. Both said, the police repeatedly punched them, slapped them and swore at them. They said, as a result of the above, they were frightened and scarred, and confessed to the police. However, note that neither of them complain to the police, to the Magistrate Court or the High Court about alleged police brutality, when they appeared before them. It is entirely a matter for you whether or not you accept or reject the two accuseds' alleged confessions, after considering the above.

(c) **The Accuseds' Case:**

37. I had summarized the accuseds' cases for you from paragraphs 23 to 25 hereof. I repeat the same here. They denied the allegations on oath. They asked you to disregard their alleged confessions to the police, because according to them, the police repeatedly assaulted, threatened and swore at them, while they were in police custody. Accused No. 1 also said, he was not at the crime scene at the material time, because he was attending a village wedding ceremony, and was with his family, at the material time. Accused No. 1 called his mother (DW2) to confirm the above. Accused No. 2 also said, he was not at the crime scene at the material time, because he was with his family. If you accept the two Accuseds' evidence, you must find them not guilty as charged on both counts. If you reject their evidence, you must still consider the total strength of the prosecution's case, and decide accordingly. It is a matter entirely for you.

(d) **The Need to Consider All the Evidence**

38. Five witnesses gave evidence for the prosecution:
- (i) Ms. Hamidan Haniff (PW1);
  - (ii) Mr. Ritesh Kapoor (PW2);
  - (iii) Ms. Mereoni Nawaltabu (PW3);
  - (iv) DC 2659 Eiki Kaumaitotoya (PW4); and
  - (v) PC 4663 Taitusi Luailala (PW5).

Three witnesses gave evidence for the defence:

- (i) Accused No. 1 (DW1);
- (ii) Ms. Mansilina Sailliku (DW2); and



- (iii) Accused No. 2 (DW3).

Two Exhibits were tendered by the prosecution:

- (i) Prosecution Exhibit No. 1 – Accused No. 2's interview statement.
- (ii) Prosecution Exhibit No. 2 – Accused No. 1's interview statement.

39. You must consider all the above evidence together. Compare and analyze them together. If I haven't mentioned a piece of evidence you consider important, please take it onboard, in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his/her evidence, in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his/her evidence, in your deliberation. You are the judges of fact.

**I. SUMMARY**

40. Remember, the burden to prove the accuseds' guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accuseds, at any stage of the trial. The accuseds are not required to prove their innocence, or prove anything at all. In fact, they are presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accuseds' guilt, you must find them guilty as charged. 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 the accuseds' guilt, you must find them not guilty as charged.

47. Your possible opinions are as follows.

- |     |                                  |               |                      |
|-----|----------------------------------|---------------|----------------------|
| (i) | Count No. 1: Aggravated Burglary | Accused No. 1 | Guilty or Not Guilty |
|     |                                  | Accused No. 2 | Guilty or Not Guilty |

- |      |                    |               |                      |
|------|--------------------|---------------|----------------------|
| (ii) | Count No. 2: Theft | Accused No. 1 | Guilty or Not Guilty |
|      |                    | Accused No. 2 | Guilty or Not Guilty |

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



**Salesi Temo**  
**JUDGE**

**Solicitor for State** : **Office of the Director of Public Prosecution, Suva**  
**Solicitor for Accused No. 1** : **Legal Aid Commission, Suva**  
**Solicitor for Accused No. 2** : **Legal Aid Commission, Suva**