

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 203 of 2018

[CRIMINAL JURISDICTION]

STATE

V

- 1. RIZWAN ALI**
- 2. VICTHAL VIKASH PRASAD**

Counsel : Mr. E. Samisoni & Mr. Z. Zunaid for State
Mr. M. Young for the 1st Accused

Hearing on : 25- 28 February 2019

Summing up on : 01 March 2019

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 is 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. 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 that witness to be reliable.
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 proven 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 proven 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 proven 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 the prosecution 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 as to whether the prosecution has proven a particular element of an offence, then you must find the 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 is charged with and matters that will enable you to decide whether or not the charges are proved against the 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 for the following offences:

COUNT 1

Statement of Offence

Aggravated Burglary: contrary to section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

RIZWAN ALI and VICHTAL VIKASH PRASAD on the 26th day of December, 2017 at Nasinu in the Central Division, in the company of each other, entered as trespassers into the house of Abdur Raafe, with the intent to commit theft.

COUNT 2

Statement of Offence

Theft: contrary to section 291(1) of the Crimes Act 2009.

Particulars of Offence

RIZWAN ALI and VICHTAL VIKASH PRASAD on the 26th day of December, 2017 at Nasinu in the Central Division, in the company of each other, dishonestly appropriated (stole) 1 x HP laptop, assorted jewellery and \$600.00 cash the property of Abdur Raafe with the intention of permanently depriving Abdur Raafe of the said property.

18. You may have noted that the above named second accused had pleaded guilty to the two counts. You should bear in mind that you must not simply assume that the first accused who is before this court must therefore be guilty as well.
19. You would also note that the 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 proven 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) with the company of one or more other persons;
 - (iii) entered a building as a trespasser;
 - (iv) with intent to commit theft of a particular item of property in the building.
21. 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.
22. Please remember that an offence may be committed by one person acting alone or by more than one person acting together with the same criminal purpose. The offenders' agreement to act together need not have been expressed in words. It may

be the result of planning or it may be a tacit understanding reached between them on the spur of the moment. Their agreement can be inferred from the circumstances.

23. Those who commit crime together may play different parts to achieve their purpose. The prosecution must prove that the accused took some part. The prosecution case is that the first and the second accused planned to commit the two offences above and accordingly, the first accused was giving directions regarding the lay out of the complainant's house to the second accused who entered the house and stole the items and the first accused was waiting outside to warn the second accused if someone comes.
24. In this case you heard the evidence of the second accused who admitted committing the offence of aggravated burglary and theft as charged in the two counts above. Therefore, what you have to decide in this case is whether the first accused acted together with the second accused to commit each offence and took some part in committing each offence.

Evidence

25. First prosecution witness was Mr. Abdur Raafe. He said that:
 - a) *On 26/12/17 he left his house with his wife to go to Wainudo. Before he left the first accused asked him where he is going and he told the first accused that he is going to Wainudo.*
 - b) *He said the accused had been his neighbour ever since the accused was born. He said the first accused lives next door and the accused had stayed overnight in his house approximately 10 to 15 times.*
 - c) *On his way, around 2.30pm, the second accused called him to ask the time he would return home. When he returned home around 5pm that day he realised that one laptop, \$600.00 cash and some jewelries were stolen from his house.*
 - d) *Around 7pm the same day the first accused came with the elder brother to his house and asked for forgiveness for whatever happened. The accused also told him that he can show where the laptop is.*

- e) He said on 11/01/19 the accused called him from the remand centre and told him "you are the only one who could do something about my case".
- f) He said the second accused used to come to him to ask for tools. He said both accused used to call him Chacha, which means uncle.
- g) During cross examination he said he had known the second accused for 3 to 4 years. When he was asked what the first accused told him when the accused came with his older brother to his place, he said "he asked for forgiveness". When he was asked whether the accused mentioned about the other items that was stolen he said that the accused only spoke about the laptop.

26. The second prosecution witness was Sanjesh Karan. He said;

- a) On 26/12/17 the first accused and the second accused called him and told him that they are coming to pick him up from his house. He said the first accused is a family friend whom he had known for 16 years and the second accused is also a friend of his. When they called him on that day they told him that they have a bunch of hybrid vehicle keys and asked him to give those keys to the complainant whom he referred to as 'Chacha'.
- b) They came in a taxi to pick him up and showed him the bunch of keys. Thereafter they went to Samabula and then to 8 miles.
- c) While they were waiting for the complainant, he heard the first and the second accused talking about breaking into the complainant's house. After that discussion the first accused told the second accused to call the complainant. The second accused then called complainant to find out the time he would return. After the phone call the first accused and the second accused were again discussing about the breaking in. Thereafter the second accused went towards the first accused's house.
- d) When the second accused returned, he was wearing a blue colour overall and all his fingers were taped with masking tape. He said, the second accused was also wearing a pompom. Thereafter the second accused went towards the back of the complainant's house. At this time the first accused was on the phone with the second accused explaining the second accused how to enter into the complainant's house. The first accused was standing towards the driveway so that he could warn the second accused if anyone comes. He said the first accused had told the second accused that the first accused knows the in and out of the complainant's house. By this time he was sitting in front of his friend's house. He said from where he was, he could not see the second accused enter the complainant's house.
- e) After about 2minutes the second accused came with a laptop. Thereafter the second accused called the same taxi which was used to pick him before that. They all went to

Vatou Road. It was him, the second accused, the first accused, the second accused's defacto and the taxi driver.

- f) They went to the house of a person by the name Akash. Him and the second accused got off the taxi and went to Akash. He said, the second accused sold the laptop to Akash for \$200 and gave \$40 as his share.*
- g) During the cross examination when he was asked whether the planning to enter the complainant's house was done in Aklesh's porch, he said they were standing towards the wash tub and he was seated in the porch. He said he could hear the conversation. When he was asked the distance between him and where the second accused and the first accused were supposed to be planning, he pointed out to a distance of about 3 metres. When he was asked whether he saw any other items the second accused was carrying he said 'no'.*

27. The third prosecution witness was Assistant Sergeant 3650 Semi Volitikoro ("PW3") and the fourth prosecution witness was IP Elia Waqasoqo ("PW4"). They said, around 12.20pm on 27/12/17, they went to see the complainant after receiving a call from the complainant. They were informed that the first accused had confessed to the complainant that the first accused took part in the break-in. Then they approached the first accused. They introduced them and then cautioned the first accused. They explained the first accused his rights. Both of them said that the first accused made some admissions to them.
28. The third prosecution witness said that from what he could remember the first accused said that he took part with other two friends; he did not go inside the complainant's house; and he was on the watch when the two went inside the complainant's house. He also said that the first accused told him and PW4 that two friends brought valuable belongings from the complainant's house.
29. According to PW4, the first accused had said that the first accused was sitting next to the complainant's house with the second accused and PW2 when they saw the complainant leaving the house; they planned to break in to the complainant's house;

the plan was for the second accused to enter the house, PW2 to be on watch from inside the compound and for the first accused to stay where they were sitting on the lookout; the second accused came with a laptop and they went in a taxi and sold the laptop to one Akash.

30. Both PW3 and PW4 said that there were no threats made against the accused, there was no force, no pressure and no false promises was made. They arrested the first accused and thereafter the first accused led them to recover the laptop from one Akash. They also arrested Akash and PW2 based on the information given by the first accused.
31. The fifth prosecution witness was DC 3979 Nilesh Maharaj. He said he conducted the cautioned interview of the first accused. He said the accused did not make any complaints to him regarding the accused's arrest.
32. During cross examination he said PW4 did not inform him that the first accused made admissions during arrest. He said when admissions are made by an accused during arrest the correct procedure is for the interviewing officer to be accordingly informed by the arresting officer. He further agreed that all the information that was obtained from the accused upon arrest should be communicated to the interviewing officer. He said in this case no information was given to him by the arresting officer regarding any admissions.
33. That was the case for the prosecution. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving the accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence on oath and he called the second accused as his witness.

34. The first accused said in his evidence that;

- a) On 26/12/17 while he was at home the second accused came looking for a flat to rent. He took the second accused to one of his neighbour by the name of Aklesh. Before that they went to pick up PW2 and then went to Samabula to pick up 'keys for hybrid'. After picking up the keys the second accused called the complainant and asked him the time the complainant will return home. This was around 3 o'clock. Thereafter they picked the second accused's wife and then went to Aklesh's house. He showed the second accused the vacant flat between 3.30pm and 4.00pm.
- b) Then all of them came in front of the porch at Aklesh's house and started discussing about the flat. There was the second accused, PW2, Makelest, Aklesh and the second accused's defacto wife. They sat there for 10 to 15 minutes. He then received a phone call and he went up the driveway to answer the call. He said he was on the phone for nearly half an hour. While he was still on the phone PW2 and the second accused brought something in a bag. He said he put his phone down when he saw them. They told him that they are going to see Akash who is a friend of his. Then he ended his phone call and went with the second accused, the second accused's defacto wife and PW2 to Akash's place.
- c) He said the second accused and PW2 went out from the vehicle and came back after 5 minutes when they were at Akash's place. Thereafter he was dropped at 8 miles and this was after 4pm.
- d) Later, while he was at home the complainant and his wife came to his house and said that their house had been broken into. Then he went to the complainant's house with his elder brother. He was told that a laptop, jewelry and cash are missing. Then he told them that it was the second accused who took those items and he apologised for what had happened in their house.
- e) On the next day CID officers came and asked him the location the second accused had sold the laptop. He informed the CID officers that he had told the complainant that it was the second accused who sold the laptop. The CID officers asked him to show Akash's residence to them.
- f) Thereafter he went with them to Akash's residence and then to pick PW2. They were taken to the police station. At the police station when he was asked he told the police that he did not know where he got the laptop from. He said after taking statements from all of them they were all released.
- g) During cross examination he agreed that he asked the second accused to call the complainant and to find out the complainant's location. He said that is because the second accused had the keys and the complainant was the buyer. He agreed that the second accused went to his house and got a blue overall, taped his fingertips and

returned with a pompom. He said he did not see the second accused breaking in to the complainant's house as he was on the phone on the driveway.

- i) He agreed that he saw the second accused return with something and thereafter him, the second accused and PW2 went and sold the items to Akash. He said he did ask for forgiveness from the complainant but it was not in the sense that he broke into the complainant's house. He agreed that he was given his rights before his arrest. He said he only informed the police that he was on the phone and he only saw them bring the items and where they were sold. He agreed that the police officers did not assault or threaten him.
- ii) He agreed that he led the police officers to Akash's house where the laptop was recovered and also to PW2's house which led to PW2's arrest.
- iii) During re-examination he said, when he asked the second accused to call the complainant to find out the complainant's location he was on the phone. He said the second accused asked him about the complainant's mobile number and then he gave the number to the second accused. He said he did not see the second accused going in to his house and return with a blue colour overall but he saw the second accused had placed the overall and the hammer on the porch after the second accused returned.

35. The second defence witness was Vichal Vikash Prasad, the second accused. He said that;

- a) On 26/12/17, he went with the first accused and PW2 to the complainant's house around 2.30pm to deliver some car keys which the complainant on a previous occasion had agreed to buy. The complainant was not there. He said when he went to check on the complainant, the first accused and PW2 were at the roundabout which was about 60-70 metres away from the complainant's house.
- b) Then he came back and went to see a vacant flat with the first accused. After that he called the complainant to find out the time the complainant would return, so that he can take the keys to the complainant.
- c) Thereafter he broke into the complainant's house with a hammer wearing an overall which he got from a tool room underneath the first accused's house. He said that the first accused was talking to someone on the phone at the roundabout when he went to get these items.
- d) He said he took an HP Laptop, \$600 cash and some jewelry from the complainant's house and came back to the vacant flat at Aklesh's house. PW2 was at Aklesh's porch and he told PW2 that he found a laptop and some jewelry from the house. Then they came on to the roundabout and told the first accused that they are leaving and will come back in the afternoon. The first accused also wanted to come. Then they went to

Vatou road where he and PW2 sold the laptop for \$200. He gave \$40 to PW2 and kept \$160.

- e) During cross-examination he denied the suggestion that the first accused asked him to call the complainant. He denied planning with the first accused to break-in to the complainant's house. He denied being on the phone with the first accused while he was inside the complainant's house. His evidence was that he committed the offence alone.*

36. That is a summary of the evidence. You may have noticed that I have not reproduced the entire evidence that was led. I have only referred to 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.
37. 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.
38. At this point, I wish to direct you on the law on evidence of an accomplice. Accomplices often give evidence against an accused person and of course their evidence must always be approached with caution. This is because accomplices may want to implicate others to save themselves or may exaggerate other people's role in the offence and diminish their own. For this reason, the law says that it is dangerous to convict on the evidence of an accomplice alone and that even if you accept the evidence as credible and reliable you should look for other independent evidence to corroborate the evidence of an accomplice. However, even if you find no such corroboration, it is still open to you to rely on the evidence of an accomplice, as long as you have warned yourself about the dangers of it.

39. In this case you heard the evidence of PW2. According to PW2, he did not take part in committing the two offences but he was there with the first and the second accused and he heard and saw what the two accused did. However, he said he received \$40 as his share after the laptop was sold. According to PW3 and PW4, he (PW2) was initially arrested for this matter.
40. Given the evidence led in this case, if you find that PW2 was an accomplice, you should warn yourself before you decide whether to rely on his evidence as I have explained just now.
41. The prosecution says that they are also relying on the confession made by the first accused to the police officers, PW3 and PW4. However, PW3 and PW4 did not inform the court the exact statement made by the first accused to them. Both PW3 and PW4 had not noted down the statement said to have been made by the first accused when they arrested him. PW3 said he had made a police statement which includes details of the confession made by the first accused only after several months.
42. You may also have noted that the accounts given by the two police officers regarding the contents of the confession made by the first accused were not entirely consistent. According to PW3, the first accused had told him that two friends entered the house and that the first accused was supposed to be on the lookout. Therefore, given the evidence the two friends who entered the house should be the second accused and PW2. According to PW4, only the second accused had entered the house and PW2 and the first accused were supposed to be on the lookout.

43. Further, the fifth prosecution witness who was the interviewing officer of the first accused said that he was not informed by the arresting officers regarding any admissions made by the first accused.
44. However, it was not disputed that the stolen laptop was recovered based on the information given by the first accused. This fact does not necessarily suggest that the first accused had admitted to the police officers that he had committed the two offences he is charged with. The reasonable inference to be drawn from the said fact is that the first accused had the knowledge that the complainant's laptop was stolen and he also knew that it was sold and to whom it was sold.
45. Therefore, given the evidence in this case, it is open for you to conclude that the evidence regarding the purported confession made by the first accused to PW3 and PW4 to the effect that the first accused took part in committing the two offences is not reliable.
46. In the event you decide to accept the evidence that the accused did make admissions to the police officers in addition to the admissions that points to the first accused's knowledge on the fact that the laptop was stolen and that it was sold, you have to first consider whether those admissions are true, given all the evidence you heard in this case, before you rely on those admissions.
47. You also heard the evidence of the complainant who said that the first accused asked him for forgiveness and that the first accused said that he can show where the laptop is. The complainant also did not come out with the exact statement made by the first accused. The first accused said in his evidence that he did not ask for forgiveness in the sense that he broke into the complainant's house.

48. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
49. 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.
50. 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 the prosecution has proven all the elements beyond reasonable doubt.

If you are sure that the prosecution has proven all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

51. Any re-directions?

52. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the 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.
53. Your opinion should be as follows;
- 1st count - guilty or not guilty
 - 2nd count - guilty or not guilty




Vincent S. Perera
JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the State.
Chand & Young Lawyers, Suva for the first accused.