

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 393 of 2018

STATE

vs.

- 1. TEVITA LESIVOU**
- 2. TEVITA BOLA**

Counsel: Ms. S. Tivao for the State
1st Accused In Person
2nd Accused In Person

Date of Hearing: 29th, 30th and 31st and 1st August 2019

Date of Closing Submissions: 01st August 2019

Date of Summing Up: 02nd August 2019

Date of Judgment: 12th August 2019

JUDGMENT

1. The first and the second accused are being charged with one count of Attempted Aggravated Robbery, contrary to Sections 44 and 311 (1) (a) of the Crimes Act. The particulars of the offences are that:

COUNT ONE

Statement of Offence

ATTEMPTED AGGRAVATED ROBBERY: *Contrary to Sections 44 and 311 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

TEVITA LESIVOU and TEVITA BOLA on the 13th day of October 2018, at Suva in the Central Division, in the company of each other, attempted to rob **HITESH LAL** of his wallet and mobile phone, the properties of **HITESH LAL**.

COUNT TWO

Statement of Offence

SERIOUS ASSAULT: Contrary to Section 277 (b) of the Crimes Act 2009.

Particulars of Offence

TEVITA LESIVOU on the 13th day of October 2018, at Suva in the Central Division, assaulted **POLICE CONSTABLE 3646 SHIRIDATH PRASAD** by punching **POLICE CONSTABLE 3646 SHIRIDATH PRASAD** in due execution of his duty.

2. The hearing commenced on 29th of July 2019 and concluded on the 2nd of August 2019. The prosecution presented the evidence of three witnesses. The first accused exercised his right to remain silence, hence, he did not give evidence for the defence. The second accused gave evidence for his defence. Subsequently, the learned counsel for the prosecution and the two accused made their respective closing addresses. I then delivered my summing up.
3. The three assessors in their opinions unanimously found the two accused guilty of the offence of Attempted Aggravated Robbery.
4. Having carefully taken into consideration the evidence presented during the hearing, the closing addresses of the parties, the summing up and the opinion of the assessors, I now proceed to pronounce my judgment as follows.
5. According to the information, the prosecution alleges that these two accused in company with each other have committed this offence. The prosecution does not allege in the information that the two accused have committed this offence with other accomplices.

Accordingly, the prosecution's case is founded on the allegation that these two accused in the company with each other attempted to rob the complainant on the 13th of October 2018 at Carnavon Street Suva.

6. However, the complainant in his evidence stated that he was surrounded by five to six youths while he was standing near the food vendor. The boys tried to touch his trousers' pocket. The complainant then tried to move away. The boys then got hold of him. One of them tried to cover his mouth and others tried to put their hands into the pocket.
7. In view of the evidence of the complainant, it appears that his version of events is not consistent with the charge as stated in the information. The complainant claims that five to six boys tried to rob him and not only two boys as charged in the information.
8. The Fiji Court of Appeal in Yang Xieng Jiong v State [2019] FJCA 17; AAU0077.2015 (7 March 2019) held that the prosecution is not allowed to conduct the trial based upon a totally different basis which is not explained in the information, unless the information is amended according to the changes. Nawana JA held that:

“The appellant was entitled to know the basis upon which the case against him had been presented by the state; and, that basis had not been anything else other than on the basis of the individual criminal liability as presented by the information by the DPP. This cannot be changed by making an opening statement on a totally contrary line and bring in a completely different case, which would certainly have entailed the involvement of different legal principles. This, in my view, is not permissible as it is against the fundamental rules of criminal procedure. The issue is made clear in view of the mandatory provisions of Section 58 of the Criminal Procedure Act, which states:

Every charge or information shall contain-

- i. statement of the specific offence or offences with which the*

- accused person is charged; and,*
- 2. Such particulars as are necessary for giving reasonable information as to the nature of the offence charged.*

The purpose of the charge is to ensure that the accused person knows the offence with which he or she is charged (Per Goundar J. in Kamlesh Lata Arun v State [2009] HAA 52-55/08L 23 October 2009.

This court, in the case of Lal v State; AAU 154.2014; [2018] FJCA 147 (04 October 2018) adopted the ruling of the Supreme Court of Canada in H. M. the Queen v N. H. Rooke and R. C. De Vries; [1990] 1990 CanLII 1131 (SCC) and Morozuk v The Queen; 1986 CanLII 72 (SCC), [1986] 1 S.C.R. 31, which held that it was a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved; and, permitting the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial.

In the circumstances, I conclude that the prosecuting state counsel is not empowered to conduct the case totally on a different basis by making an opening statement, which is manifestly different to the information presented to court and served on an accused person by the DPP without an amendment to the information, if such amendment is warranted. I am unable to agree with the submission of the learned counsel for the state that the prosecuting counsel's opening statement has had the effect of giving sufficient notice of the basis of charge to the appellant.

9. This inconsistent nature of the evidence of the complainant with the information undoubtedly creates a reasonable doubt whether the complainant was explaining about the same incident on which the information is based upon or not.
10. The second witness of the prosecution is PC Ramulo. He was doing city operation in a police car during the early hours of the 13th of October 2018. While he was turning to the corner of Carnavon Street, he has seen two i-taukei youths were trying to rob an Indo Fijian man. The Indo Fijian man was lying while the two was trying to rob him. During the cross examination, PC Ramulo said that he saw this incident from the initiation and no one tried to run away when he approached them. PC Ramulo said that the two youths did not try to elude from the police as they were focusing on the victim when he got off from the police car.
11. However, the complainant in his evidence said that he was standing and trying to get himself free from the group of five to six youths when the police vehicle came and parked in front of them. Then the boys tried to run away but he managed to get hold of one of them, and the police officer managed to arrest another one. According to the complainant, he was standing and not lying down when the police arrived. Moreover the group of boys tried to elude from the police when they saw the police vehicle parked in front of them. However, account given by PC Ramulo fundamentally contradicts the version explained by the complainant, thus, creating a reasonable doubt whether the complainant and PC Ramulo are talking about the same incident or two different incidents.
12. The complainant in his evidence said that he managed to get hold of one of the suspects who was wearing a hoody. Other suspect was arrested by the police officer. He had then travelled to the police station with the two suspects in the same police vehicle. According to the complainant, he had identified the two suspects at the police station when the police officers presented him the two suspects for the identification. While he was staying at the police station, the two suspects had communicated with him as well. Accordingly, it appears that the complainant had had sufficient time to see and observe the two suspects. In fact, the complainant said during the cross examination, that he could identify the two suspects.

However, the complainant did not say or identify in his evidence that the first and second accused are the same two suspects that tried to rob him with some other youths on the early hours of 13th of October 2018. Neither the learned counsel for the prosecution invited or asked the complainant whether he can identify the two accused as the two suspects that tried to rob him with few other youths on the early hours of the 13th of October 2018.

13. PC Ramulo did not say that the two accused are the same two suspects that he arrested at the Carnavon Street on the early hours of the 13th of October 2018 while they were trying to rob an Indo Fijian man. Neither the learned counsel for the prosecution invited or asked PC Ramulo whether he can identify the two accused as the two suspects that he arrested on the early hours of the 13th of October 2018 at the Carnavon Street while they were trying to rob an Indo Fijian man.
14. DC Prasad had received the two accused at the police station when they were brought in by PC Ramulo during the early hours of the 13th of October 2018. According to DC Prasad these two accused were brought into the police station in relation to an incident of aggravated robbery. The complainant of that incident of aggravated robbery did not come to the police station with the two accused. The complainant came to police station after the two accused were brought into the police station. DC Prasad did not specifically say who was that complainant. However, PC Ramulo said the complainant of the alleged incident of attempted robbery by the two youths came to the police station with him in the same police vehicle. Moreover, the complainant in his evidence said that he went to the police station with the two suspects in the same police vehicle. Accordingly, there is a reasonable doubt whether these two accused were brought into the police station by PC Ramulo in respect of this alleged attempted robbery as charged in the information or another incident of aggravated robbery. PC Ramulo did not explain whether he briefed DC Prasad about the allegation for which he brought these two accused into the police station.
15. In view of these reasons, I find the prosecution has failed to prove beyond reasonable doubt that the two accused have committed the offence as charged in the information. Therefore, I have cogent reasons to disagree with the unanimous opinion of the three assessors.

16. In conclusion, I hold the two accused are not guilty of this offence of Attempted Aggravated Robbery, contrary to Sections 44 and 311 (1) (a) of the Crimes Act and acquit them from the same accordingly.
17. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva

12th August 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

1st Accused In Person.

2nd Accused In Person.