

**IN THE HIGH COURT OF FIJI AT SUVA**

**CASE NO: HAC. 28 of 2018**

**[CRIMINAL JURISDICTION]**

**STATE**

**V**

**SOKOWASA BULAVOU**

**Counsel** : Ms. M. Choudhary for the State  
Mr. K. Prasad for the Accused

**Hearing on** : 26 - 28 August 2019

**Summing up on** : 29 August 2019

**SUMMING UP**

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should 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 you agree with that opinion. You are judges of facts.
2. 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. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room. Few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments 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 if you agree with them.
4. A statement made by a witness to the police 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.
5. 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 the complainant. No such emotion should influence your decision.
6. 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 behaviour 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.

7. 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. Sometimes we honestly forget things or make mistakes when recalling past events.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with any inconsistency you may come across. 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. In this regard, 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 that witness is 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 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 proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be 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 the 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. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge has been proved.
15. Please remember that 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.
16. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

*Statement of Offence*

**AGGRAVATED ROBBERY:** contrary to section 311 (1) (a) of the Crimes Act 2009.

*Particulars of Offence*

**SOKOWASA BULAVOU** with others, on the 14<sup>th</sup> of January, 2018, at Suva, in the Central Division, robbed one **ALVEEN HARAK** of his 1 x Samsung J2 black in color mobile phone valued at \$299.00 and a wallet containing \$186.00 in cash, Wespac ATM Card, FNPF Joint Card, FNU ID Card, Voters ID Card, E-Ticketing card, all to the total value of \$485.00 and at the time of such robbery used personal violence on the said **ALVEEN HARAK**.

17. In order to prove that the accused is guilty of the above offence, the prosecution should prove all the elements of the offence beyond reasonable doubt. If you find that you have a reasonable doubt in respect of any element, that is, if you find that the prosecution has failed to prove even one element of the offence beyond reasonable doubt, you should find the accused not guilty. However, a reasonable doubt is not a mere imaginary doubt but a doubt based on reason.
18. To prove the offence of aggravated robbery in this case the prosecution must prove the following elements beyond reasonable doubt;
  - a) the accused;
  - b) committed robbery; and

- c) the robbery was committed in the company of one or more other persons.
19. The first element involves the identity of the offender. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence and no one else.
20. A person commits robbery if he immediately before committing theft; or at the time of committing theft; or immediately after committing theft, uses force or threatens to use force on another person with intent to commit theft or to escape from the scene.
21. A person commits theft if that person;
- a) dishonestly;
  - b) appropriates the property belonging to another;
  - c) with the intention of permanently depriving the other of that property.
22. The element 'dishonestly' is 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 an accused's state of mind.
23. 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. At law, property belongs to a person if that person has possession or control of the property.
24. Robbery when committed in the company with one or more other persons amounts to aggravated robbery. This is the third element of the offence of aggravated robbery which you are required to consider.
25. 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.

26. Those who commit crime together may play different parts to achieve their purpose. The prosecution must prove that the accused took some part in committing the crime.
27. If you are sure that the offence of aggravated robbery was committed by more than one person and that the accused acted together with the others to commit that offence and took some part in committing that offence, you should find the accused guilty of the offence of aggravated robbery.

#### *Doctrine of recent possession*

28. The prosecution in this case is relying on direct evidence and also on the doctrine of recent possession.
29. With regard to recent possession, the law is that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called upon to account for the possession, that is, to give an explanation of it, which is not unreasonable or improbable. The strength of the inference, which arises from such possession, is in proportion to the shortness of the interval which has elapsed from the time of the offence. If the interval is short, the presumption is so strong, that it almost amounts to proof; because the reasonable inference is that the person must have stolen the property and committed the offence. If an explanation is given which may be true, it is for you to decide on the whole of the evidence whether the accused is guilty or not; that is to say, if you think that the explanation may reasonably be true, the accused is entitled to an acquittal, because the Prosecution has not discharged the burden of proof imposed upon it of satisfying you beyond reasonable doubt. That burden never changes, it always rests on the Prosecution.

30. You should also remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.
31. The prosecution led the evidence of four witnesses. 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. As I have already informed you, the burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence on oath.
32. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
33. The evidence of the complainant, Alveen Harak ("PW1") was that he was struck from behind near Bad Dog Café on 14/01/18 around 4.30am and while he was falling down, his J2 mobile phone and the wallet which were in his pockets were stolen. He did not see the person who took the two items from him. But he said that he had earlier noticed a group of four individuals behind him and then he saw the boys who attacked him crossing the road. He was walking with two other friends who were in front of him when this happened. According to him the police who were present at the other side of the road may have noticed the incident. He shouted at the police seeking assistance and a police officer approached the person who robbed him. This person resisted and then more police officers went to assist the first police officer. At that instance, this person who was resisting threw a phone away, which was picked by a different police officer. The complainant identified



that it was his phone. He identified the accused as the person who threw his phone and then arrested by the police that day. He said he saw the accused while he was crossing the road.

34. During cross examination he agreed that there was a crowd where the incident occurred. He said he was hit on his leg from behind but was not pushed. When it was pointed out that it is stated in his police statement that he felt four unknown boys behind him pushed him down to the floor, he again said that he was not pushed but he was chopped at the back of his knee and he fell backwards. He said police may have written down what they understood from what he had explained to the police.
35. He denied the suggestion that the accused assisted him to get up and said that he got up without any assistance. He said that the police officers to whom he called out were across the road. He said few police officers were there and a police vehicle was parked in front of the Library. He said he assumed that the police officers noticed him being robbed and the police reacted very fast.
36. He agreed that he consumed alcohol that night. He agreed that the police officers started to search individuals in front of him.
37. The second prosecution witness was one Elvine Ranesh Kishore ("PW2"), one of the friends of the complainant who was with him at the time of the incident. He said that he came out from a night club around 4.30am on 14/01/18 with the complainant and another co-worker and then walked towards McDonalds to have Breakfast. He was walking in front, then the co-worker and the complainant was at the far back. At one point in time he could not see the complainant when he turned around. Then he saw the complainant on the ground and four boys were trying to take something out from the complainant's pockets. The said boys dispersed so fast that he could see only one of them with the complainant's phone. When he saw this

person he was standing near Bad Dog Café. The person then ran towards the Suva City Library. They then called for help and saw few police officers coming towards them. The police gave a chase to the person who ran with the phone and managed to arrest him. The person threw the phone under a car near the library. This phone was picked up by the police. He said, when he saw the person running with the phone that person was 7 to 8 meters away across the road. He said that the light in that area was normal not very dark. He said there were street lights and nothing was blocking his view. He identified the accused as the person who ran with the phone.

38. During his cross-examination, he agreed that he saw an i-Taukei man helping the complainant to standup. He did not see that i-Taukei man that helped the complainant talking to a police officer. He said that the said i-Taukei man helped the complainant after the complainant's pockets were emptied. He said it took about 15 to 25 minutes for the police to arrive from the time he saw a person take items out from the complainant's pockets.
39. The third prosecution witness was PC 4918 Jone Masireva ("PW3") who arrested the accused. He said in his evidence that he saw one Fijian male being robbed by one I-Taukei Male. Later on he said that he saw four individuals robbing the Fijian male and that he saw that they robbed one mobile phone and one wallet. He saw this from a distance of about 10 to 14 meters. He said that he saw one youth taking the mobile phone and the wallet for 10 to 15 seconds. He then approached the said individuals. When he was approaching them, one of the I-Taukei males obstructed him. He managed to search that person's pockets and then went after the person who took the wallet and the phone. He managed to catch that person. A phone was recovered by the fellow officers beside the Fintell Building and the complainant confirmed that the phone belonged to him. He later came to know that the name of the person he arrested was Sokovasa Bulovau.

40. During cross-examination he admitted that he knew the accused before this incident and he had seen the accused many times. Counsel for the accused also highlighted that PW3 had stated in his police statement that the accused is a well-known pickpocket. He agreed that the first person he searched was part of the four that robbed the complainant. But when he was asked the reason for him not to arrest that person, he said that he should arrest the one he saw taking the phone and the wallet. He admitted that it was very easy for him to identify the accused because he had seen the accused before. He said he saw the incident when he had passed Temptation 2 Nightclub towards Temptation 1 Nightclub. He denied the suggestion that the accused talked to him while he was searching the first i-Taukei man and the suggestion that the accused had body contact with the said person he was searching, while him being searched. He said that the accused crossed the road when the first person obstructed him. When he was asked the reason for him to search the said first person, he said he had to search that person before he go for the accused. He denied the suggestion that the accused did not run away from the police.
41. The fourth prosecution witness was Pauliasi Sicinilawa ("PW4"), one of the police officers who was with PW3 during the incident. He said that on 14/01/18 while on a foot patrol with two other police officers, he came across a robbery scene near O'Reilly's Nightclub. He said that PW3 was walking about 2 meters ahead of him and that PW3 was present at the robbery scene. PW3 then ran after s person and called him and the other police officer to assist PW3. He said that PW3 arrested that person near the Suva Library and the person resisted. Then he saw that person throwing a phone. He went and picked it up. The phone was shown to the complainant and the complainant confirmed that it is his phone. Later he came to know the name of the person that was arrested is Sokowasa Bulavou. He identified the accused in open court.

42. During cross-examination, he said that the accused threw the phone after the arrest. He said that when the accused was running PW3 called out to the accused and told him to stand still, but the accused kept on running. He denied seeing PW3 conducting a search on an i-Taukei man apart from the accused. He said that when he was going past Temptation 2, he saw PW3 running after the accused.
43. The accused said in his evidence that on 14/01/18 between 4.00am and 5.00am while he was walking past Bad Dog Café towards Temptation 2 Nightclub, he saw one Indian sitting down and two of his friends standing beside that person. He was on his way to catch a cab after having drinks at Signal Nightclub. He said he was alone. He said that he 'picked' the one that was sitting down and asked what's happening. The person then pointed towards Temptation 2 Nightclub where the crowd was coming out from. He then left and when he was about to cross the road, he met PW3 who was conducting a search on an i-Taukei man with a beard. He called out to PW3 saying "Ehh Kovula, Vacava" and went past the person being searched. As he passed the said person, something touched his shoulder and he pulled it out and crossed the road to Fintell to catch a cab. When he reached the other side of the road, he realized that there is a phone in his hand and it was not his. He then heard officers calling his name. He looked around but kept walking. When they were about to arrest him, he threw the phone away. Then they arrested him. He said that he did not run away from the police. He said that he did not rob the complainant.
44. During cross-examination he said that he did not know that the phone he threw belonged to the complainant until he was taken to the police station.

## *Analysis*

45. Defence says there are inconsistencies in the evidence led by the prosecution. I have explained you how to deal with inconsistencies. You should follow the said directions when you deal with any inconsistency you may come across.
46. The accused does not dispute the fact that the complainant was robbed at the relevant place and the relevant time as alleged by the prosecution. That is, he does not dispute that force was used on the complainant (by someone) and he does not dispute the fact that the complainant's mobile phone and the wallet were stolen. He says that he did not take part in the robbery and he came into possession of the phone accidentally. He admits that he threw the phone he had with him when the police called out to him but says that he did so because that was the time he realized he was having a phone which is not his, in his possession. He also does not dispute the fact that the said phone he threw belongs to PW1, the complainant.
47. The complainant did not see who stole his phone and the wallet.
48. PW2 said that he saw a person taking something out from the complainant's pocket and he also said that he saw one person with the complainant's phone. When he was asked during cross-examination whether he saw the person taking the phone from the complainant's pocket, he said he saw the person taking out something, but not sure whether it was the phone or the wallet.
49. PW3 said that he saw the accused stealing the phone and the wallet from the complainant.
50. PW3 agreed that he knew the accused. If he clearly saw that the accused stole the phone and the wallet from the complainant, then why did he search the i-Taukei person without going after the accused?

51. If PW3 clearly saw the accused taking the phone and the wallet from the complainant, he should have seen what exactly the other individuals who said to have participated in committing this crime had done at the material time. Yet, PW3 did not describe what exactly he saw. Then, according to PW3, having seen the person he searched first participating in committing the offence, he does not arrest that person.
  
52. Though PW3 claimed that he saw the same person taking the phone and the wallet, only the phone was found in the possession of the accused. You have to consider whether this would support the defence version that the accused did not rob the phone (or the wallet) from the complainant and the phone came into his possession subsequently and accidentally.
  
53. In the event you accept the evidence of PW2 or PW3 that they saw the accused stealing from the complainant then please bear in mind that an honest and a convincing witness can still be mistaken. Mistaken recognition can occur even of close relatives and friends. Therefore, you should closely examine the following circumstances among others when you evaluate the evidence given by the PW2 and PW3 on the identification of the accused;
  - a) Duration of the observation;
  - b) The distance within which the observation was made;
  - c) The lighting condition at the time the observation was made;
  - d) Whether there were any impediments to the observation or was something obstructing the view;
  - e) Whether the witness knew the accused and for how long;
  - f) Whether the witness had seen the accused before, how often, special reason to remember; and
  - g) Duration between original observation and the identification.

54. PW3 said during cross-examination that the accused is a known pickpocket. Please remember not to prejudice your minds against the accused due to this statement. There was no evidence led before this court to substantiate the said statement.
55. If you are convinced beyond reasonable doubt that the accused is the one who took the mobile phone or both the mobile phone and the wallet from the complainant, and also convinced beyond reasonable doubt that the accused committed the offence with one or more other individuals, then you should find the accused guilty of the offence of aggravated robbery.
56. Though you are convinced beyond reasonable doubt that the accused is the one who took the mobile phone or both the mobile phone and the wallet from the complainant, but not sure whether he committed the offence with others, then you should find him guilty of the offence of robbery.
57. If you do not believe the evidence of PW2 and PW3 that they saw the accused taking the mobile phone or both the mobile phone and the wallet from the complainant and you are left with the evidence that the accused had the complainant's mobile phone in his possession and threw the same when the police called out for him, the facts the accused does not dispute, you should apply the doctrine of recent possession. Accordingly, you should consider whether the accused had given a reasonable and probable explanation which may be true. If you find the explanation of the accused as to how the phone came into his possession to be reasonable and probable and that it may be true, then you should acquit the accused. In the event you do not accept his explanation, and decide to draw the inference that the accused must have stolen the property; again you have to decide whether the accused is guilty of aggravated robbery or the offence of robbery. That is, you should find the accused guilty of the offence of aggravated robbery only if you are satisfied beyond reasonable doubt that the accused committed the offence with others. If you are not satisfied

beyond reasonable doubt that the accused committed the offence with others, you have to find him guilty of robbery.

58. 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.
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 against an accused 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 his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
  - (ii) Without necessarily believing him 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 his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he has not given any evidence at all. You should still consider whether the 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 the accused. 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;

Aggravated robbery - guilty or not guilty

If not guilty;

Robbery - guilty or not guilty



  
Vincent S. Perera  
JUDGE

**Solicitors;**

**Office of the Director of Public Prosecutions for the State  
Legal Aid Commission for the Accused**