

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 245 OF 2018

STATE

-v-

PENIONI NAKAVULEVU

Counsel: Mr. S. Komaibaba with Mr. U. Prasad for Prosecution
Mr. A.K. Singh for Defence

Dates of Trial: 23, 24, 25 September 2019

Date of Summing Up : 26 September 2019

SUMMING UP

Ladies and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.

3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The Counsel for Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the counsel. You may properly take into account their arguments when evaluating the evidence. It is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law that accused person is innocent until he is proven guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find an accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty. However, the doubt must be reasonable and not be based on mere speculation.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this court room. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial. This Summing-Up is not evidence. Statements, arguments, questions and comments by the counsel are not evidence either. A thing suggested by a counsel during a witness' cross-examination is also not evi-

dence of the fact suggested, unless the witness accepted the particular suggestion as being true.

- 10 Your duty is to find the facts based on the evidence and apply the law to those facts. Use your common sense and approach the evidence with detachment and objectivity. Do not get carried away by emotions.
- 11 You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
- 12 In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole.
- 13 In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who have given evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in applying them.
- 14 Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the witnesses' demeanour in the witness-box when answering questions. How did they conduct themselves in court? In general, what was their demeanour in court? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
- 15 In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth.
- 16 The agreed facts of this case are that:
 - (i) the Complainant in this matter is SINGHS SUPERMARKET located in Naselai, Nausori.

(ii) the Complainant's supermarket was broken and following items were stolen:

- 9 x Carton of BH 10 Cigarette valued at \$57, 290.40;
 - 2 x Carton BH 20 Cigarette valued at \$12,257.05;
 - \$22,000 cash;
 - Cheques of \$9000;
 - 1 x Fiji Bitter (750ml) valued at \$68.40;
 - 1 x Fiji Gold (750ml) and 10 bottles valued at \$193.80;
 - 1 x Bounty Rum and Cola valued at \$3.10;
 - 13 x Joske Brew can valued at \$58.50;
 - 2 x Tribe bottle valued at \$6.20;
 - 1 x Vodka can valued at \$4.29;
 - 2 x 750ml Bounty Rum valued at \$133.90;
 - 2 x 375ml Bounty Rum valued at \$74;
 - 2 x 750ml Regal Gin valued at \$133.90;
 - 3 x 375ml Regal Gin valued at \$111.00;
 - 2 x 750ml Whiskey Regal valued at \$133.90;
 - X 375mil Whiskey Regal valued at \$111.00;
 - 3 1 x 2 x 375ml Deluxe Whiskey valued at \$74.00;
 - Mosute Wine valued at \$14.95
 - 1 x BH 10 valued at \$6.70;
 - 3 x BH 20 valued at \$37.20;
 - 1 x Rothman 10 valued at \$6.70;
 - 2 x taki glass valued at \$1.00;
 - 7 x Nivea Men Cream valued at \$83.93;
 - 8 x Bruit spray assorted valued at \$63.92;
 - 12 x Gillette Shave valued at \$299.88;
 - 6 x Revlon Hair Color valued at \$75.54;
- Total value of \$101,243.96.

Items recovered were about 15 gross of cigarettes. (Not from the accused)

- (iii) the accused person is not disputing that the finger prints which were found at Singh's Supermarket belonged to him.
- (iv) the finger print which was uplifted from the crime scene belongs to the accused person.

17. The accused is charged with two offences namely Burglary and Theft; the information is as follows:

COUNT ONE

Statement of Offence

BURGLARY: Contrary to Section 312(1) of the Crimes Act of 2009.

Particulars of Offence

PENIONI NAKAVULEVU on the 11th day of June 2018 at Naselai Nausori, in the Eastern Division, entered into SINGHS SUPERMARKET as a trespasser with intention to commit theft therein.

COUNT TWO

Statement of Offence

THEFT: Contrary to Section 291 (1) of the Crimes Act of 2009.

Particulars of Offence

PENIONI NAKAVULEVU on the 11th day of June 2018 at Naselai Nausori, in the Eastern Division dishonestly appropriated 9 cartons of BH 10 cigarettes valued at \$57,290.40, 2 carton of BH 20 cigarettes valued at \$12,257.05, cash of \$22,000.00, cheques amounting to a total of \$9,000, 1 carton of Fiji Bitter valued at \$68.40, 22 bottles of Fiji Gold valued at \$193.80, 1 can rum and cola valued at \$3.10, 13 cans of Joskes valued at \$58.50, 2 bottles of

tribe valued at \$6.20, 1 can of vodka valued at \$4.99, 2 x 750ml Bounty Rum valued at \$133.90, 3 x 375ml of Regal Gin valued at \$111.00, 2 x 375ml Delux Whisky valued at \$74.00, 1 Mosuto wine valued at \$14.95, 1 BH 10 valued at \$6.90, 3 x BH 20 valued at \$37.20, 1 Rothmans 10 valued at \$6.70, 2 taki glass valued at \$1.00, 7 x Nivea Cream valued at \$83.93, 8 Brut Body Spray valued at \$63.92, 12 Gillet shave valued at \$299.88, 6 x Revlon hair colour valued at \$75.54, all to the total value of \$101,243.96, the property of SINGHS SUPERMARKET.

18. I will now deal with the elements of Burglary. The offence of Burglary is defined in section 312(1) of the Crimes Act ...A person commits a burglary if he or she enters or remains in a building as a trespasser with intent to commit theft of a particular item of property in the building.

19. The Prosecution must prove beyond reasonable doubt the following elements:

- (i) the accused
- (ii) entered or remained in the building
- (iii) as a trespasser
- (iv) with intent to commit theft

20. A trespasser is a person who enters and remains in a building without the owner's permission. In other words, that person enters and remains in the building without any lawful authority, thus she or he becomes a "trespasser".

21. Accordingly, in order to prove the count of Burglary, the prosecution must establish that:

- a the accused entered into or remained in the supermarket building of Shalendra Singh on the 11th of June 2018 as a trespasser.
- b When he entered that building his intention was to commit theft of particular items of property kept in that building.

22. The 2nd count is one of Theft. 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.
23. 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.
24. ‘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.
25. Proof of the elements of these offences could be established only through evidence. Evidence can be from direct evidence that is the evidence of a person- that is- what witness saw, heard or perceived by his/her senses, as well as documentary evidence for example the photographs or fingerprints tendered in evidence. You should, in addition, consider circumstantial evidence that is the evidence that is not direct but you can put proved factors together and make some inferences and come to conclusions.
26. There is no direct evidence in this case that the accused had entered the complainant’s supermarket on that particular day. The Prosecution relies on circumstantial evidence, the fingerprint evidence in particular, to prove that it was the accused person and no one else had entered the supermarket and that he was the one who had taken away the property.
27. The law on circumstantial evidence is that if, on considering a series of pieces of evidence, you are satisfied beyond reasonable doubt that the only reasonable inference to be drawn is the guilt of the accused, and there is no other reasonable explanation for the circumstances

which is consistent with the accused's' innocence, you may find the accused guilty of the offences charged.

28. I will now deal with the summary of evidence in this case. In doing this, I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's' evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision in this case.

Case for Prosecution

PW.1 - Shalendra Singh (The Complainant)

29. Shalendra said that he was running a Super Market by the name of 'Singh's supermarket' in Naselai, Nausori. On the 11th June 2018, his security guard informed him that his supermarket had been broken into in the early hours of the day. When he went to the supermarket, he found the supermarket being ransacked and the items listed in the agreed facts missing. He noted that the roller shutter on the back side of the building had been broken and a cabinet had been put in place to prevent the roller shutter from coming down. This entrance he said is used to go to the boardroom and the rooms upstairs and no outsider could enter from the back door. Only his wife and the children used the back door. He said that the accused was never employed at the shop.
30. He further said that the roller shutter is operated by a remote controller and he ensured that the roller shutter was properly closed when he closed down the shop on Friday the 9 June 2018. During the weekend it was kept closed.
31. Under cross examination, Shalendra denied that he had given his statement to police on the 9 May 2019. He admitted that he did not see the accused entering his shop. He said that he had never seen the accused before. He admitted that the back door is used for loading and unloading by people who come to deliver things at the shop and his employees and it was not open for the customers. He said that the roller door was under his control and supervision.

32. Shalendra denied buying vegetables from outside farmers. He could not remember if somebody had come on Friday the 9 June 2018 to sell *dhania* and cabbages. He denied that the accused had come to the shop with another person to sell *dhania* and cabbages on the 9 June 2018.

PW 2. D/CPL Sakiasi Koroi

33. D/CPL Koroi said that when he was based at Nousori Crime Scene Investigation Unit, he received instructions on the 11. 06. 2018 to conduct a crime scene examination into a burglary occurred at a Supermarket at Naselai. When he visited the crime scene, he noted a broken padlock and found that the roller shutter at the back entrance to the bulk store partly open and a cabinet was put in place to stop the roller shutter from coming down. It was the only entry point that was open at that time the important point for his examination. Upon a fingerprint examination at the base of the roller shutter, he developed three chance prints or finger prints which he obtained to a tape and signed at the reverse. He tendered in evidence one of the finger prints (PE.1) he obtained from the base of the roller shutter.
34. Under cross-examination, D/CPL Koroi said that the bulk store is situated behind the supermarket in the same building. He admitted that no photograph was taken of the place from where the finger prints were obtained. He admitted that fingerprints of the employees of the super market were not excluded. He admitted that no fingerprint was found inside the supermarket or on the white cabinet. He admitted that he had not examined the carton of cigarettes recovered for fingerprints. He did not rule out the possibility that if somebody had tried to stop the roller shutter from coming down he could have left his fingerprints on the roller shutter.
35. That is the case for the Prosecution. At the close of the Prosecution's case you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
36. The accused elected to give evidence under oath although he had nothing to prove in this case. The fact that an accused gives evidence does not relieve the Prosecution of its burden to prove its case beyond reasonable doubt. The burden is always on the Prosecution. The

Defence also called a witness to support accused's version. You should consider the evidence presented by the Defence using the same tests you had used to test the credibility of Prosecution's witnesses and give it such weight as you deem appropriate.

Case for Defence

DW 1 – Penioni Nakavulevu

37. Penioni said that in June 2018, he was working for a farm at Lokhia owned by his cousin sister's husband Samu Bavu. It was a vegetable farm of cassava and dalo.
38. On Friday the 9th of June 2018, they were harvesting the vegetables and, in the afternoon at around 4-5 pm, they took the harvested *dhanian* and the cabbage to the Nausori market. When they arrived they found that the market was closing down.
39. Samu was liaising with the market venders about marketing prospects of his produce. One Indo-Fijian farmer from Naselai advised to check with Singh's Supermarket. They then went to Singh's Supermarket at Naselai. When they reached the supermarket they were stopped at the front gate by the security guard. Samu told the security guard that they were selling some vegetables like cabbages and *dhanian* which was in the car. They went to the back of the supermarket as instructed by the security guard so that Samu could talk to the manager.
40. It was after 5 pm. The Supermarket was still open but the bulk store was closing down. When they came to the bulk store, the shutter was coming down. They tried to hurry inside. He managed to stop the shutter with his hand as it was coming down. He called the person who was controlling it to wait. The controller stopped the shutter and it went up again. Samu went in to negotiate while he was just standing there at the shutter. Samu came back and informed that the supermarket was not going to buy the vegetables as they were in stock.
41. Penioni said that 15 cartons of cigarette were found from the two persons who were initially charged with him but nothing was recovered from his house.

DW 2- Samuela Bavu

42. Samuela said that he is running a vegetable farm and selling the vegetables in the market. On 9th of June 2018, in the afternoon, he went to Nausori market with Penioni, the first cousin of his wife. The Nausori market was closing down and they could not find a buyer. They then went to Naselai where a big subsistence farmer advised them to check with the supermarket he usually took vegetables to sell.
43. When they arrived at the supermarket they asked the security guard if they could see the owner and the security guard informed them to go quickly since the boss was about to close down the shop. They went straight to the side door at the back and the shutter was closing down. They rushed in and Peniona tried to stop the shutter and he went in underneath the shutter. The boss was standing inside the bulk with his remote controller. He offered to sell the vegetable in the car. The owner told him to come back later, if they need the vegetables he will call.

That is the case for Defence.

Analysis

44. There is no dispute that the Supermarket owned by the complainant was burgled on the 11 June 2018 and that the items listed in the agreed facts had been stolen.
45. There is no direct evidence or eye witness account touching the burglary and the theft. The Prosecution solely relies on the circumstantial evidence, based on the fingerprint found on the roller shutter, to prove the charges. The Prosecution invites you to draw an inevitable inference from this admitted fact that it is the accused, and nobody else had committed the burglary and theft.
46. The Defence denies the allegations. The Defence admits that the fingerprint found at the crime scene belongs to the accused. Having so admitted the accused comes up with an innocent explanation.

47. According to D/CPL Koroi, the fingerprint was developed from the base of the roller shutter in an examination done on the 11th June 2019, soon after the burglary.
48. You heard the explanation advanced by the accused as to how his fingerprint would have come into being at the base of the roller shutter. The accused does not deny the possibility that he may have left his fingerprint at the base of the roller shutter. The Defence Counsel invites you to believe the version of the accused which he says is supported by Samuela, accused's wife's cousin brother.
49. The Prosecution says that the explanation is implausible and the same should be rejected. The complainant said that the back entrance where the roller shutter was is a restricted area only accessible to his family members, employees and the suppliers. He said that the accused was never employed at the supermarket. He denies having seen the accused at any time before. He denies that the accused had approached him with another person with an offer to sell vegetables to the supermarket on the 9 June 2018. The Defence Counsel says that the complainant is not consistent in his evidence. You decide what weight you should attach to complainant's evidence and whether it is acceptable to you.
50. On the basis of all the evidence led in the trial, it is up to you to decide whether the explanation advanced by the accused is believable and acceptable to you. If you think that the explanation given by the accused may reasonably be true, the accused is entitled to be found not guilty, because the Prosecution has not discharged the *onus* of proof imposed upon it of satisfying you beyond reasonable doubt of accused's guilt. That *onus* never shifts; it always rests on the Prosecution.
51. If you are sure that the only reasonable inference that can be drawn from the facts and circumstances of this case is that the accused had left his fingerprint when he broke into the supermarket on the 11th June 2018 and he entered the supermarket that night with the intention to steal then you should find the accused guilty of the offences he is charged with.
52. That concludes my summing up of the law and the evidence in this particular trial. We have now reached the stage where you must deliberate together and form your individual opinions on whether the charges have been proved against the accused. On your return you will

be asked to separately state in Court whether the accused is guilty or not guilty on each count.

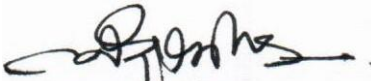
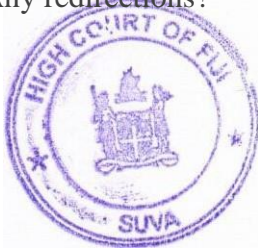
53. Your possible opinions would be:

Count 1- Burglary - Guilty or Not Guilty?

Count 2- Theft - Guilty or Not Guilty?

54. Would you please now retire to consider your opinions? When you have made your decisions would you please advise the Court clerk and the Court will reconvene to receive your opinions?

55. Any redirections?



Aruna Aluthge
Judge

AT SUVA

26 September 2019

**Solicitors: Office of the Director of Public Prosecution for State
A.K. Singh Lawyers for Defence**