

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CASE NO: HAC. 49 OF 2014

BETWEEN : **STATE**

AND : **1. JANARDHAN**
2. RONIL KUMAR

Counsel : ***Mr. Niudamu J. for State***
: ***Ms. Vulimainadave K. for the 1st Accused***
2nd Accused appears in Person

Hearing on : ***03rd February – 05th February 2020***

Summing up on : ***06th February 2020***

SUMMING UP

Ladies 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 Assessors of facts.

2. As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty, let us proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room. 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.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments for the prosecution and the defense are not evidence. A suggestion made during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made in 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.

5. 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 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.
6. 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 available 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.
7. 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, a part or none of any witness' evidence.
8. 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 we all 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.
9. 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 between the evidence given by different witnesses. 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 not, then you can disregard that inconsistency. 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.

10. 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.
11. 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.
12. 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 guidelines. It is up to you, how you assess the evidence and what weight you give to a witness' testimony.
13. 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 proved. You should decide what happened in this case, taking into account those proved 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 proved facts. If there is more than one reasonable inference to

draw against the accused as well as in favour of him, based on the same set of proved facts, then you should not draw the adverse inference.

14. As a matter of law you should remember that the burden of proof always lies on the prosecution. The accused are presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused are guilty and the accused are not required to prove that they are innocent. The prosecution should prove you the guilt of the accused beyond reasonable doubt in order to find them guilty. You must be sure of the accused person's guilt.
15. In order to prove that the accused are guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. Having carefully considered the evidence if you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must find the accused not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
16. You are not required to decide every point the parties in this case have raised. You should only deal with the offence the accused are charged with and matters that will enable you to decide whether or not the charge is proved against the accused.
17. 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 a must.
18. Let us now look at the Information. The Director of Public Prosecutions has charged the accused of the following offence;

Statement of Offence

AGGRAVATED ROBBERY: contrary to section 311(1) (a) and section 45 (1) of the Crimes Act, 2009.

Particulars of Offence

Janardhan and Ronil Kumar on the 16th day of April 2014 at Lautoka in the Western Division, robbed Atishma Devi and Shaiyum Shiraj of \$35,000.00 cash and \$5,000.00 worth of cheques, the property of Shiu Prasad & Sons Limited.

19. You heard the court reading the said Count to the accused, to which the accused pleaded not guilty.

20. To prove the offence of Aggravated Robbery the prosecution must prove the following elements beyond reasonable doubt.
 - a) the accused;
 - b) committed robbery; and
 - c) at the time the robbery was committed, the accused was in the company of 1 or more others.

21. The first element involves the identity of the offender. The prosecution should prove beyond reasonable doubt that the accused committed the offence and no one else. This needs elaboration. It is not essential for one of the accused to have committed all the alleged acts by him, when the allegation is that the accused did the acts in the company of others. When an offence is committed by more than one person in pursuit of the common objective, each person is liable for the entire act. If you have acceptable evidence to believe that an act was done by more than one person collectively in achieving a common goal and the accused actively took part in it, irrespective of whether the others are charged or not, the accused would be liable for each and every act whether they personally did that or not.

22. As for the statement of offence, the accused were charged together with section 45 of the Crimes Act. Section 45 (1) of the Crimes Act reads;

45. (1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

Therefore, it would not be necessary for both the accused to have acted together in every act alleged to have performed by them.

23. When you consider the issue of identification, you must remember that the prosecution relies entirely on the caution interviews of the accused for that purpose. The records of caution interviews were considered separately before the commencement of this trial, by this court on their voluntariness and admissibility as evidence. The court having considered the evidence and the relevant factors has ruled that those statements given at the caution interviews of these two accused are made voluntarily, hence admissible. Yet, my direction is for you to consider the two caution interviews and the charge statement marked PE1, PE2 and PE3 as to the credibility of their contents and satisfy your selves as to whether the accused took part in committing the alleged offence.

24. As for the second element, the prosecution version as supported by the evidence of PW1, PW2 and PW3 that a robbery did in fact took place, is not challenged by the defense in any way. Therefore, in my view, the 2nd element is satisfied thereby. However, it is up to you to evaluate the evidence properly and come to conclusions.

25. 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.

26. A person commits theft if that person;
Dishonestly;

Appropriates the property belonging to another;

With the intention of permanently depriving the other, of that property.

27. 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.
28. 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. In law, property belongs to a person if that person has possession or control of the property.
29. Robbery becomes aggravated robbery, if an accused was in the company of one or more other persons at the time of committing the robbery.

Summary of the evidence

30. The first witness called on behalf of the prosecution or the PW1 was Mr. Roneel Kamal Sen. His evidence was that;
 - (a) He has been a director of Shiu Prasad & sons Limited for about 26 years. His company is in the wholesale and retail business of Indian spices used in cooking. Their office is located at 14, Walu Street, Marine Drive, Lautoka.
 - (b) On the 16th of April 2014, he was in his office and by about 10.00am he has prepared his banking roll. On that day, there had been about \$35,000.00 in cash and \$5,000.00 in cheques. He has packed it in a brown paper bag and put into a plastic bag together with the deposit book and given his accountant, Atishma to go to the bank with driver Shaiyum to bank it.
 - (c) As soon as Atishma and Shaiyum went out of the office he heard a cry '*chor, chor*' and when looked at the CCTV, has seen two of his workers running out of his office and he has come out soon.

- (d) He has seen Shaiyum, bleeding from the head and Atishma lying down on the ground, hurt and the banking she carried, robbed.
 - (e) He knows the 1st accused, Janardhan as Janardhan was working for him for about 4-5 years for him as a sales person and a driver. On that day, at the time of the robbery, Janardhan has been there in his office.
31. In answering the cross examination on behalf of the 1st accused, the witness states, that during the time the 1st accused worked for him, The 1st accused has settled all the accounts properly, and at the time of the incident the 1st accused was inside the building.
32. The next witness called for the prosecution was PW2, Ms. Atishma Devi. Her evidence was that;
- (a) She was working at Shiu Prasad & sons as an Accountant on 16th of April 2014.
 - (b) That morning when she was taking the banking money, she has come out of the office behind a co-worker Shaiyum and while he went to open her door, someone has come behind and pushed her, snatching the plastic bag which contained the banking inclusive of the money and the cheques.
 - (c) There had been \$35,000.00 cash and \$5,000.00 worth of cheques with her, in the plastic which was robbed from her. She has fell down and got herself injured due to the push and she has shouted for help.
 - (d) Shaiyum has heard her shouting and ran after the robbers. She has seen four robbers and they have got into a black car parked at the Island Electricals and taken off towards P. Meghji side.
 - (e) the Island electrical shop is situated just in front of their office on the Walu Street.
33. The PW3 was Mr. Shaiyum Shiraj Ali. His evidence was that;
- (a) On the 16th of April 2014, he was employed as a salesman at the Shiu Prasad & Sons, situated at 14, Walu Street, Lautoka.

- (b) On that day at about 10.30am, he has come out of the office to go to the bank with Atishma. While he was opening the vehicle door, he has heard Atishma shouting and having told that she has been robbed, he has chased the robbers. Suddenly, he was hit with something from the side and he has fallen down. When he got up, he has seen a black car being driven very fast. The person who ran away with the money had curly hair at the back of the head, like a Fijian person's hair.
34. In answering the cross examination, PW3 confirms that their office had CCTV cameras at that time and his boss had access to the footage.
35. PW4 was Cpl. 2932 Mohammed Shamim. He has served for 19 years at the Fiji Police Force. He states that;
- (a) He was stationed at the Lautoka Police Station, attached to the Crimes Branch on the 18th of April 2014.
 - (b) On that day, he has reported to work at 7.00am and while on duty he was instructed by the Crime Officer to interview Mr. Janardhan, under caution.
 - (c) The interview was conducted in English at the Crimes Office of the Lautoka Police Station and there has been no one else there other than Mr. Janardhan and himself at that time.
 - (d) There has not been a witnessing officer as they were short of man-power at that time.
 - (e) The witness states that the interview was recorded in the Question and Answer format and the 1st accused appeared to be quite normal and co-operative at all relevant times of the interview. He further states that, the accused was given the opportunity to obtain legal advice and was not subjected to any inducement, threat or a promise. He confirms that the 1st accused was not assaulted by him or anyone else in his presence and the 1st accused never made any complaint to him of such assault.
 - (f) The handwritten original record of the said interview was marked and produced as PE1. Together with the handwritten copy, a typed copy of the said caution interview is also provided to you for ease of reference.

- (g) As the caution interview has been admitted as evidence, all the contents of the said document has become evidence of this case. The answers to the questions 27 to 106 elicits the 1st accused meeting with other people, planning the robbery, him giving them the vital information for the proper execution etc.
 - (h) At the conclusion of the recording, the witness has read over the contents and accused has signed the notes confirming them to be correct. The witness identifies the 1st accused as Janardhan from whom he recoded an interview under caution.
36. In cross examination, on behalf of the 1st accused, PW4 states that;
- (a) There were more than 10-12 police officers present at the Lautoka Police Station at the time of the caution interview, some in uniform and some in civilian clothes.
 - (b) When suggested that he witnessed the 1st accused being punched by 10-12 police officers at the Lautoka Police Station, the witness denies it. Furthermore the witness denies the suggestion that the 1st accused was slapped about 6-7 times before the interview by the other police officers in his presence.
 - (c) The witness admits that in the contents of the caution interview, the questions 1 – 27 do not contain any admissions of guilt by the 1st accused. In explanation, the witness states that majority of that contains the administrative questions. The learned counsel suggests that when the 1st accused started to deny the allegations in question 28, he was punched by 10-12 police officers in the Lautoka Police Station. The witness denies the suggestion. However, it is assumed that the learned counsel has framed every question on the instructions given to her by the 1st accused. Therefore, you should note that this stance was quite contradictory to the 1st accused's earlier stance of being punched before the commencement of the caution interview.
 - (d) The learned counsel further suggests that the 1st accused was hand cuffed with his hands to the back of his body during the caution interview. The witness denies that and states that the 1st accused was not hand cuffed.

- (e) You should note that as suggested if the 1st accused was in line of denial of the charged and due to physical assault has changed the stance, the record would clearly show a turning point. When analyzed, the answer to question 28 flows in line with the answer to the question 27 and the answer to question 27 flows in line with the answer to question 26. It should also be noted that the 1st accused alleges fabrication only to the answers to question 8 and 17.
37. The next witness for the prosecution, PW5 was DC 3824, Vedh Prakash. Presently, he is retired and states in his evidence that;
- (a) On the 19th of April 2014, he was attached to the Fiji Police Force and was working as a Detective Constable in the Criminal Investigation department (CID) branch of the Lautoka Police Station.
- (b) On that day, he has received instructions to charge the 1st accused, Mr. Janardhan, which he has complied with and recorded a charge statement. He has not forced threaten or induced Mr. Janardhan to make the charge statement.
- (c) The witness states that Mr. Janardhan did not complain of anything and the statement was recorded in the question and answer format. The recording has commenced at 14.50hrs and has concluded at 16.10hrs on the same day.
- (d) The said charge statement was marked and produced as PE2. Since this charge statement too is admitted as evidence, the contents of it become a part of the evidence, which you should consider.
- (e) In cross examination, though the 1st accused alleges non-recording of his complaints among others, he does not allege that he did not make the said statement containing the details of the alleged incident.
- (f) The witness concedes that though a witnessing officer has signed the charge statement, his name or details are not mentioned and that he could not recollect who the witnessing officer was.
38. The PW6 was detective Sargent 1898, Arvin Singh. His evidence was that;

- (a) He has been working for the Fiji Police Force for 31 years. On 18th of April 2014, he was serving, attached to the CID branch of the Lautoka Police Station.
 - (b) On that day while on duty, he was instructed by Crimes Officer to conduct an interview under caution of the 2nd accused, Mr. Ronil Kumar. Accordingly he has conducted an interview of Mr. Ronil Kumar under caution at the Crimes Office of the Lautoka Police Station. The interview has commenced on the 18th of April 2014 at 11.15hrs and has concluded on the following day the 19th of April at 16.40hrs.
 - (c) The interview was conducted in English and was recorded in Q & A format. The 2nd accused, Mr. Ronil Kumar was never promised, induced, threatened or intimidated to make the statement. The 2nd accused was given enough time to rest and was awarded all his due rights. He was taken for a reconstruction of the incident. During the caution interview DC Marika has been there as a witnessing officer. The 2nd accused did not make any complaint to him then.
 - (d) The original of the said caution interview was tendered as PE3. As this caution interview has been admitted as evidence, all the contents of the said document, PE3 too has become evidence of this case, which you should consider carefully.
 - (e) The contents of PE3 sets out how the robbery was planned, executed and the way robbers escaped too. The details of the execution considerably tallies with the evidence offered by PW2 and PW3. Furthermore, it considerably matches with the contents of PE1 and PE2.
 - (f) At the conclusion of the caution interview, the 2nd accused was given the record to read and having read it, has signed confirming the correctness.
39. In answering the cross examination by the 2nd accused, the PW6 stated that;
- (a) He is the interviewing officer of the 2nd accused and not the investigating officer of this case.
 - (b) The witness confirms taking the 2nd accused for a reconstruction of the crime scene. When asked of the place taken to, the witness states that the 2nd accused showed him the place where he was picked up and where he

had parked the vehicle in preparation for the robbery. The places he was taken to were Shirley Park and Walu Street.

- (c) Describing of the team who took out the 2nd accused for the reconstruction, the witness states that they went in vehicle fleet 25, driven by Detective Corporal Salend, with Detective Corporal Farasiko, himself, the 2nd accused and the witnessing officer. The witness states that he could not recollect whether the photographs were taken or not of the 2nd accused showing the crime scene.
 - (d) While the interview was about to be concluded, he received further information and on that, few further questions were asked from the 2nd accused.
 - (e) The 2nd accused alleges that the entire contents of the alleged caution interview, PE3 were fabricated and the witness denies.
40. Though the prosecution called the PW7, DC Sailasa to submit and prove the alleged charge statement of the 2nd accused, his evidence had to be disregarded and struck out as a proper copy of the alleged charge statement was not provided in the disclosures.
41. With leading the evidence of above witness the prosecution closed their case. The Court being satisfied that the prosecution has apparently (prima-facie) adduced sufficient evidence covering the elements of the alleged offence, acting under the virtue of Section 231 (2) of the Criminal Procedure Act, has called for the defense.
42. At the end of the prosecution case you heard me explain his rights and giving several options to the accused. They had those options because they do not have to prove anything. The burden of proving their guilt beyond reasonable doubt remains on the prosecution at all times.
43. The accused having understood their rights, elected to remain silent. That is their constitutional right and you should not draw any adverse inference from it.

44. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain 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, which evidence you would accept and which evidence you would not accept is a matter for you to decide.
45. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proved and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence have been proven beyond reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.
46. I will elaborate on this a little more. Firstly, you should decide whether you accept the contents of PE1, PE2 and PE3 as true or to which extent you accept them. As I have explained you before, you may accept in full, a partly or nothing of them. Then decide whether the prosecution has proved all the essential elements of the offence. If and only if you are satisfied that the prosecution has proved all the elements, you should consider whether any doubt is created by the inconsistencies or the cross examination. If you have any reasonable doubt, the accused are entitled to the benefit of such doubt.
47. Furthermore, you will have to consider the case against each of the accused separately and decide whether there is sufficient evidence against each one of them. The contents of the statements of one accused should not be used against the other. You will have to be satisfied that you have no reasonable doubt of the criminal involvement of each of the accused.
48. The accused's explanation was that they were not involved in the robbery. Though they did not offer any evidence to substantiate that and did not call any witnesses in support of that, you should still consider their stance. Generally,


when the accused give explanations, one of the three situations given below would then arise;

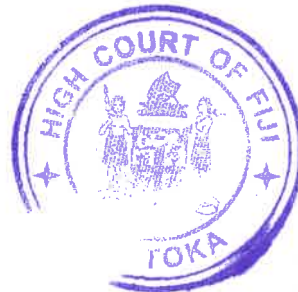
- (i) You may believe their explanations and; if you believe them that means that prosecution has failed to convince you, and then your opinion must be that the accused are 'not guilty'.
- (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind regarding the prosecution case, and therefore, again your opinion must be 'not guilty'.
- (iii) The third possibility is that you reject their explanations. That is you disbelieve the accused, yet that itself does not make the accused guilty. The situation would then be the same as if they had not given any explanations at all. You should yet consider whether the prosecution has proved all the elements beyond reasonable doubt.

49. Any re-directions?

50. Madam and Gentleman 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 come back to court and you will be asked to state your opinion.

51. Your opinion should be whether the accused are guilty or not guilty of the charge of Aggravated Robbery.


Chamath S. Morais
JUDGE



Solicitors for the State : *Office of the Director of Public Prosecutions, Lautoka.*
Solicitors for the 1st Accused : *The Legal Aid Commission, Lautoka*
Solicitors for the 2nd Accused: *Appears in Person*