

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 363 of 2018

[CRIMINAL JURISDICTION]

STATE

V

- 1. VERETI KOROI**
- 2. PENIASI BERABI**
- 3. MALAKAI CIRIKIDAVETA**

Counsel : Ms. S. Lodhia for the State
Ms. L. Manulevu and Mr. E. Sau for the 1st Accused
Mr. K. Verebalau for the 2nd Accused
Ms. T. Kean for the 3rd Accused

Hearing on : 16 - 20 March 2020

Summing up on : 20 March 2020

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 each 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 the 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, the admitted facts and the exhibits tendered. A 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 police statement of a witness can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence.
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/her 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 are charged with and matters that will enable you to decide whether or not the charge has been proved against each accused.
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

VERETI KOROI, PENIASI BERABI & MALAKAI CIRIKIDAVETA on the 27th day of September, 2018 at Nasinu in the Central Division, in the company of each other robbed **TUERE MAITVUKI** of 1x Samsung brand J1 mobile phone and \$7 cash, the properties of **TUERE MAITAVUKI**.

17. You would note that the three accused persons are jointly charged with the same offence. Please remember that you should consider the evidence against each accused separately to see whether the prosecution has proved that charge against each accused. In the event you find one accused guilty of the offence, you must not simply assume that the other accused must be guilty as well.

18. In order to prove that a particular accused is guilty of the above offence, the prosecution should prove all the elements of the offence beyond reasonable doubt against that accused. 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 against a particular accused, beyond reasonable doubt, you should find that accused not guilty. Please note that a reasonable doubt is not a mere imaginary doubt but a doubt based on reason.
19. 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) the robbery was committed in the company of one or more other persons.
20. 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.
21. 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.
22. A person commits theft if that person;
 - (i) dishonestly;
 - (ii) appropriates the property belonging to another;
 - (iii) 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. Robbery when committed in the company of 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.
26. 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.
27. 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.
28. When you consider the case against each accused, if you are sure that the offence of 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 that offence you should find the accused guilty of the offence of aggravated robbery.
29. 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.

30. The prosecution led the evidence of six witnesses. At the end of the prosecution case you heard me explain several options to the accused. The accused had those options because they do not have to prove anything. The burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The three accused chose to remain silent. That is their right. You should not draw any negative inference against the three accused given their decision to exercise that right.
31. 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.
32. The first prosecution witness was Eremasi Maitavuki Rabonu (PW1). He said in his evidence that;
- a) *On 27/09/18 after drinking beer at 'Union' he was heading towards the bus stand to go home around 4.00am. He had his Samsung J1 mobile phone and \$7 cash with him. He sat on a bench located at the right side of McDonalds and tried to speak to his mother over the phone. But there was no answer. Then he saw three people coming towards him. He said that he knew that they are "stealers" and as he saw them he stood up and walked in front. The person leading them was wearing a black jacket and 'a Lee brown in colour'. The second person was wearing a basketball vest which was blue in colour. The third person was wearing a grey t-shirt with 'a Lee brown in colour'. They were iTaukei males.*
 - b) *He said the person leading them came to him and got hold of him and the second person tried to take the phone he was holding. He screamed asking for help. Then the third person choked his neck. When he was choked he fell onto the ground and he said he could not feel himself. Once he fell onto the ground they managed to take the money from his pocket. He said that when he started screaming for help he released his phone and they took the phone.*
 - c) *He said that when this happened only he and the three of them were there. Once he fell onto the ground and they took the money the police arrived. Then the three iTaukei men ran. A police officer by the name of Vereti took him to the vehicle and the rest of the police officers ran after the three. The vehicle also followed the three men. It first stopped at the BBQ Stand. He said one of them were caught there and the other two were caught in the passage of Post Fiji next to the BBQ Stand.*

- d) *The three men who were caught were brought inside the vehicle and they went to Totogo Police Station. He was taken to the Lami Health Centre to be medically examined. His medical report was marked for identification as MF11 which was later tendered with consent as PE1.*
- e) *During cross examination on behalf of the first accused he said that he did not drink much that morning. He said that he saw the time on his phone when he left Union and it was 4.00am. He agreed that the time he called his mother would have been between 4.05am to 4.10am. He agreed with the suggestion that the area where he was sitting was not properly lit.*
- f) *He agreed with the suggestion that he is not able to describe what the three people heading towards him were wearing and that the description of the clothes he gave was of the three people that were arrested by the police were wearing that morning. He also agreed with the suggestion that he cannot correctly recall the description of the clothes the three people arrested were wearing that morning at Totogo Police Station. He agreed with the suggestion that he could not tell who the person which got hold of him is, because the place was not properly lit.*
- g) *He agreed with the suggestion that he was robbed by the people immediately after he called his mother and that the time would have been between 4.10am and 4.15am. He agreed that he became unconscious when the third person choked him. He agreed that he was unconscious for quite some time. He agreed with the suggestion that the police showed him the three people that were arrested and told him that they were the three people that robbed him after he was taken to Totogo Police Station.*
- h) *During cross examination on behalf of the third accused he agreed that when he called his mother there were lot of people who were waiting to go home after leaving the nightclub. He said the phone and the \$7 that were stolen, were not recovered that morning.*
- i) *During re-examination he said when the three people were heading towards him he saw what they were wearing. He said the three people that were arrested that morning were wearing the same clothes. He said that he became unconscious just after 4.00am. The last thing he remembers before being unconscious is that he was been strangled and apart from that he does not remember anything else.*

33. The second prosecution witness was Filipe Wainibuli (PW2). He said that;

- a) *In September 2018 he was working at Nandos in Suva as a Security Officer. On 27/09/18 he was doing the night shift. Around 5.30am he saw an iTaukei man running from McDonalds heading towards the BBQ Stand near Handicraft. When he saw this he was sitting down outside Nandos. He said that iTaukei man had a beard and was wearing a blue basketball vest. He said that this person was holding a white t-shirt on*

the left hand and a black phone on the right. The person was running as if someone was chasing.

- b) After he saw this he went to the bathroom and came back after thirty minutes. Then a police officer in civilian clothes approached him from the Westpac side and asked him whether he saw someone running past Nandos. He told the officer everything he saw.*
- c) During cross examination on behalf of the second accused he said the time 5.30am he mentioned was just an estimate. He said that it would take 50 seconds to 1 minute for a person to walk from the benches besides McDonalds to the place he was sitting. He said that during the time he was sitting outside the restaurant not one was arrested by police officers. He did not hear anyone call out for help during that time. He also agreed that it would be around 6am when the police officer came to him and questioned him.*
- d) During re-examination he said that when he saw the man run past him the place was empty.*

34. The third witness for the prosecution was PC 5049 Selema Tikoeburevere (PW3). He said that;

- a) In September 2018 he was based at Totogo Police Station and was attached to the operations team. On 27/09/18 he was on the nightshift and around 5.30am he was on a mobile petrol near McDonalds. PC Rusi and PC Emori were with him and PC Seva was their driver. He said he can't recall where he was seated. As they passed McDonalds they saw three iTaukei youth touching the pockets of another iTaukei youth who was lying on a bench. The driver stopped the vehicle and he got off the vehicle.*
- b) He said that while he was still inside the vehicle he managed to see the faces of the three iTaukei youth and they were 4 to 5 meters away. He saw their faces for about 5 seconds. At that time there was light coming from McDonalds and there were park lights. Nothing was obstructing his view when he saw the faces. He could not recall what the three youths were wearing at that time. He could not recall whether he saw anyone apart from the three youths and the one on the bench. He recognized them as Berabi, Malakai and Vereti. He said that he knew all three of them because they were seen in the red zone area most of the time. He said he had known Berabi for about 5 years. He had seen him for about 3 to 4 times in a week. He had spoken to Berabi 3 to 4 times in a week during the 5 years. He had seen Berabi about one time after 27/09/18.*
- c) He had known Malakai for about two years and he said that he had not seen him that much. He said he had seen Malakai once a week during the two years before 27/09/18 and had spoken with him roughly once a week. After 27/09/18, he had seen Malakai once at Rewa Street.*
- d) Before that day he had known Vereti for about one year. He said that during that one year he had seen Vereti roughly once a week and had spoken to him once a week. He said he*

- had not seen Vereti after 27/09/18.*
- e) As they got off the vehicle and approached the three of them, they ran away behind McDonalds. He again managed to see their faces for about 3 seconds and he was about 3 meters away when he saw the faces. He said that there was sufficient light and nothing obstructed his view of the faces of the three. He chased the three of them with PC Emori. The other youth was still lying on the bench. He managed to apprehend Vereti at the back of McDonalds and Malakai was arrested by PC Emori. Berabi ran towards the BBQ stand next to Westpac. He said he did not lose sight of Vereti from the time he chased him. He said Vereti tried to resist the arrest. After arresting the two they walked towards Westpac and waited for the police vehicle. He said he can't recall what happened to Berabi after they walked to Westpac. Then he said that PC Rusi caught Berabi but cannot recall how he was caught.*
 - f) No stolen item was recovered from Vereti. He pointed at the second accused as the person he was referring to as Berabi. He pointed at the third accused as the person he referred to as Malakai. He pointed at the first accused as the person he referred to as Vereti.*
 - g) During cross examination on behalf of first accused he said he can confirm the time of the incident to be from 5.30am to 5.45am because his team was carrying out the task of closing down the nightclubs in Suva and the nightclubs are closed at 5 o'clock. When it was pointed out to him that the complainant had said in evidence that he was lying on the ground and not on a bench, he said that the complainant was lying on the bench. When it was pointed out that he had not mentioned about identifying the youth in his police statement before they ran away, he said he may have overlooked it. He agreed that he had stated in his police statement which was made on the same day, that "at the station, came to know them as Vereti Koroi and Malakai Cirikicaveca". When it was pointed out that his statement does not reflect that he had known Vereti for one year, he said he may have overlooked it. He agreed with the suggestion that it took less than one minute to reach the place where the arrest was made from the bench beside McDonalds when he chased the first accused.*
 - h) During cross examination on behalf of the second accused he said he cannot recall whether there was any other person present when the arrest was made. When he was asked whether a person standing or sitting in front of Nandos will be able to witness everything that happened he said 'yes'. He said he can't recall whether the third suspect was already inside the vehicle when he entered the vehicle. He agreed with the suggestion that he cannot confirm whether anything was actually taken from the person who was lying down.*
 - i) During cross examination on behalf of the third accused he agreed that his statement does not reflect that he had known the third accused prior to the arrest and what the third accused was wearing.*
 - j) During re-examination he said that he knew the three accused by their first name and he does not know the surnames.*

35. The fourth witness for the prosecution was Ratu Emori Longavatu Navoso (PW4). He said that;

- a) *He is with the police for the past 7 years. He was based at Totogo Police Station in September 2018. On 27/09/18 he came across an incident at Sukuna Park while he was patrolling the area with PC Seva, PC Selema and PC Rusiate between 5.30am to 6.00am. He said that there was an iTaukei youth on the ground with three iTaukei persons touching his pockets. This was around 5.30am to 5.45am. He saw this while he was inside the vehicle. He saw the faces of the three iTaukei persons for around 5 seconds at a distance of about 5 to 10 meters. There was "a lot of lights around the area".*
- b) *He said that nothing was obstructing his view when he saw their faces but he cannot recall what they were wearing. He said that he only recognized "Mala" and he did not identify other two. At that time their focus was on the three iTaukei persons and they did not look around to see whether anyone else was there. He said that he had known Mala for more than three months before that day and he had spoken with him once.*
- c) *Once he saw this incident the vehicle stopped and then they ran towards the place of the incident. While he was running he saw Mala's face for 5 to 6 seconds at a distance of 3 to 4 meters. He said that the area was bright and nothing obstructed his view of Mala's face. Once he started running Mala and the other two ran away towards the back of McDonalds and the other iTaukei youth was still lying on the ground. He chased Mala and managed to apprehend him just behind McDonalds. He said that he and his partner PC Selema managed to catch only two and no one else was around them. He chased them for 18 to 20 seconds. He said that Mala tried to resist arrest.*
- d) *After the arrest they walked with the suspects towards the vehicle which was parked beside the BBQ stall behind Westpac. Mala was loaded into the vehicle and taken to the station. He said that the three suspects and the youth who was lying on the ground were taken to the police station in the same vehicle.*
- e) *He pointed at the third accused as the person he was referring to as Mala. No stolen item was recovered from Mala.*
- f) *During cross examination on behalf of the first accused he said he can confirm the time because 5.30am is the time the nightclubs are supposed to close and they were on their way to make sure that the nightclubs closed at 5.30am.*
- g) *During cross examination on behalf of the second accused he agreed that all three suspects ran in the same direction and when two suspects were arrested by him and his partner the third suspect was running in front. He agreed that a person standing or sitting in front of Nandos restaurant would be able to see everything that transpired. He agreed that the Western Mini Van stand cannot be seen from the place where he had loaded the suspects and there is quite a distance between the two places.*
- h) *During cross examination on behalf of the third accused he agreed that the iTaukei man*

he saw on the ground was unconscious and he did not see how he became unconscious. He said that the third accused first ran and then he started walking behind McDonalds. He agreed with the suggestion that when he was in the vehicle, because people were walking around the area, his view was obstructed by those people. He agreed that he could not confirm whether anything was stolen at that point because the iTaukei man was unconscious. He agreed that there was no mention of the name Malakai in his police statement recorded on the day of the incident just 15 minutes later and that what is mentioned in his statement is "three iTaukei youths". He agreed that he had mentioned in his statement that he and two other officers chased three youths where in his evidence he said only him and PC Selema chased. He agreed that he had never spoken to Malakai prior to the incident.

- i) During re-examination he said that Malakai started walking as soon as he was told to stop. He said that he mentioned in his statement that he and two other officers gave chase because three of them including PC Rusi got off from the vehicle and chased the suspects. He said that the correct version is only him and PC Selema chased the two suspects and he saw PC Rusi with the third suspect when he arrived at the vehicle after arresting the two suspects.*

36. The fifth witness for the prosecution was PC 5116 Rusiate Ralasi (PW5). He said that;

- a) On 27/09/18 around 5.00am he was on mobile petrol with PC Seva who was driving, PC Selema and PC Emori. Around 5am they went to wash their vehicle and came along Victoria Parade 10 minutes later. In front of McDonalds he saw a person lying down on the ground beside a bench and three persons touching the pockets of that person lying down. He said that two of them were known to the police and he recognized them. He saw their faces for 2 to 3 seconds while he was inside the vehicle at a distance of 7 to 10 meters. The lighting in the area was sufficient for him to identify the two. Nothing was blocking his view. He couldn't recall what they were wearing or whether anyone else were there because he was focusing on the one that was on the ground and the two that he recognized. He said that he saw this around 5.20am to 6.00am.*
- b) He said he recognized Berabi and Malakai. He said the two of them were known to the police. He had known Berabi for two years prior to that date and he had come across him 2 to 3 times in a week during those two years. He had seen Berabi usually around the market area and in front of nightclubs. He had spoken to him once in a week.*
- c) He said that Malakai was known to the police for about 2 to 3 months before the incident. He had seen him in the weekends at night roaming around with street kids. He had spoken to Malakai once.*
- d) After he saw the touching of the pockets he came to out of the vehicle with PC Selema and PC Emori and approached the place where the victim was lying. Then the three males who*

- were touching the pockets of the male on the ground started walking away. He asked them to stop to ask them what happened to the person who was lying down beside the bench, but the three kept on walking away and then started running. He saw the faces of Malakai and Berabi for about 5 seconds before they ran away.
- e) He could not recall whether they ran in front of McDonalds or at the back. He told the other officers to follow them and approached the person who was lying down beside the bench. He then loaded the victim into the vehicle. They then went around Sukuna Park and came near the BBQ stall beside Westpac. From there he saw Berabi walking in the passage between the BBQ stall and the Westpac branch. He approached Berabi and told him that he will be escorting him to the station. Berabi refused saying that he is going towards the bus stand to catch the bus home. Because Berabi refused several times he dragged Berabi and then pushed him inside the vehicle. After he entered the vehicle the other two officers came with the other two suspects.
 - f) He said that Berabi was caught 10 to 15 seconds from that time he saw Berabi touching the pockets. This was a rough estimate and everything was happening very fast. He did not search Berabi.
 - g) He pointed at the second accused as the person he was referring to as Berabi. He pointed at the third accused as a person he was referring to as Malakai.
 - h) During cross examination on behalf of the second accused he agreed that it is mentioned in his police statement recorded on the same day that "I later came to know that his name was Peniasi Berabi". He said that he only knew the name Berabi but he later came to know the full name. He agreed that he had mentioned in his statement dated 18/06/19 that "we went around to the Western Mini Bus stand where PC Selema and PC Emori managed to arrest the other two suspects from there". When it was pointed out that in his evidence he said that the other two suspects were also loaded beside the BBQ stand, his answer was that he was not focusing on other two. He agreed that in his statement dated 27/09/18 he had said that "I then with the help of PC Seva we overpowered the said suspect and we escorted him to the station". He agreed that he had mentioned in his statement dated 18/06/19 that he knew the three suspects when touching the victim's pocket and that the three suspects are familiar to him since they are always found on the streets. He agreed that he did not talk to anyone that morning outside Nandos restaurant.
 - i) During cross examination on behalf of the third accused. He agreed that the name Malakai is not mentioned in the two statements he had made specifically about touching the iTaukei man's pocket.
 - j) During re-examination he said that he can't recall where the other two suspects were arrested and he may have overlooked when he mentioned in his statement that they were arrested at the Western Mini Bus stand. He said he knew all three of them at that time but today he cannot recognize Vereti's face. He said he did not mention Malakai's name because he only arrested Berabi.

37. The sixth witness for the prosecution was PC 2273 Sevanaia Manulevu (PW6). He said that;
- a) *On 27/09/18 he was doing an operation. He was the driver of the vehicle and they were coming back from washing the vehicle. As they approached Sukuna Park the officers told him to stop. Constable Selema, constable Emori and constable Rusiate were with him. When the officers told him to stop the time was about 5.00am to 5.30am.*
 - b) *Others got off the vehicle and he saw an iTaukei youth lying on the ground. He also saw three iTaukei youth there but couldn't recall what they were doing. He did not identify the three of them. PC Rusiate brought the victim to the vehicle and then he drove around Stinson Parade and came to the BBQ stall. PC Rusiate told him to stop the vehicle and said that one of the suspects is there. He stopped in front of the entrance towards the back of Westpac. He said that it took about 3 to 4 minutes to reach there from the time the victim was loaded into the vehicle.*
 - c) *Then PC Rusiate got off the vehicle and got hold of the suspect. PC Emori and PC Selema brought one suspect each and all of them were loaded into the vehicle. At the police station he came to know the names of the suspects.*
 - d) *During cross examination on behalf of the second accused he agreed that in his statement dated 18/06/19 he had mentioned that "...later we proceeded towards Mini Bus Stand Western PC Selema, PC Emori arrested the other iTaukei youth". He agreed that he did not seek assistance from someone who was standing near Nandos restaurant that morning.*

Analysis

38. In this case, the defence does not dispute the fact that PW1 may have been robbed on 27/09/18. What they dispute is the identification of the three accused as the offenders. The defence counsel have pointed out a number of inconsistencies in the evidence presented by the prosecution and they have highlighted the fact no stolen item was recovered from any of the accused who were said to have been arrested shortly after they were allegedly seen touching PW1's pockets.
39. It was pointed out that there were three versions in the evidence presented by the prosecution as follows;

- (i) The first version is of PW1 that he was robbed between 4.10am and 4.15 am. He said he is sure of the time because he checked the time from his phone.
- (ii) The second version is the version of the police witnesses (PW3, PW4, PW5 and PW6) that the incident took place around 5.30am and all three offenders ran together towards the back of McDonalds where two were arrested there and the third one ran further towards the BBQ stand where he was arrested.
- (iii) The third version is of PW2, the security officer of Nandos Restaurant where he said one person ran past him around 5.30am where that person ran from McDonalds heading towards the BBQ Stand and a police officer questioned him after 30 minutes whether he saw someone run past Nandos. PW2, does not witness two suspects being arrested at the back of McDonalds. In fact he sees only one person running towards the BBQ stand around 5.30am and does not see police officers chasing or arresting anyone at the back of McDonalds.

- 40. You may consider it important to see whether the version of PW1 be reconciled with the other two versions? Was there an explanation for this inconsistency?
- 41. If as the complainant said, he was robbed of his phone and the money around 4.10am by three individuals, and if as the police said they saw the three accused searching PW1's pockets around 5.30am, then you may think that; either, the three accused were searching PW1's pockets for more than one hour until the police chased them or that there may be a possibility that though the three accused may have attempted to steal from PW1, they may not be the offenders who robbed PW1's phone and the money as per the charge in this case. As it was highlighted, no stolen item was recovered from any of the accused persons.
- 42. Would it be probable for three assailants who commits robbery of an individual who is unconscious, in front of McDonalds as explained in the evidence, to be searching

that individual's pockets for more than one hour? If there is a doubt that the three accused in this case may not have been the individuals who had committed the offence as per the charge, you should find each accused not guilty.

43. PW1, though he described the clothes the three individuals who attacked him were wearing, also admitted during cross-examination that the police showed the three accused to him and the description he gave was of the clothes he saw the three accused were wearing after they were arrested. He agreed that he was not able to describe what his assailants were wearing when they were heading towards them. The defence also pointed out that none of the police witnesses described the clothes the three accused were wearing at the time of arrest. Given this evidence you have to decide whether you are satisfied beyond reasonable doubt that PW1 clearly saw the clothes of his three assailants or he simply remembers what the three accused's were wearing when they were shown to him by the police after being arrested.

44. When you consider the evidence on the identification of each accused, 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 witnesses on the identification of each accused in relation to the offence;
 - (i) Duration of the observation;
 - (ii) The distance within which the observation was made;
 - (iii) The lighting condition at the time the observation was made;
 - (iv) Whether there were any impediments to the observation or was something obstructing the view;
 - (v) Whether the witness knew the accused and for how long;


- (vi) Whether the witness had seen the accused before, how often, any special reason to remember; and
- (vii) Duration between original observation and identification.

45. Any re-directions?

46. 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 each accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

47. Your opinion should be whether each accused is guilty or not guilty.




Vinsent S. Perera
JUDGE

Solicitors:

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