

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 238 of 2018

[CRIMINAL JURISDICTION]

STATE

V

- 1. EPI TEKEI KATONIVERE**
- 2. ILAITIA TAMANITOAKULA**

Counsel : Ms. W. Elo for State
Ms. N. Mishra & Ms. S. Naidu for 1st Accused
Ms. M. Singh & Ms. S. Hazelman for 2nd Accused

Hearing on : 10 - 12 March 2020

Summing up on : 12 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/her 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 offences the accused are charged with and matters that will enable you to decide whether or not the charges have 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 offences;

FIRST COUNT

Statement of Offence

Aggravated Robbery: contrary to Section 311 (1) (a) of the Crimes Act, 2009.

Particulars of Offence

EPI TEKEI KATONIVERE and ILAITIA TAMANITOAKULA on the 9th day of June, 2018 at Nasinu in the Central Division, robbed **PRANIT SINGH** of 1 x Samsung J2 mobile phone valued at \$250, 1 x wallet valued at \$25.00 containing \$35.00 cash, 1 x Fiji Rugby flip flops valued at \$90.00, all to the total value of \$400.00 and during the theft did use force on **PRANIT SINGH**.

SECOND COUNT

Statement of Offence

Common Assault: contrary to Section 274 of the Crimes Act, 2009.

Particulars of Offence

EPI TEKEI KATONIVERE on the 9th day of June, 2018 at Nasinu in the Central Division, unlawfully assaulted **SANJESH NARAYAN**.

17. After the conclusion of the case for the prosecution, it was decided that the case should not proceed against the first accused on the first count; and also that the said count cannot be maintained against the second accused as it is framed. Accordingly, the defence was called in relation to the first accused, on the second count only; and in relation to the second accused, on the lesser offence of robbery.
18. In order to prove that the accused is guilty of an offence, the prosecution should prove all the elements of that offence beyond reasonable doubt.

19. Please remember to consider the evidence against each accused separately. In the event you find one accused guilty of the relevant count, you must not simply assume that the other accused must be guilty as well. It is necessary for you to consider whether the prosecution has proved the relevant offence beyond reasonable doubt against each accused, separately.
20. To prove the offence of robbery in this case, the prosecution should prove the following elements beyond reasonable doubt.
21. The first element of the offence involves the identity of the offender. The prosecution should prove beyond reasonable doubt that the accused committed the offence and no one else.
22. 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.
23. 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.
24. 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.
25. '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.
26. The elements of the offence of common assault are as follows;
 - (i) The accused;

- (ii) Unlawfully;
- (iii) Assaulted another person.

27. 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.
28. Unlawfully means without any lawful authority.
29. Assault is using of unlawful force. A touch constitutes an assault if it is done without any lawful excuse.
30. The prosecution led the evidence of five 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 first accused chose to remain silent. That is his right. You should not draw any negative inference against the first accused given his decision to exercise that right. The second accused gave evidence on oath.
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 Pranit Singh (PW1). He said in his evidence that;
 - a) *On 09/06/18, in the night, while he was on his way towards the temple with his cousin Sanjesh Narayan and a friend of his, three iTaukei boys came towards them. He said, "two of them went from the side, one of them punched my cousin on the forehead". He then ran towards the house. After running a distance of about 8 to 9*

- meters, he stopped to see what happened to his cousin. As he stopped, one of the 'Fijian guys' tackled him and he fell on the ground.
- b) Then this person started choking him. He hit that person on the side of the face with something hard like a stone which he was able to get hold of. Then the person let go of his throat and grabbed him by his collar asking him where is his phone and the wallet. He gave his phone and the wallet. The person also took his black and white slip on shoes which had the Fiji Rugby Logo on them. There was \$35 cash inside his wallet. The person ran away with the items.
- c) He said that he could not see the face, but saw the shirt the said person was wearing. It was a dark blue t-shirt with something white in circle shape. According to him there was a street light where the incident happened but it was not bright enough to see everything. He had an eye problem where he cannot see clearly. When the person was choking him, he could focus on the shirt.
- d) A police officer arrived within 10 to 15 minutes from the time the items were taken from him and he was asked 'where the robbers went'. Then the police officer chased the robber. He said that when the police officer came to him, they ran towards the roadside where there were some iTaukei boys were standing. The police officer thought that they are the 'robber' but it turned out that they weren't. Then they saw the 'robber' running and the police officers chased him (the 'robber') while he (PW1) was standing near the police vehicle outside the church.
- e) He said that one of the robbers were caught. They went to the police station and his statement was recorded. By this time he was fully covered with mud.
- f) The next day he was taken for a medical examination and then to the police station where the shoes that were stolen from him and the shirt the 'robber' was wearing were shown to him. He identified them. He was shown a pair of shoes in open court which he identified as the shoes that were taken from him. These were tendered as PE1. He was also shown a t-shirt which he identified as the t-shirt the person who attacked and took his items was wearing. This was tendered as PE2.
- g) During cross-examination on behalf of the second accused, he agreed telling the police that ". . . the iTaukei boy wearing the blue vest got hold of me by my neck and dragged me to the Nadera ground . . ." He agreed that this version regarding the clothes was different from the version he gave in his evidence. He also agreed that he

told the police that the items except the shoes were taken by the person wearing the blue vest.

- h) He agreed that he told the police that the pair of 'flip on' were shown at his home in his second police statement.*
- i) During re-examination, he said that it was a t-shirt that he saw and he may have used the word 'vest' mistakenly, or the police officers may have thought that the person who attacked him was wearing a vest, or may be his cousin had said that but the police had written that in his statement. He also said that when the person grabbed him, he saw a little circle and at the time he was thrown onto the ground, he noticed that there was a logo.*

33. The second prosecution witness was Sanjesh Narayan (PW2). He said that;

- a) In the night, on 09/06/18, while he was on his way to the temple with his brother and a friend and as they reached the rugby ground in Nadera, he saw 3 Fijian boys coming towards them. One was wearing a blue t-shirt, one was wearing a dark blue t-shirt with 'something while like a round on it' and the third person was wearing a green t-shirt. He said the one who was wearing the green t-shirt punched him on his forehead and he fell down. By the time he got up, they took his brother, PW1, to the ground.*
- b) There were street lights in that area, but there was not much light.*
- c) As soon as he got up, he ran to the road to get help. He saw a police vehicle and he informed the police that his brother is being robbed on the ground. Then the police started chasing them. He said that they 'got one of them' and two ran away. Thereafter they went to the Valelevu Police Station.*
- d) During cross-examination he said that the persons who took PW1 to the ground were the one who was wearing a blue t-shirt and the one wearing dark blue t-shirt with white round. He agreed that he told the police that the "one wearing the blue vest grabbed Pranit and took him to Nadera ground".*

34. The third witness for the prosecution was Special Constable Peni B. Mateivalu (PW3). He said that;

- a) He resides at Lot 4, Ratu Dovi Road, Nadera. On 09/06/18 when he saw an iTaukei*

male rushing to his neighbour's compound which was a few centimeters away and at the same time a police vehicle parked between the neighbour's house and his house. He heard the police officer inside the vehicle shout "Butako" and at the same time the said iTaukei male jumped over the fence to his compound and ran towards the back of his house. He said that he managed to catch the person at the back of his house after chasing him. He said that the said person resisted but then the driver of the police vehicle whose name was either Nitish or Nitesh managed to calm the person down.

- b) He knew the person who was arrested as "Epi" and the said Epi used to come to his house to see his brother. He said that he had known Epi for more than 3 to 4 years and that they go to the same church. He recognized the first accused as the person he referred to as Epi.*
- c) During cross-examination on behalf of the first accused he said that the first accused at that time was wearing a muscle vest and it was green and white in colour. He agreed that the colours green and white were prominent in the said vest. He said that his statement to police was given in the morning and not from 9.50pm to 10.05pm on 09/06/18 as stated in his statement.*

35. The fourth witness for the prosecution was PC 5165 Khushal S. Dutt (PW4). He said that;

- a) While he was on duty on 09/06/18 at Valeleou Police Station they received a report in relation to Nadera Duvoula Temple around 8.17pm. He left with his partner DC Nitesh (PW5) and DC Peter to attend that report. When they reached the junction at Tomanu Road off Yasiyasi road they were stopped by an Indian boy who informed them that his cousin is been robbed at the Nadera ground. He was shown the place, and he saw the cousin on the ground. He also saw three boys running across the ground. He got off the vehicle with PC Peter and chased the said three boys. When he first saw the three boys running, the said three boys were approximately 5 to 6 meters away. He said that they ran through the playground which was muddy.*
- b) The three boys then ran inside the Nadera Methodist church compound. He ran after them and DC Peter ran towards the short-cut beside the church. Then the three boys ran in different directions. The first one ran and climbed on a fence, the second one ran to the short-cut and the third one ran into a cassava patch that leads to a small creek*

beside the church. He said that he saw a police vehicle at the driveway of the compound in which the one who climbed the fence went into. He followed the one who went into the cassava patch. He followed that person who jumped into a creek and went inside a culvert. He saw the person jumped with the light from his torch. He said that he was unable to apprehend that person.

- c) When he went back to the police vehicle he saw PW3 and PW5 and an iTaukei boy wearing a white and green muscle vest. He explained that a muscle vest does not have a sleeve.*
- d) They went to the Valelevu police station where the iTaukei boy was detained. They again went back to pick the complainants and Constable Peter. He recorded the statement of PW1 and PW2 where he was informed of the description of the suspects.*
- e) After recording the statements he again went with PW5 to Duvula road. At that time Duvula road was crowded with those who were returning from the temple. The iTaukei boys who reside at the barracks along Duvula road were also there. One of those iTaukei boys were wearing a dark blue round neck t-shirt with a round design in white. He also identified that person as Ilaitia who was known to him even before he joined the police. He said Ilaitia was also known as "Tia" and that he is residing in the barracks opposite Duvula bread shop. Later he identified the second accused as the person he was referring to as Ilaitia. While he was trying to control the crowd PW5 arrested the second accused. While the second accused was being arrested he noted the t-shirt the second accused was wearing and he also noted that the second accused's legs were muddy. He said that the second accused did not want to go inside the police vehicle. However he saw the second accused sitting inside the vehicle while he was controlling the crowd. He said he sat next to the second accused and he could smell liquor from the second accused.*
- f) He said that PW5 escorted the second accused into the station. At the police station he also noticed that the second accused was wearing one white and black slip-on with Fiji Rugby logo on one leg and the other one was broken. The said slip-on shoes were recovered by PW5 and the second accused was detained at the station.*
- g) On the following day he escorted PW1 to the hospital for a medical examination. He tendered the medical report of PW1 as PE3. After the medical examination PW1 was escorted to the police station.*

h) During cross examination on behalf of the second accused he agreed that he had a clear view of the three boys when they were running across the ground and that he got closer to the boys. He also agreed that he had known the second accused for over three years. He also agreed that he did not recognize the second accused while he was running after those three boys. He said that he cannot confirm whether the second accused was wearing shoes when he saw the second accused in the crowd. He said that he can't recall whether the second accused was wearing shoes at that time of the arrest and while he was being escorted to the police station. But he said that the second accused was wearing one slip on at the police station and the other one was broken. He agreed that he has failed to mention certain important details in his statement.

36. The fifth witness for the prosecution was DC 3379 Nitesh Kumar (PW5). He said that;

- a) He started his shift on 09/06/18 at 7.00pm. He said that around 8.30pm he was driving a police vehicle with PW4 and PC Peter heading to Nadera Police Post. Before they reached the police post, at the Tomanu Road Junction, they were stopped by two Fijian boys of Indian descent. They waived at the vehicle to stop and when the vehicle was stopped, informed them that three iTaukei boys were robbing 'his cousin brother' in the playground.*
- b) PW4 and DC Peter then gave chase to the suspects who ran towards the Nadera Methodist Church. He drove the vehicle to Ratu Dovi Road and entered another road that leads to the Church. Then he saw one of the suspects coming towards him. As soon as the suspect saw the police vehicle he jumped over a fence to a house compound. He shouted for assistance and a person from that house who happened to be a police officer, caught the suspect after a chase at the back of the house. He then escorted the suspect to the police station.*
- c) He said that the suspect was wearing a 'muscle vest round neck t-shirt' which was green and white in colour. At the time of arrest the suspect had mud on his legs and clothes and smelt of liquor.*
- d) Thereafter they brought PW1 and PW2 to the station and statements were recorded. After gathering information about the other suspects through the said statements, he went on patrol with PW4 again. Around twenty to ten, at Ratu Dovi Road, he noticed*

an iTaukei boy wearing a t-shirt with the description provided, that is, 'dark blue round neck t-shirt with something written on white colour both in front and the back'. He arrested the person and took him to the vehicle. PW4 was trying to control the crowd at that time. The person arrested said that he does not know anything and he smelt of liquor. They escorted him to the police station. He said that he also saw mud on both legs of this person and noticed that he was wearing a pair of slip on that was black and white in colour. He seized that pair and detained the person at the station.

- e) He said that he was also the investigating officer of the case. He prepared a search list on the following day. He tendered this search list dated 10/06/18 as PE4. He identified PE1 and PE2 as items recovered from Ilaitia.*
- f) During cross-examination on behalf of the first accused, he agreed that no item was recovered from the first accused upon arrest.*
- g) During cross-examination on behalf of the second accused he said that PW3's statement was recorded at his house at Nadera. When it was suggested that the second accused was not wearing shoes when the second accused got into the police vehicle, he said that the second accused was wearing 'a slip on'. He said that he clearly saw the slip on the second accused was wearing, at the police station and it was seized after confirming the brand. He said that the second accused was detained after the shoes were seized.*

37. The second accused (2DW1) said in his evidence that;

- a) On 09/06/18 after he finished his training at the ground around 11.00pm to 12.00pm, he went to a friend's house for drinks. He was drinking at this friend's house till 6.00pm. Around 6.30pm he was 'very drunk' but he managed to go home. He woke up between 10.30pm and 11.00pm because he was hungry and he went to the nearby shop. While he was walking towards the shop, PW4 called him by his nickname 'Tia' and asked him to get into the police vehicle for questioning with regard to a robbery. At that time he was wearing a 'dark blue round neck with a white round design small at the front and big at the back'. He was not wearing any shoes.*
- b) After he got into the vehicle, he was taken to the Valelevu Police Station. He was then taken to the cell and he spent the night there. The next morning, PW4 got him to sign on a paper and he did not know what it was about. He said that he did not have a Fiji*

Rugby Union flip flop with him. The t-shirt he was wearing was given to the police. He said that he does not know anything about the allegation.

- c) *During cross-examination by the prosecution, he agreed that the road at which he was arrested was not muddy. He agreed with the suggestion that when he was arrested, his legs and feet were muddy. He said that it was because the place where they usually sit at his friend's place was muddy.*

Analysis

First count

38. This count is relevant to the second accused but the offence you have to consider is robbery. PW1 and PW2 do not identify PW1's assailant. The only evidence they gave on identification is the description of the t-shirt.
39. You should note that in his evidence PW1 was referring to a dark blue t-shirt with round design in white colour on it as the t-shirt the person who attacked him was wearing. He identified PE2 as the said t-shirt he saw. However, he agreed that he had mentioned in his police statement which was given on the same day that the person who attacked him was wearing a blue vest. You also heard that according to PW2, one was wearing a blue t-shirt, one was wearing a dark blue t-shirt with 'something white like a round on it' and the third person was wearing a green t-shirt. Further, PW2 agreed telling the police that "one wearing the blue vest grabbed Pranit and took him to Nadera ground".
40. When the second accused was arrested on the same day he was wearing PE2.
41. The prosecution says that they are also relying on the doctrine of recent possession in this case, to prove the charge of robbery against the second accused.
42. With regard to recent possession, the law is that if, recently after the commission of the alleged offence, a person is found in possession of the stolen goods, that person is called upon to give an explanation for the possession, an explanation which is

not unreasonable or improbable. The reason is that, from the fact that a person is found in possession of stolen items soon after the offence of theft is committed, an inference can be drawn that the said person must have stolen the property. 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 and it always rests on the prosecution.

43. In this case PW1 said that his shoes (PE1) were stolen on the night of 09/06/18. PW4 and PW5 gave evidence about arresting the second accused on the same night but they do not say that they saw the second accused wearing shoes at the time of arrest. PW4 said that he saw the accused wearing one shoe (PE1) at the police station and PW5 said that he saw the second accused wearing the pair of shoes (PE1) at the police station. Those shoes according to both PW4 and PW5 were seized on 09/06/18 together with PE2, the t-shirt the second accused was wearing. But the search list PE4 is dated 10/06/18 and it does not mention the t-shirt PE2. The second accused says that he never had PE1 in his possession.
44. Therefore, as far as doctrine of recent possession is concerned, you should decide whether the doctrine of recent possession would apply in this case given all the relevant evidence and whether or not a strong inference can be made against the accused accordingly.

Second count

45. This count is relevant to the first accused.

46. The description given by PW2 regarding the person who assaulted him is that the said person was wearing a green t-shirt. However, it is an admitted fact and also the evidence of other prosecution witnesses that when the first accused was arrested, he was wearing a t-shirt which was green and white in colour. The only evidence against the second accused is this colour of the t-shirt he was wearing at the time of arrest on 09/06/18.
47. The defence says that there are serious inconsistencies in the evidence presented by the prosecution and therefore the prosecution has not proven the case against the accused beyond reasonable doubt.
48. 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 each accused beyond reasonable doubt.
49. 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.
50. Any re-directions?
51. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges 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.
52. Your opinion should be as follows;

First count against the second accused on the offence of robbery - guilty or not guilty

Second count against the first accused on common assault - guilty or not guilty



A handwritten signature in blue ink, appearing to read "Vincent S. Perera".

Vincent S. Perera

JUDGE

Solicitors;

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