

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 421 of 2018

[CRIMINAL JURISDICTION]

STATE

V

WAIKALE DAVUIQALITA

Counsel : Ms. S. Lodhia for State
Ms. S. Hazelman for the Accused

Hearing on : 15 – 17 June 2020

Summing up on : 18 June 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 the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless you agree with that opinion. You are 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 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's guilt.
14. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge against the accused has been proved.

15. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
16. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

Statement of Offence

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

Particulars of Offence

WAISALE DAVUIQALITA & OTHERS on the 3rd day of November, 2018 at Suva in the Central Division, in the company of each other stole 1x wallet containing \$120 cash and 2x e-transport bus cards from **SAHA DEO SINGH** and at the time of stealing from **SAHA DEO SINGH**, used force on him.

17. In order to prove that the accused is guilty of the above offence, the prosecution should prove all the elements of the offence beyond reasonable doubt against the 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 the accused, beyond reasonable doubt, you should find the accused not guilty. Please note that a reasonable doubt is not a mere imaginary doubt but a doubt based on reason.
18. The prosecution led the evidence of seven witnesses. At the end of the prosecution case you heard me explain several options to the accused. The accused had those options because he does not have to prove anything. The burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent but to call one witness. He had the right to remain silent. You should not draw any negative inference against the accused given his decision to exercise that right.

19. 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.
20. The first prosecution witness was Saha Deo Singh ("PW1") who was 75 years old. He said in his evidence that;
- a) *On 03/11/18 around 8.00am he got off a bus in Nadawa and was walking towards his house. He had gone to the market that morning. His house was situated at Bal Govind Road which was a bit far away from the place he got down from the bus. On his way, he was approached by three iTaukei persons from behind. Two of them held him from behind and one of them punched on his left eye and his mouth. He said that they tore his clothes and took his money amounting to \$120 and also two 'bus fare top-up cards' that were with him. After taking the two cards and the \$120 they ran towards a settlement. He could not recall the name of the settlement. He said he knew the three iTaukei persons who took his cards and the money.*
 - b) *He said the police arrived immediately, he got into the police van and they went to the settlement in the van. There were three police officers in the van. At the settlement while he sat inside the van the police went to make inquiries. After that the police brought "the alleged robber" who robbed him and asked him whether 'he was the one'. He said "yes". He didn't know the name of that person. Then that person was taken to the police station in the van and he went to the hospital for a medical examination.*
 - c) *He went to the police station and gave his statement. He was shown the two cards that were stolen from him, at the police station, after he gave his statement. He identified the said two cards in court. A purple card which he said that belongs to him was marked for identification through him and later tendered as PE2A; and a red card which according to him belongs to his wife was marked for identification through him and was later tendered as PE2B. This card had the name 'Prem Wati' written on the back. The medical report issued after examining him was marked for identification through him and was later tendered as PE5.*
 - d) *During cross-examination he admitted that he had told the police in his police statement that when he went in the van to the Veiraisi Settlement, he saw one of the three boys who robbed him standing near a house and upon him informing that to the police, the police arrested that person.*

- e) *During re-examination he again said that the police brought the boy to him and that the reason that he told the police that he pointed out to the boy before the boy was arrested was because he was in shock.*

21. The second prosecution witness was PC 6590 Josateki Seru ("PW2"). He said that;

- a) *On 03/11/18 at about 0906 hours Valeluvu Police Station which he was serving, received a report of a robbery in progress from Bal Govind Road, Nadawa. He left with the driver PC Ziad and PC Pawan to attend to that report. He got off at Bal Govind Road where he met the victim. The victim was taken on board the vehicle after he got the information from the victim as to who robbed the victim and where those persons went. He took a shortcut to Veiraisi Settlement to make inquiries.*
- b) *He said he received information about three iTaukei youth who had gone past a house in a suspicious manner. He said that he was also given the names of those three as Jone, Vereniki and Waisale. Then he said he saw some iTaukei youth standing near a tin house and when he inquired he got to know that the name of one of them was Vereniki. He arrested Vereniki and took him to the vehicle. The victim then pointed at Vereniki as one of the persons who robbed him. At the Valelevu Police Station they searched Vereniki along with DC Sabua and DC Sabua found two 'e-ticketing bus tickets', one red and one blue. Those cards were shown to the victim and the victim identified those cards. He identified PE2A and PE2B as the two cards found from Vereniki.*
- c) *He said that around 10.30am on the same day, he went with DC Inoke and DC Sabua to arrest the accused to Veiraisi Settlement. He said that he cannot recall what happened when they went to arrest the accused, but said that it was DC Inoke who arrested the accused. He said the accused was drunk and he had some cuts on his lips and a scar. He couldn't remember whether the accused was asked how he got the cuts. He said that the accused was not assaulted or threatened by the police officers at the time of arrest.*

22. The third witness for the prosecution was DC 4581 Warinawa Sabua ("PW3"). He said that;

- a) *On 03/11/18 while he was serving at the Valelevu Police Station he responded to a report of robbery at about 0918 hours. He went with DC Inoke and Constable Josateki to the Bal Govind Road where the alleged incident had taken place. He said that Constable Josateki went and arrested one Vereniki while he was inside the police vehicle. Vereniki was brought to the vehicle and was identified by the clothes Vereniki was wearing. Vereniki was then taken to the Valelevu Police Station.*
- b) *He searched Vereniki's pockets at the police station and he found two 'bus cards'*

which were identified by the victim who was in the police station at that time. He tendered the search list he prepared regarding the said search as PE1. He also identified PE2A and PE2B as the 'bus cards' he found that day.

- c) After Vereniki was locked in the station, the same team went to arrest the accused based on the information they received. After they reached Veiraisi, DC Inoke and Constable Josateki went in search of the accused while he remained inside the vehicle. After the other two officers brought the accused under arrest to the vehicle, the accused was escorted to Nasinu Police Station. When the accused was brought to the vehicle, the accused was drunk and he could see injuries on the accused's face. He was unaware as to how those injuries were caused. They were instructed to take the accused to the Nasinu Police Station because the first suspect was already locked at Valelevu Police Station.*
- d) They handed the accused over to the police officers at the Nasinu Police Station. He said that the accused was not threatened or assaulted by the police officers.*

23. The fourth witness for the prosecution was DC 4647 Pita Gaunatalei ("PW4"). He said that;

- a) He interviewed the accused under caution on 04/11/18 in the interview room at Valelevu Police Station. The witnessing officer was Inoke Tuiloaloa (PW5). He tendered the cautioned interview as PE3. The three of them placed signatures after the interview was concluded as the interview was recorded by typing in the computer. He commenced the interview at 1229 hours and suspended it at 1320 hours for the scene reconstruction. The interview was recommenced at 1415 hours and thereafter concluded at 1440 hours.*
- b) He read PE3 and said that all the answers recorded therein were given by the accused. He said that either himself or any other officer in his presence did not threaten or assault the accused to give those answers and that he did not make up any of the answers in PE3. The computer was right in front of the accused and the accused was reading the cautioned interview. He said that the accused was not forced to sign the interview. He said PE2A and PE2B were shown to the accused in relation to Question and Answer 48.*
- c) He was also the Investigating Officer of the case. He said that after receiving information from the victim, a team of officers attended to the scene. They received information that Waisale, Vereniki, Jiuta and Tobua were seen that morning at Veiraisi Settlement moving around in a suspicious manner. He said that the accused was arrested that evening based on the information received from Vereniki that it was the accused who gave the cards to him. He said that the accused was also identified by the victim and later the accused was taken to the Nasinu Police Station and was locked. The accused was brought to the Valelevu Police Station on 04/11/18 and was interviewed under caution after Vereniki's interview was concluded.*

- d) *He said that Vereniki was identified by the victim inside the police vehicle and the accused was identified by the victim when the victim arrived at the police station where the victim pointed at the accused as the person who searched his pockets.*
- e) *During cross-examination he agreed that the accused was not arrested in the evening but in the morning. He said that the PW1 came to the police station on 04/11/18. He initially said that the accused was brought to Valelevu Police Station on 04/11/18 before 11.30am, but later agreed that it is recorded in the station diary that the accused was brought to the station for interview at 11.30am. He said that during the interview, both the accused and him sat in front of the computer. When it was suggested that some questions and answers were already typed on the computer, he said that they are using a format of the interview on the computer, but has to delete the questions before they start a new interview.*
- f) *He agreed that he had the access to Vereniki Vuli's cautioned interview. When it was suggested that the accused had injuries at the commencement of the interview, he said he cannot recall. He said in relation to questions 20, 21 and 22 the accused had informed him that the accused was not suffering from any sickness and the accused refused to go and see a doctor. He denied the suggestion that the accused requested his mother to be allowed to be present during the interview.*
- g) *He said that there will always be mistakes when he is typing the questions because he has to listen and type while thinking of the other questions to ask. He said the name Vereniki is typed in Question 48 by mistake where it should be Waisale. When he was questioned about question 53 where an answer is not recorded, he said that there was an answer, but maybe he didn't type the answer.*
- h) *He said that after the interview was printed, he just had to read the questions that need to be signed and there is no place to add any other questions, and that is why there is no record that the interview was read back to the accused.*
- i) *When it was suggested that the station diary does not indicate that the accused was taken for a scene reconstruction, he said that DE1 which is a copy of the station diary contains only up to 1305 hours, but the interview was suspended for reconstruction at 1320 hours.*
- j) *During re-examination he said that the original station diary is not in court for the purpose of trial because when he called the relevant officer who had the key to the room where the diary is kept, that officer had gone to police stores at Nasese to pick up logistics for the station and that officer could not make it back to the station to make the said station diary available for the trial.*

24. The fifth witness for the prosecution was Badge No. 5090 Inoke Tuiloaloa ("PW5"). He said that;

- a) *On 03/11/18 he was serving at the Valelevu Police Station and a report was received of an aggravated burglary in the morning. After receiving the report, one Vereniki was arrested as the first suspect and then they proceeded to Veiraisi to*

look for the other suspect. He said that he was part of the team that arrested Vereniki. He said that at Veiraisi they conducted a house to house search looking for Waisale and one Jovesa. The third was Vereniki who was already under arrest by that time. He said he went to Veiraisi with Constable Sabua, Constable Josateki and the Crime Officer.

- b) When he first went to the accused's house which was pointed out to him by someone, he was told by who he referred to as 'the small brother', that the accused is not at home. He then left that house but went back within one minute to ask the whereabouts of the accused. Then he saw a person peeping from the house. When he went over to that person and asked the name, he was told that it is 'Waisale'. Then the accused was arrested and taken to Nasinu Police Station. He said that when he arrested the accused, the accused was drunk. He could also see some fresh cuts and old scars on the accused. The fresh cuts were on the face and the hand. When he asked the accused did not tell him where the accused got the injuries from.
- c) The accused was then taken to the Nasinu Police Station and was handed over to the charge room. He said that from the time of arrest until the accused was handed over to Nasinu Police Station, the accused was not threatened or assaulted by any police officer.
- d) He was also the witnessing officer for the accused's cautioned interview. He was present throughout that interview. He said the interviewing officer and him did not make up any answers. He said the accused was reading the cautioned interview while it was being typed in the computer. When he was questioned about the date 10th November 2018 mentioned in question 24 of PE3, he said that it may be a typing error and he checked everything before it was printed. He agreed with the suggestion that if the accused was reading the cautioned interview whilst it was being typed, the accused would have corrected the Interviewing Officer.
- e) During re-examination he said that the answer to question 38 was complete when he checked and when he signed after it was printed, he trusted the Interviewing Officer that the exact copy in the computer and the one that is printed, is the same. He said the answer to question 53 was there when he checked in the computer, but he did not check whether the answer is there before signing it. He also said that in question 57, the interview was read by Waisale and it may be a technical error for the printer or the computer for 'Vereniki' to be written there.

25. The sixth witness for the prosecution was DC 4900 Amrit Lal ("PW6"). He said that;

- a) On 04/11/18 he recorded the charge statement of the accused at the Valelevu Police Station. Accused's mother was present when it was recorded because the accused requested his mother to be present during the recording of the charge statement. It was tendered as PE4. The accused looked normal during the time the statement was recorded and the accused did not complain to him about being assaulted by

police officers or regarding the manner the cautioned interview was recorded.

26. The seventh prosecution witness was Dr. Mere Taulua Bitu ("PW7"). She said that she examined PW1 on 03/11/18 and prepared the medical report tendered as PE5. She had noted injuries on PW1's face as recorded in PE5 and she said that those injuries could have been caused by punching or slapping.
27. The witness called by the defence was one Maciu Cama. He said that;
 - a) *He lives at Qarase Road, Veiraisi. On 03/11/18, the accused came to his house between 7.00am and 8.00am and the accused left his house around 10.00am. The accused is his cousin brother.*
 - b) *During cross-examination he said that he did not tell the police that the accused was a friend but told them that the accused is his cousin brother, when he gave the police statement. He also denied telling the police that the accused left his house at 1.00pm that day. He denied the suggestion that he made up a story with the accused.*

Analysis

28. In this case, the defence does not dispute the fact that PW1 may have been robbed by more than one person on 03/11/18. But they dispute the fact that the accused took part in that robbery. The only evidence presented by the prosecution against the accused in this case is PE3, the cautioned interview of the accused and according to the defence, the said cautioned interview does not contain his answers and it was fabricated by the Interviewing Officer (PW4). The defence also brought a witness who testified that the accused was at his house between 7.00am and 8.00am on 03/11/18 whereas according to PW1 the he was robbed around 8.00am. So it was the position of the defence that the accused was not there at the place of offence at the time of offence, and therefore it was not possible for him to have committed the offence.
29. The prosecution says that the answers recorded in PE3 were given by the accused

and they are true and therefore, based on those answers they have proved beyond reasonable doubt that the accused has committed the offence he is charged with.

30. To prove the offence of aggravated robbery, the offence which the accused is charged with, 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.
31. The first element involves the identity of the offender. The prosecution should prove beyond reasonable doubt that the accused committed the offence.
32. 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. Robbery when committed in the company of one or more other persons, amounts to aggravated robbery.
33. 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.
34. 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.
35. Therefore, in this case, 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.

36. As it was pointed out, in this case, the defence does not challenge the fact that the offence of aggravated robbery was committed on 03/11/18 on PW1. What they challenge is that the fact that the accused took part in committing this offence.
37. Let us take the evidence of PW1. It should be noted that the defence did not challenge the fact that PW1 was robbed on 03/11/18.
38. PW1 did not explain in his evidence how he noticed that three persons approached him as he said that they approached him from behind. He did not come out with any description of his three assailants even though at one point he said that he knew the three iTaukei persons that robbed him. It should also be noted that soon after the alleged incident, PW1 identified one person, Vereniki, as one of his assailants. According to PW1's evidence he did not see or identify the accused at the police station either on 03/11/18 or on 04/11/18 and he did not identify the accused in this case as one of the assailants who robbed him on 03/11/18. He did not say that he went to the police station on 04/11/18.
39. You may recall that the prosecutor in her closing address told you that PW1 said in his evidence that his wallet was stolen on 03/11/18. This is a misstatement of the facts as PW1 never mentioned in his evidence about a wallet. He only said that \$120 cash and two e-ticketing cards were stolen from him.
40. The defence highlighted the inconsistency between PW1's evidence and his statement to police which he admitted making, with regard to identifying Vereniki at Veiraisi Settlement as one of his assailant's. PW1 had told the police that first he pointed at a person whom he identified as one of his assailant's based on the clothes the person was wearing and then the police arrested that person. But his evidence in court was that the police brought a person to him and then he identified that

person as one of his assailants. In his evidence he did not say that he had an opportunity or that he managed to observe and remember the clothes one or all of his assailants were wearing. The explanation for giving this wrong version to police according to PW1 was because he was in shock. Would you accept 'being in shock' as a valid reason for PW1 to make an incorrect statement of that nature in his police statement?

41. PW2 was the police officer who arrested Vereniki and was also part of the team that arrested the accused. He initially said that he did not have any other role to play in this case apart from arresting Vereniki. Then being reminded by the prosecutor he said that he was part of the team that arrested the accused. Again he said that he cannot remember what happened when they went to arrest the accused. Then he said it was DC Inoke who arrested the accused and he also said that the accused was drunk and had injuries on his face.
42. You would note that the person from whom PW2 said that he received the information about the three names (Jone, Vereniki and Waisale) did not give evidence. Therefore, this information PW2 said he received amount to hearsay evidence and it is not admissible in relation to the fact whether one Jone, one Vereniki and one Waisale in fact went past a house in Veiraisi Settlement in a suspicious manner that morning. Because you cannot examine the credibility and the reliability of this person who is alleged to have given the information to PW2 and therefore the veracity of this information, without that person (let us call him "informer") being called as a witness. You cannot determine whether this informer actually saw three iTaukei youth behaving in a suspicious manner or even if the informer saw three iTaukei youth go past him that morning; whether that informer properly identified the three as Jone, Vereniki and Waisale; or who are the exact people this informer had allegedly referred to by those names. You are unable to ascertain whether this informer referred to Vereniki arrested by PW2 when he mentioned the name 'Vereniki' and whether he referred to the accused in this case by the name 'Waisale', even if you believe PW2's evidence regarding this

information received from the informer.

43. Therefore, you cannot consider PW2's evidence to decide whether Vereniki who was arrested by PW2 or the accused whose name is Waisale went past a house in Veiraisi Settlement on 03/11/18 in a suspicious manner.
44. PW3 is the police officer who said among other things that he searched Vereniki and found PE2A and PE2B. He was part of the team that went to arrest Vereniki and also the accused. He clearly said that PW2 and PW5 went to arrest the accused and brought the accused to the vehicle while he remained in the vehicle, though PW2 said that he cannot remember what happened when they went to arrest the accused and that it was PW5 who arrested the accused.
45. PW4 said in his evidence among other things that they (police) were told by Vereniki in whose pockets the police claim that PE2A and PE2B were found, that Vereniki was given those cards by the accused. Remember that Vereniki was arrested as the first suspect in this case and he was pointed at by PW1 as one of the three persons that robbed him. According to what PW4 said, Vereniki had implicated the accused when Vereniki was being questioned as a suspect. Vereniki was not a witness in this case. What Vereniki supposed to have said during his cautioned interview, especially against the accused in this case is not admissible evidence against the accused in this trial. The reason is simple. Vereniki was arrested soon after the alleged incident. When Vereniki was brought to the police vehicle PW1 identified Vereniki as one of his assailants and when Vereniki was searched at the police station, the cards PE2A and PE2B the complainant (PW1) said that were stolen from him were found in Vereniki's pockets. So there is a possibility for Vereniki to implicate someone else to save himself. He had a reason to implicate the accused.
46. More importantly the prosecution had decided not to charge Vereniki in this case and Vereniki was not called as a witness for you to assess for yourself whether in fact Vereniki had told that to the police that the accused gave him PE2A and PE2B

and whether that is true. Therefore, this evidence of what Vereniki had allegedly told the police amounts to hearsay evidence as well.

47. The prosecution should have been careful not to lead that evidence on what Vereniki had allegedly told the police implicating the accused and PW4 being a police officer should have known that such evidence is inadmissible and should not have come out with that evidence when he testified. Therefore, you should disregard this evidence of PW4 on what Vereniki had allegedly told the police implicating the accused.
48. You should also note that DE1 contains the entries of the relevant station diary which was disclosed by the prosecution to the defence. The entries so provided do not cover the duration the cautioned interview was conducted. It was the position of the defence that the accused was not taken for scene reconstruction contrary to what is stated in PE3. The defence challenges that there is no station diary entry to support the position that the accused was taken for such scene reconstruction. The response given by PW4, the Investigating Officer was that the copy of the diary entries does not cover the time the reconstruction was done. He also said that the original station diary is in the station sergeant's room at the police station, but when he called the officer who has the key to that room, that officer was in another location and that is why he had failed to make the station diary available for this trial.
49. As you clearly know by now, the prosecution bears the burden of proving the case against the accused beyond reasonable doubt. In this case, the defence says that the accused was not taken for a scene reconstruction and the station diary of the police station does not have any entry regarding the accused being taken for a scene reconstruction. The prosecution has not provided the station diary entries that covers the time the accused was alleged to have been taken for scene reconstruction and you heard the explanation given by PW4 for not producing the original station diary to court for the purpose of this trial.

50. The complainant did not mention about identifying the accused at the police station as the person who searched his pockets. He did not also mention about visiting the Valelevu Police Station on 04/11/18 contrary to what PW4 said in his evidence.
51. Let us move on to the cautioned interview tendered as PE3. When you deal with this cautioned interview statement, you must decide the following;
- a) Did the accused make the statement in question? That is, did the accused give the answers recorded in PE3. If you are not sure that he made the admissions in PE3, the matter ends there. You should disregard the cautioned interview statement tendered as PE3.
 - b) If you are satisfied that the accused gave the answers recorded in PE3 and gave that statement, then you should decide whether you are sure that the said statement is true. Which means that you should consider the cautioned interview statement tendered as PE3 as you would consider the evidence given by a witness. You may accept the entire statement to be true or a part of it is true or you may consider the entire statement is not true. You may rely only on what you would consider to be true.
52. The defence says that PE3 is a document fabricated by the police and the accused did not give most of the answers, especially the ones that amounts to admissions. The defence had particularly pointed out to question 24 which indicates that the accused was questioned regarding a wrong date which is 10/11/18; question 38 where the answer to that question is not complete; question 48 on page 6 (there are two questions by that same number) where it says that the cards were shown to 'Vereniki'; and question 53 where no answer is recorded; in support of that position that PE3 was simply prepared by PW4 and the accused was made to place his signature. The defence argues that if the accused was given the opportunity to read the record of interview while its being typed as PW4 said, the accused would have pointed out to PW4 regarding those issues in relation to those questions.


53. On this issue whether PE3 is fabricated, the evidence of PW5 who was the witnessing officer is also crucial. According to him, he checked everything on the computer before PE3 was printed out and everything was in order. The answer to question 38 was complete and there was an answer to question 53. When it was printed out assuming that those answers were there, he trusted the Interviewing Officer and he just signed. Therefore, PW5's evidence suggests that there had been a possible tampering with what is typed in PE3. It also suggests that it is a possibility that the accused too may have simply signed without having the opportunity to read PE3, supporting the claim that it does not contain the answers given by the accused.
54. On this same issue whether the accused gave the answers in PE3 or whether it is a fabricated document you may also consider the inconsistencies between PE3 and the evidence given by PW1.
55. One inconsistency is the number of persons who were involved with the offending. PW1 said there was three. PE3 only refers to two. PW1 did not say that his wallet was stolen, but PE3 refers to a wallet being stolen.
56. Another point you may consider is that to question 32 where it was suggested that the accused stole the wallet containing \$120 and assorted cards, the answer was '*there was no money in the wallet only 2 e Transport card*'; but in answer to questions 52 and 55 where it was again suggested that the accused had stolen \$120 the answers have been in the affirmative.
57. Therefore, you may consider the above and any other relevant evidence and should decide whether you are satisfied beyond reasonable doubt that the answers recorded in PE3 were in fact given by the accused and whether they are true.
58. The prosecution called PW6 to point out that the accused had not made any complaint to PW6 about the manner the cautioned interview was recorded or how he was treated by the police officers, when the charge statement was recorded. You

may also note that according to PW6, the accused's mother was present during the recording of the charge statement because the accused requested his mother to be present. However, when it was suggested to PW4 that the accused wanted his mother to be present during the cautioned interview, PW4 said that the accused did not want to exercise his right for a family member to be present.

59. PW7 tendered the medical report of PW1 which was not challenged by the defence. Therefore the fact that the PW1 had those injuries reflected in PE5 is not disputed. However, the evidence of PW7 or the medical report PE5 does not establish any connection between those injuries and the accused.
60. The defence had pointed out that there were several inconsistencies in the evidence presented by the prosecution. You may deal with those inconsistencies and any other inconsistency you may come across, in line with the directions I have already given.
61. May I now direct you on the defence of *alibi*. According to the witness called by the defence, the accused was at his house from around 8.00am on 03/11/18, where this witness said that the accused came to his house between 7.00am and 8.00am that day.
62. Please bear in mind that though an accused raises the defence of *alibi*, there is no burden for the accused to prove that he was elsewhere during the time the offence was alleged to have been committed. The prosecution should still prove that it was the accused that committed the offence and therefore the *alibi* is not true.
63. When you consider the evidence of the accused regarding his *alibi*, if you think that the version of the accused is true or it may be true, then you must find the accused not guilty of the offence.

64. However, you should also bear in mind that you should not assume that the accused is guilty of the offence merely because you decide not to accept his evidence on *alibi*. You should remember that sometimes an accused may invent an *alibi* just because it is easier to do so rather than telling the truth. The main question remains the same. That is, whether you are sure that it was the accused who committed the offence.
65. Any re-directions?
66. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge, against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
67. Your opinion should be whether the accused is guilty or not guilty.




Vincent S. Perera
JUDGE

Solicitors;

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