

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 383 OF 2018

STATE

-v-

ERONI VAQEWA

Counsel : Ms. S. Tivao for Prosecution
Mr. K. Verebalavu for Defence

Dates of Hearing : 22, 23, 24 and 25 June 2020

Date of Summing Up: 26 June 2020

SUMMING UP

Ladies and Gentleman Assessor,

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

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

suggestion as being true. You may take into account those arguments and submissions when you evaluate the evidence.

11. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in applying them.
12. In the course of cross-examination, the Defence counsel referred to previous statements of witnesses recorded by police. A previous statement made by a witness is not evidence in itself unless it is adopted and accepted by the witness under oath as being true. You can of course use those statements to test the consistency and credibility of the witness if you are satisfied that such a statement was made.
13. Documentary evidence is evidence presented in the form of a document. The medical report is an example. In this case the medical report is tendered as an agreed fact. You can accept the contents of the medical report as being true.
14. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. You have seen how the witness' demeanour in the witness box when answering questions.
15. Proof can be established only through evidence. Evidence can be direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. You are also free to draw reasonable inferences in the circumstances of this case if such inferences are based on facts proved by evidence.
16. The Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. Agreed facts in this case are that:
 1. The Accused was caution interviewed on the 19th August 2017 in the iTaukei language by DC Jone Tupua.

- II. The Accused agreed to be part of the ID Parade.
- III. The medical report of Ajay Ashwan Kumar dated 28th February 2017 is agreed to by both parties (attached).
17. Let us now look at the information, a copy of which has been given to you. Please refer to the information. There are 7 counts. You have to consider evidence against each count separately to satisfy yourselves that each count has been proved beyond reasonable doubt.

COUNT ONE

Statement of Offence

AGGRAVATED ROBBERY; *Contrary to Section 311(1) (a) of the Crimes Act 2009.*

Particulars of offence

ERONI VAQEWA on the 27th day of February 2017, at Nasinu in the Central Division, in the company of others, stole assorted properties namely 1 x phone, 1 x Wallet, \$1400.00 cash, BSP card and 1 x Motor Vehicle (Taxi) registration No. LT83, belonging to **AJAY ASHWIN KUMAR** and immediately before stealing, used force on **AJAY ASHWIN KUMAR**.

COUNT TWO

Statement of offence

OBTAINING PROPERTY BY DECEPTION; *Contrary to Section 45 and Section 317 (1) of the Crimes Act 2009.*

Particulars of Offence

ERONI VAQEWA with others, between the 27th day of February 2017 and 28th day of February 2017, at Suva in the Central Division, by deception dishonestly obtained a total of \$1000 from the Bank of the South Pacific (BSP) which was held by BSP to the credit account holder **AJAY ASHWIN KUMAR** in easy card number 5453547 with the intention of permanently depriving **AJAY ASHWIN KUMAR** of the \$1000.

COUNT THREE

Statement of offence

CRIMINAL INTIMIDATION: *Contrary to Section 45 and Section 375 (1) (a) (i) of the Crimes Act 2009.*

Particulars of Offence

ERONI VAQEWA with others, on the 27th day of February 2017, at Nausori in the Central Division threatened to kill **SIKELI VUETI**.

COUNT FOUR

Statement of offence

ABDUCTING WITH INTENT TO CONFINE A PERSON: *Contrary to Section 45 and Section 281 of the Crimes Act 2009.*

Particulars of Offence

ERONI VAQEWA with others, on the 27th day of February 2017, at Nausori in the Central Division, abducted **RESHMA RADHIKA PRASAD** with intent to cause **RESHMA RADHIDA PRASAD** to be wrongly confined.

COUNT FIVE

Statement of offence

ABDUCTING WITH INTENT TO COFINE A PERSON: *Contrary to Section 45 and Section 281 of the Crimes Act 2009.*

Particulars of Offence

ERONI VAQEWA with others, on the 27th day of February 2017, at Nausori in the Central Division, abducted **ASHRIEL TANISHA LAL** with intent to cause **ASHRIEL TANISHA LAL** to be wrongfully confined.

COUNT SIX

Statement of offence

AGGRAVATED ROBBERY: *Contrary to Section 311 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

ERONI VAQEWA on the 27th day of February 2017, at Nasimu in the Central Division in the company of others, stole assorted properties namely \$1,000 cash, a BSP Card, 1 x pair of gold earrings, 1 x gold bracelet, 2 x diamond rings, 1 x i-phone7 Plus, 1 x iPhone 6, 1 x Samsung 6 phone, and a DVR unit belonging to **RESHMA RADHIKA PRASAD** and immediately before stealing, used force on **RESHMA RADHIKA PRASAD**.

COUNT SEVEN

Statement of offence

OBTAINING MONEY BY DECEPTION: Contrary to Section 45 and Section 317 (1) of the Crimes Act 2009.

Particulars of Offence

ERONI VAQEWA with others, between the 27th day of February 2017 and 28th day of February 2017 at Suva in the Central Division by deception dishonestly obtained a total of \$1070 from the Bank of the South Pacific (BSP) which was held by BSP to the credit account holder **RESHMA RADHIKA PRASAD** in easy card number 9132369 with the intention to permanently depriving **RESHMA RADHIKA PRASAD** of the \$1070.

18. Counts 1 and 6 are on Aggravated Robbery. 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; or at the time of robbery, has an offensive weapon with him.

19. The first element involves the identity of the offender. This element has to be established in respect of each count. That is the main issue of this whole trial. The Prosecution must prove beyond reasonable doubt that the accused and no one else, in the company of others, committed these offences.

20. 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.
21. Counts 2 and 7 are on the offence of Obtaining Property by Deception. The elements of Obtaining Property by Deception are as follows:
 - a. The accused;
 - b. By a deception;
 - c. Dishonestly obtained property;
 - d. Belonging to another;
 - e. With the intention of permanently depriving the other of the said property.
22. "Deception" means an intentional or reckless deception, whether by words or other conduct, and whether as to fact or as to law. To deceive isto induce a man to believe that a thing is true which is false.
23. Count 3 on Criminal Intimidation. The Prosecution must establish beyond any reasonable doubts:
 - a. The accused
 - b. Without lawful excuse,
 - c. With intent to cause alarm,
 - d. Threatened another
24. The threat to cause alarm can be inferred from the type of the threat itself and any other relevant facts and consequences. If the victim was frightened by the actions of the accused and his words, the offence is made out. Therefore the actions of the accused and the words uttered to the victim have to be taken into account when deciding if criminal intimidation has been established.
25. I will now direct you as to how you should approach the issue of joint enterprise. An offence may be committed by one person acting alone or by more than one person acting together with the same criminal purpose. In this case, the Prosecution says that the accused committed the

offence in the company of other persons. I must explain to you the liability of a number of people committing a crime together.

26. If several people decide to commit an offence together, and all of them participate and assist each other in doing it, each of them is guilty of the crime that is committed. This is so, even though individually, some of them may not actually do the acts that constitute the offence. 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 a crime together may play different roles to achieve their purpose. The prosecution must prove that the accused took some part in committing these crimes. If you are sure that the offences were committed by more than one person and that the accused acted together with the others to commit these offences and took some part in these offences you should find the accused guilty of the offences as charged.
28. There is a final legal matter I must direct you which is very important. In this case the Prosecution case depends wholly on the correctness of identification of the accused as the offender. The Defence challenges this identification and says that the witness Ajay Kumar is mistaken. The Prosecution relies on the evidence of Ajay Kumar and the identification he did at the identification parade to prove the identity of the accused. In these circumstances I must warn you of the special need for caution before convicting an accused on the correctness of this identification.
29. The reason for this is the danger that a wrong identification will cause a miscarriage of justice and there have been cases where this has happened. It is not a question of a witness being untruthful or dishonest but mistakenly believing the person seen at the crime scene at the crucial time was the accused. With a genuine belief, a mistaken witness can nevertheless be a convincing one. I am not saying that is necessarily the case here. I am explaining the reason for the special care with which you must approach this issue.
30. You must decide whether the evidence of identification is reliable and should be accepted or whether it is unsatisfactory and should be rejected or leaves you in doubt. To do this you must

examine all the circumstances and determine the strength or quality of the identification. It is for you to assess the value of the evidence that has been given.

31. To do this you must closely examine the circumstances in which the identifications came to be made. Generally, this will include such matters as:
 - How long did the witness have the person under observation? Was it a significant period or just a fleeting glimpse?
 - At what distance?
 - In what light?
 - Was the view impeded or obstructed in any way?
 - Was the accused a person known to the witness?
 - Had the witness ever seen the accused before and, if so, how often?
 - How long elapsed between the original observation and any subsequent identification of the accused as that person?
 - How was the subsequent identification made?
32. Such matters as these go to the quality of the identification evidence.
33. The Prosecution adduced evidence in respect of the identification parade conducted by police on the 20 August 2017, nearly 6 months after the alleged incident. Every precaution should be taken by police in this procedure to exclude any suspicion of unfairness or erroneous identification.
34. The Defence says that, in conducting the identification parade, the police have not followed the proper procedure so that it was not fair. In arranging an identification parade, the Force Standing Orders require the police to pick participants from the society with similar physical characteristics such as the built and the age group as the suspect in order to avoid the possibility of the suspect being singled out from the others at the parade. The police must also take all precautions to ensure that the witness does not get an opportunity to see the suspect before the identification parade is conducted. The Defence argues that the proper procedures were not followed by the police. It is for you to decide what weight to be attached to the identification parade. It is burden of the prosecution to prove that the identification parade was conducted in a fair manner.

35. That completes my directions to you on the legal issues.
36. I must also remind you of the evidence given and the cases of both the Prosecution and Defence. In doing this I do not propose going through all the evidence of every witness. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision on this case.

Case for Prosecution

PW 1- Ajay Ashwin Kumar

37. Ajay Kumar is a taxi driver. He said, on 27.02.2017, after completing three jobs early in the morning, he parked his taxi at 'Food 4 Less' at around 8 a.m. opposite the Suva Bus Stand. An i-taukei guy came and sat beside the driver's seat. The passenger asked that he be taken to Maqbool Road to pick some Kava. This passenger was wearing a blue and white Bula T-shirt, 'sulu' and sunglasses.
38. When this passenger instructed him to go to Maqbool Road, he was talking to the passenger and saw the passenger's face. On the way, the passenger wanted to see his grandmother at Sukanaivalu Road in Nabua. He took this passenger to Sukanaivalu Road and, at a roundabout, the car was stopped. The passenger went somewhere. He returned to the vehicle after 5 minutes and sat in the same place. The passenger was still wearing the sunglasses. When the passenger was coming towards him from a distance of 8-10 meters, he observed the passenger for 1 minute.
39. Then he drove the taxi to Maqbool Road on passenger's instructions. He was asked to stop the taxi at a driveway and open the boot. When he went to open the boot, he saw two people coming towards him, one of them carrying a sack. At that time, the passenger was standing beside him, at a distance of about 2 m.
40. When the person with the sack came near the boot, he returned to the driver's door. As he was opening the door, one guy came and grabbed him from behind. The passenger then came and put a cello tape on his eyes and the mouth. He was pushed into to the back seat. Other two sat

on either side, pushing him to the middle. He thought it was his 'last day'. They said: "relax brother, if you cooperate, we won't do anything to you, we just want to use your vehicle."

41. He could not see anything as his eyes were cello-taped. To block the view, they spray painted all the glasses except for the windscreen. They then asked him to go to the boot where his hands and legs were also taped. They took the vehicle and were roaming around for some time. One Indian guy also joined them after.
42. They took his phone and asked him to call his wife to inform that he will be late. They allowed to talk to the wife by cutting the cello tape on his mouth.
43. They asked for money. He told them to take the wallet and the money inside it. It had around \$850. They took week's income of \$360.00 supposed to be given to his boss and the BSP ATM card which was in the wallet. They asked for his PIN. At first he gave a wrong PIN. They came back and punched him. Then he gave them the right one. They had withdrawn \$2,000 from his card. He had two accounts with BSP. They had taken \$1,000 from one account. He recognized his bank statement when it was shown to him.
44. Ajay Kumar said that he had been tied at the back of the taxi for 15 hours. He was blind folded. When a 4th person came into the taxi, they were speaking very slowly. They had some new planning. They were speaking about going to Farm Road. Then they went somewhere. The driver had dropped off three people and had come back. Before they got off the car they tied his hands again. Then he heard an Indian lady crying and saying something to them. A small girl was also crying. They brought the lady and the daughter to the taxi. The lady was saying "leave me" and they were asking for jewelry. They drove the vehicle when the lady and her daughter were in the vehicle. They informed the lady to cooperate with them.
45. They called the lady's father-in-law and demanded \$250,000 from him. When the father-in-law said that he had only \$1000, one person asked to keep that money for the funeral of the lady and her daughter. They were driving and driving and finally parked the vehicle and went somewhere. He managed to free himself and jumped to the driver's seat. He spoke to the lady. She was scared and wanted to reach home. He dropped the lady and her daughter back home at Farm Road. They had told them not to go to the police station, so he directly went to the lady's

home. The police were there already. They took him to the police station and for a medical checkup.

46. After that, he saw the passenger in Nadi Police Station at an identification parade and at the court house. He said he could remember this passenger as he was his last passenger on that particular day. He was asked by a police officer to come to the Nadi Police Station in August 2017. When he went to a police officer, he was explained about the identification parade and taken to a 'bure' at the back of the Station. There were about 10 people standing in the 'bure' at that time. Police officers told him to look at those people and identify the passenger that day. He picked him out. He said that the 10 people had similar features with same built with same skin colour. He pointed at the accused in the dock as the person he identified.
47. Witness said that he was affected by this incident and did not drive taxi thereafter. He showed us the scars on my face.
48. Under cross examination, Ajay Kumar said that he could not remember the physical description of the 3 passengers who gave the first three jobs early in the morning because they were short runs. He admitted that, while driving, he was concentrating on the road and not on the person seated beside him. He admitted that he had no suspicion whatsoever of the passenger prior to the incident. He admitted that he had never seen this passenger before 27 February 2017. He admitted that the identification parade was conducted 6 months after the incident. He admitted that he could not see the passenger's eyes as he was wearing sunglasses. He said that he was 99% confident that the person he picked at the identification parade is the same passenger who boarded his taxi in Suva. He admitted that in the statements he had given to the police, he had never given the physical description of this passenger although he had described the built and the skin colour of the other two people. He said that he was only answering the questions the police officer had asked. He denied the proposition that he failed to give the physical description of the passenger because he could not remember him.
49. He said that he received a call on 19 August 2017 asking him to come to the Nadi Police Station to take part in an identification parade to identify the passenger who boarded his taxi on 27 February 2017. Prior to the ID parade, he knew that a suspect was in custody. He denied that the suspect was shown to him before the identification parade. He took 5-8 minutes and went to each person lined up in the parade before the identification was made. He said that at that

time of the identification parade, the person he identified had long hair and a beard and was not wearing sunglasses whereas the passenger who boarded the taxi had short hair and was clean-shaven.

50. Ajay Kumar said that all the 9 people had beards, were wearing 3/4 trousers, and barefoot. He denied that the only person wearing a 3/4 in the parade was the accused.
51. Under re-examination, Kumar said that he gave the physical description of the passenger to police although none of the statements recorded what he said.

PW2 - Reshma Prasad

52. Reshma said that she is married to Kunaal Ravindra Lal with one daughter Ashriyal Lal, 8 years of age. She was working for Auto World Trading Fiji Limited.
53. In 2017, she was residing at Farm Road. On 27th of February, 2017, she returned home with her daughter at around 8.30. p.m. She noticed that her gate was opened and the lights for the terrace was off. She didn't see the security Sikeli there. It was raining. She went inside the house to get the umbrella for her daughter.
54. When she went outside to get her stuff from the car, two people attacked her. They held her hands and mouth and put her in her car. It was dark. These men were wearing masks. After that, one Toyota Prius taxi came. They put her and her daughter in the taxi and went inside the house. The man in the taxi spoke in Indian accent. He said he is very dangerous. He demanded money. He was also wearing a mask.
55. They cut the DVR and took the cameras. They took the purse from the car and some of her jewelry from top of the drawer. Others finished everything inside the house and came to the taxi. They took her and her daughter in the taxi. She was scared. She couldn't even shout or ask for help because they told her not to shout or else they will kill her and her daughter. They blindfolded her and her daughter.
56. They asked her to call her husband for ransom. When she said that her husband's phone is with her, they asked her to call the father-in-law. When father-in-law answered her call, she said 'we

are being robbed; they want money. The Indian guy took her phone. He spoke to the father-in-law and asked for \$250,000. Father-in-law said that he didn't have that much money. Then he smashed all the three phones and threw them away. The Indian guy told her that the driver of the taxi is at the back. Then they left them at World Harvest Centre.

57. When they had left, they removed the blindfold. The driver drove them home. She made a statement to police. She said that her rings, daughter's bracelet, phone, some cash and ATM card from her wallet had been taken. She gave them the PIN number because she was scared. They had withdrawn \$1000 from the BSP joint account 9132369 with her husband. She recognized her bank statement when it was shown to her.
58. Reshma said that the Indian guy hit her on her face when they were trying to put her in the car. She knew that there was a knife inside the vehicle. They were with the men all the time in the moving vehicle and could not leave at any time. The incident affected her and her daughter mentally. She was so stressed and depressed.

PW3 Sikeli Vueti

59. On 27th February 2017, Sikeli was working as a guard and a cleaner at Reshma and Kunal's residence. At 8 o'clock that night, 3 people entered armed with cane knives. They came straight to him and they warned not to shout. He could not recognize their faces. He could not do much because he saw the knives, and also, they tied him up, tied his legs and hand at the back and they taped around his mouth. Then they lifted him and put him under the floor.
60. They only warned him not to shout and keep still. They did not threaten to kill. One of them stood there to guard him. Only thing he could notice after that was that he could hear their daughter crying. He managed to free himself, and informed the neighbour what was going on. When the neighbours came, those people had left.

PW4 ASP Nagata

61. On the 20th of August 2017 ASP Nagata was based at Nadi Police Station. He was asked to conduct an ID parade involving the suspect Eroni Vagewa. He caused 9 people with the same build and same age group of the suspect to be gathered from a nearby village. When those 9

men were brought to the station, he explained to them about the identification parade and gave them necessary instructions.

62. The ID parade was conducted at the Nadi Police 'Bure'. 9 people were lined up from right to left in sequence. He ordered Leone that the suspect Eroni Vaqewa be escorted into the parade. The suspect was briefed about the purpose of the ID parade. The suspect did not have any objection to the parade and of those 9 men standing on the parade. The suspect was given an opportunity to change his clothes, if he wish to do so. He asked the suspect to stand up in the line up anywhere of his choice. The suspect stood in between No. 4 and 5.
63. He then called out to the Constable Timoci if the witness could be escorted to the parade. When the witness arrived he brief the witness and gave the options as to how the identification should be done. The suspect walked along the line-up to the end. He came back and pointed out the suspect Eroni Vaqewa who was standing between the 4th and 5th persons. At this particular point in time, only he with the 9 men, the suspect and the two escorting officers were present in the 'bure'. After the identification was done, Constable Leone escorted the suspect back.
64. Under cross examination ASP Nagata admitted that the suspect was wearing a ¾, and a T-shirt. He couldn't recall if the suspect was wearing shoes. He said that all the 9 people were wearing T-shirts and ¾ shorts.
65. ASP Nagata denied that the ID parade was not conducted in a fair manner. He agreed that he could not confirm that the suspect and the witness did not see each other in the police station.
66. Under re-examination Nagata said that he classified all the 9 participants were of similar the same age group as the suspect on the basis that they looked alike on that age group.

PW5 Ravin Lal

67. Ravin Lal is the father-in-law of Reshma Prasad. On 27 February 2017, in the evening he received a call from Reshma Prasad and was told that she and her daughter had been kidnapped demanding money. One of them then took the phone and demanded \$250,000. Lal replied that he did not have that much money and offered to give \$1000. Thereafter the telephone was cut off. They again called from Reshma's phone and demanded \$250,000 to release Reshma and

her daughter. He explained his inability to pay such a big amount immediately. Then he went to Nabua and Nakasi police Stations and finally complained to the Strike Back Unit.

PW6 DC Leone

68. On the 20 August 2017, when Leone was based at the Nadi Police Station, he was tasked to escort suspect Eroni to the identification parade. Prior to the ID parade, Eroni was at the CID office.
69. Upon receiving instructions from ASP Nagata, he escorted Eroni to the police 'bure' where the ID parade was conducted. There were already 9 people lined up in the 'bure'. ASP Nagata briefed the suspect and gave the opportunity to stand in the lineup at any place of his choice. On ASP Ajay's instructions, PC Timoci then escorted witness Ajay Kumar to the 'bure'. Nagata briefed the witness on the process and asked the witness to point out the suspect. The witness, having observed to the end, pointed out the suspect Eroni.
70. Under cross-examination, the witness said that all the nine participants were nicely dressed and were wearing 3/4 shorts and T-shirts. He could not recall if they were wearing shoes. He admitted that he was not with the suspect before the escort and he could not say if Ajay and the suspect saw each other. He admitted that in his statement he had not mentioned that all the 9 participants were wearing 3/4 shorts.

PW7 PC Timoci

71. PC Timoci was tasked to escort the witness Ajay Kumar to the ID parade. Ajay was in the charge room where he received instructions at around 3.30 pm to escort the witness to the 'bure' which was located at a distance of about 50 meters. He handed the witness over to ASP Nagata. He saw 10 people with similar features lined up in the 'bure'. ASP Nagata briefed the witness. The witness having observed the lineup pointed out the suspect. Only officers present during the parade were ASP Nagata, Leone and himself.
72. Under cross-examination, the witness admitted that he was not with the witness Ajay Kumar. He could not say if the witness and the suspect saw each other.

PW8 PC Shelvin

73. On the 27th of February, 2017 Shelvin was based at the Crime Scene Investigation Unit as the crime stand-by. He received a report from the station about a break-in case at Farm Road. He visited the scene between 8pm to 9pm and conducted the investigation. He recorded statements from Ajay and Sikeli.
74. He was appointed as the Investigating Officer of the case. He was informed by Ajay and Reshma that their ATM cards with their PIN numbers were also taken by the culprits. He then prepared a search warrant and went to BSP Legal Department and uplifted the copies of bank statements of Ajay, Reshma and her husband's joint bank account statements to confirm the withdrawals. He obtained the withdrawal statement from the 25th to 28th of February 2017 showing the time and the date of the withdrawals and prepared a search list and compiled them in a docket. He recognized the statements he uplifted from the bank when they were shown.
75. Under Cross-examination, Shelvin admitted that when he recorded Ajay's statement, Ajay did not give the physical description of the passenger who boarded his taxi on 27 February 2017. He asked about the physical features of the passenger. Only description Ajay gave was about passenger's clothing. Then Ajay did not say that that the passenger had a fresh hair cut or was clean shaven. He said if he told, he would have recorded it.
76. Under re-examination, Shelvin said that when he asked about the physical features, Ajay's response was that he could not remember his face and his features because he did not see it.

PW9 Devina Chand

77. Devina was based at the Operation Centre of Bank of South Pacific. She tendered the transaction history listings for 27 and 28 February 2017 involving Ajay Ashwin Kumar's bank account 5453547 generated by the system of BSP bank. She also tendered transaction history of Kunal Ravindra Lal and Reshma Radhika Prasad joint account 9132369 for the same period. She said that the withdrawals had been done from ATM 's at Cost-u-less and World Harvest Centre, Nasinu using the ATM cards and PIN's issued by the banks to Ajay Kumar and to Mr. Kunal and Ms. Reshma Prasad. She said that no request for a CCTV footage was made in the search warrant.

PW 10 -DC Jone Tupua

78. In 2017, Jone was based at Nakasi Police Station CID. He was one of the investigators in this case. The suspect Eroni Vagewa was arrested in the Western Division in a different case. He conducted the caution interview of the suspect at the Nadi Police Station 'bure'. The suspect was with him before the ID Parade. He suspended the interview for the ID Parade which was conducted at the same venue. He was informed that Eroni Vagewa was identified by the victim at the identification parade. After that he concluded the interview.
79. In cross examination, Jone said that the 'bure' is 150 to 200 meters away from the police station. He said that this crime had been pending unresolved for long time and the Crime Officer from Strike Back Team was detailed to look into serious cases.
80. He admitted that no admissions were made by the suspect in the cautioned interview. He was also present at the 'bure' during the ID Parade. He took a call on 19 August 2017 and informed Ajay to come to Nadi Police Station for him to identify the person who hired the taxi from Suva to Maqbool Road. He had never met Ajay before the ID parade. He said that Ajay, at a verbal communication, did give him a physical description of the first passenger who boarded his taxi but, he did not take it down. According to the description given, the passenger was a Fijian guy with big built; by looking at the face, Ajay said, he could identify the passenger.
81. That was the case for the Prosecution.
82. At the close of the Prosecution's case you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case they would be cross-examined.
83. The accused elected to remain silent. That is his right under the Constitution. He is under no obligation to prove his innocence or prove anything at all. Burden of proof remains on the prosecution throughout. You must not infer that the accused remained silent because he was guilty.

Analysis

84. As you listened to the closing remarks by the Counsel, you would appreciate that there is no dispute that the offences alleged in the information were committed against the complainants, Ajay Kumar, Reshma, her daughter and Sikeli on the 27 February 2017. The only dispute is with regard to the identity of the accused. That is entirely a matter for you to decide.
85. The accused completely denies that he took part in these offences. The Prosecution says that this was not a fleeting glimpse case. It heavily relies on the identification evidence of Ajay Kumar and the subsequent identification alleged to have been done by the same witness at the identification parade. Defence takes up the position that the complainant Ajay was mistaken when he identified the accused as one of the culprits. You must consider the identification evidence carefully in terms of the directions I have given to you. You must bear in mind that even an honest witness is prone to make mistakes.
86. The circumstances of the identification evidence are that the observation of the offender was done by witness Ajay Kumar after 8 am in broad daylight. According to his evidence, the passenger who boarded his taxi at 'Food for Less', had straight away sat on the front passenger seat, right beside him, at his arm's length. Ajay Kumar had never seen this passenger before and was a complete stranger to him. The passenger had been seated in the same position for nearly 30 minutes while Ajay Kumar was driving the taxi from Suva to Sukanivalu Road and from there to Maqbool Road where he was eventually blindfolded. Ajay Kumar said he observed the passenger for 10 minutes. This observation had been done while receiving instructions in the moving taxi and also when the passenger got off on two separate occasions firstly at Sukanivalu Road and secondly, when he went to open the boot at Maqbool Road.
87. The passenger was wearing sunglasses at all times. Ajay Kumar admits that he could not see the passenger's eyes because the sunglasses were blocking his view. While on the steering wheel, Ajay Kumar was concentrating on the road. He had no suspicion whatsoever by then of this passenger and therefore had no reason to observe the passenger's face carefully. At Sukanivalu stop, when the Passenger was walking towards the taxi a distance about 8 meters, Ajay Kumar said he observed passenger's face for about one minute. He got this opportunity because the passenger was on the phone.

88. Ajay Kumar concedes that he would not remember the passengers who had given the first three jobs on that morning because they were on 'short runs' whereas this particular passenger took a long run and that being the reason for his clear recollection.
89. Ajay Kumar was summoned to the identification parade in August 2017. Approximately six months had elapsed between the original observation and the subsequent identification. Ajay Kumar walked up and down along the line-up and took 5-8 minutes to pick out the suspect. He said he was 99% sure that he picked the right person. Accordingly, his margin of doubt is 1%. He did not explain why he was confident only of 99% and not 100%. The State Counsel attributed 1% doubt to the sunglasses that were blocking the view of the passenger's eyes. It is up to you to decide if this 1% doubt entertained by the witness is sufficient enough to doubt his whole identification.
90. The suspect Ajay Kumar had identified at the identification parade had grown hair and a beard whereas the passenger who boarded the taxi had short hair, after a fresh hair-cut, and was clean-shaven, without a beard. Ajay Kumar had made three statements to police, first one immediately after the incident on the 28 February 2017, second one on 7 March 2017 and the third on the day of the identification parade. He admitted that he had only given a description of clothing and had not given the physical description of the passenger in any of those statements. He also admitted that in his statement dated 7 March 2017 he had given a physical description only of those who subsequently joined the first passenger. In his explanation he said that he was only answering questions posed by the police officer.
91. DC Shalvin is the officer who recorded Ajay Kumar's first statement. He said that the statement was recorded in a narrative form and that he recorded everything what was said. He further said that, when asked to describe the physical features of the passenger, Ajay Kumar said he could not remember the face and his features. DC Jone who caution interviewed Ajay Kumar said that a physical description of the passenger was in fact given by Ajay Kumar. However, he did not say exactly when (the date) this description was given. He admitted that the description given was not recorded anywhere. The Defence Counsel says that the Prosecution's evidence on this crucial point is inconsistent and therefore be rejected. It is up to you to decide what weight you should attach to this evidence.

92. The Defence alleges that the identification parade was not properly conducted and therefore not fair. ASP Nagata admitted that he was not involved in selecting the villages for the identification parade but he ensured that all of them had similar physical and clothing characteristics as the suspect. He admitted that he could not confirm that the suspect and the witness saw each other at the police station. Escorting officer Leone said that he was not with the suspect before (the suspect) was escorted to the 'bure' and therefore he could not confirm whether the suspect and Ajay Kumar had seen each other. DC Jone said the suspect was with him at the 'bure' where the interview was conducted. He also said that he was present at the 'bure' even when the identification parade was being conducted. You must be sure that the Ajay Kumar and the accused did not see each other before the identification parade was held. If you are satisfied that the identification parade was not conducted properly and fairly you must not give any weight to it.
93. If after a consideration of all the evidence the quality of the identification remains good the danger of mistaken identification is lessened. Taking into consideration the directions I have given to you, you decide if the complainant Ajay Kumar is an honest witness and whether he positively identified the accused.
94. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused is not required to prove their innocence or prove anything at all. If you have a slightest doubt about the identification evidence, you must give the benefit of that doubt to the accused.
95. That concludes my Summing Up of the law and the evidence in this particular trial. We have now reached the stage where you must deliberate together and form your individual opinions on whether the charges have been proved against the accused. On your return you will be asked to separately state in Court whether the accused is guilty or not guilty on each count.
96. Would you please now retire to consider your opinions? When you have made your decisions would you please advise the Court clerk and the Court will reconvene to receive your opinions?

97. Any redirections?




Aruna Aluthge
Judge

At Suva

26 June 2020.

Counsel: Office of the Director of Public Prosecution for Prosecution
Office of the Legal Aid Commission for Defence