

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

Date of Hearing : 22, 23, 24, 25 June 2020

Date of Summing Up : 26 June 2020

Date of Judgment : 29 June 2020

JUDGMENT

1. The Accused was charged on the following information and tried before three assessors.

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 Nasinu 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.*

2. The Assessors expressed a unanimous opinion that the Accused is 'not guilty' on each count.
3. Having reviewed evidence led in trial with the directions I have given in my own Summing Up, I deliver my judgment as follows.
4. The Prosecution called 10 witnesses. At the end of the Prosecution's case, the Accused was put to his defence. The Accused exercised his right to remain silent.
5. There is no dispute that the offences alleged in the information were committed on the 27 February 2017 against the complainants. The only dispute is with regard to the identity of the Accused.
6. The Accused completely denies that he took part in these offences. The Defence takes up the position that the complainant Ajay Kumar was mistaken when he identified the Accused as one of the culprits.
7. The Prosecution 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. It says that this was not a fleeting glimpse case and the identification done was beyond reproach.
8. In my Summing Up, I directed the Assessors on Turnbull Guidelines. The Assessors were not satisfied that the witness Ajay Kumar was not mistaken. I agree with their opinion which is available on evidence.
9. The circumstances of the identification evidence are that the observation of the offender was done after 8 am, in broad daylight. According to Ajay Kumar's evidence, the passenger who boarded his taxi at 'Food 4 Less', had straight away sat on the front passenger seat, right beside him, at his arm's length, and started giving directions as to his destination. Ajay Kumar had never seen this passenger before; he was a complete stranger. The passenger had been seated in the same position for nearly 30 minutes while Ajay Kumar was driving the taxi from Suva to Sukanaivalu Road and from Sukanaivalu Road to Maqbool Road until he was blindfolded at

Maqbool Road. Ajay Kumar said he observed the passenger for 10 minutes. This observation had been done while receiving instructions from the passenger in the moving taxi and when the passenger got off on two separate occasions, firstly at Sukanaivalu Road, and secondly when he went to open the boot at Maqbool Road.

10. 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. He admits that, while on the steering wheel, he was concentrating on the road. He further admits that he had no suspicion whatsoever of this passenger and therefore had no reason to observe the passenger's face carefully. At Sukanaivalu stop, the passenger was walking towards the taxi from a distance about 8 meters. Ajay Kumar said he was observing passenger's face for about one minute. The passenger was still wearing sunglasses and was on the phone talking to someone.
11. Ajay Kumar concedes that he would not remember after six months the passengers who had given him the first three jobs on that particular morning because they were on 'short runs'. This particular passenger took a long run and that being the reason for his clear recollection.
12. The alleged incident happened on 27 February 2017. Ajay Kumar was summoned to the identification parade on 20 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 as long as 5 - 8 minutes to pick out the suspect. It seems that the identification had not been easy for him. He described his difficulty in his evidence. He said that the suspect he identified at the identification parade had grown hair and a beard whereas the passenger who boarded the taxi was a clean-shaven man with short hair and was wearing sunglasses. There are marked differences between the face he had first observed and the one he pointed out at the identification parade after six months.
13. Ajay Kumar 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%. If he was 100% confident, he would not have taken such a long time to identify the suspect.
14. 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. In those statements, he had only given a description of clothing and not given a physical


description of the passenger. However, in his statement dated 7 March 2017 he had given a physical description of other two passengers who subsequently joined the first passenger.

15. In his explanation about this important omission, the witness said that he was only answering questions posed by the police officer. However, DC Shalvin who recorded Ajay Kumar's first statement said that the statement was recorded in a narrative form and that he recorded everything that was said by the witness. 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.
16. 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. According to the description he received, the passenger was a fat i-taukei man. Before the assessors was an i-taukei man but he was not a fat guy. The Prosecution's evidence on this crucial point is inconsistent and therefore be rejected.
17. The Defence alleges that the identification parade was not properly conducted and not fair. The Force Standing Orders require the police officers to take all precautions to ensure that the witness does not get an opportunity to see the suspect in the police station before the identification parade is conducted. ASP Nagata who conducted the identification was an experienced police officer. He admitted that he could not confirm if the suspect and the witness saw each other at the police station. Escorting officer Leone also 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 at the police station.
18. DC Jone was the Interviewing officer and one of the investigators of this case. His team at Nakasi Strike Back Unit had taken over the investigations of long overdue unresolved serious cases and this was one of them. He was obviously under pressure to resolve this serious case whose victims were wealthy businessman, Ravin Lal, his daughter-in-law and granddaughter. Ravin Lal described how he had to go from one police station to another and finally to Mr. Luke at the Strike Back Unit to get justice done. It is in this context that DC Jone had gone to the Nadi Police Station to conduct the caution interview of the Accused who was already in police custody for another matter. He is the one who had informed witness Ajay Kumar to be present at the Nadi Police Station to identify the passenger who boarded his taxi six months

ago. This message had been sent when the caution interview of the Accused was also fixed at the same venue for the same period of time.

19. DC Jone said that the suspect was with him at the 'bure' for the interview. He further said, having suspended the interview, he released the suspect for the identification parade. He confirmed that he was present at the 'bure' even when the identification parade was being conducted. This evidence is contrary to what ASP Nagata and Leone said. DC Jone did not say what he was doing at the 'bure' at that time. It is highly improper for an investigator/interviewer who was tempted to resolve a long overdue case to be present during the course of identification parade. I am not satisfied that the identification parade was conducted properly and fairly.
20. For these reasons, I accept the unanimous opinion of assessors. The Prosecution failed to prove its case beyond a reasonable doubt.
21. I find the Accused 'not guilty' on each count. The Accused is acquitted and discharged accordingly.




Aruna Aluthge
Judge

At Suva

29 June 2020.

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