

IN THE HIGH COURT OF FIJI AT LAUTOKA
[CRIMINAL JURISDICTION]

CASE NO: HAC. 149 of 2017

BETWEEN : **STATE**

AND : **1. SAULA LALAGAVESI**
2. APAKUKI SOWANE
3. JOSEPH NONU

Counsel : *Mr. Tuenuku T. for State*
: *All Accused appear in person*

Hearing on : *7th, 19th & 20th August 2020*
Summing up on : *21st August 2020*

SUMMING UP

Lady and gentlemen assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused are guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the Assessors of facts.
2. As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important golden principals of prudence. To wit;
 - i) If a person has committed an offence, he should be meted out with an adequate punishment.
In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused have committed the alleged offence, you should not find them guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty, let us proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room. 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.
4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments for the prosecution and the defense are not evidence. A suggestion made during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made in addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
5. A statement made by a witness to the police 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.
6. 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 anyone else. Your emotions should not influence your decision.
7. 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 behavior 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, a part or none of any witness' evidence.

8. 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 and also the difficulties in relating those facts they remember in this environment. Sometimes we honestly forget things or make mistakes regarding what we remember.
9. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his 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 between the evidence given by different witnesses. This is how you should deal with inconsistencies. 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. 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.
10. 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 the witness is a matter for you to decide.
11. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
12. 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. It is up to you, how you assess the evidence and what weight you give to a witness' testimony.
13. 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 proved. You

should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there is more than one reasonable inference to draw, for as well as against the accused, based on the same set of proved facts, then you should draw the most favorable inference to the accused.

14. 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 each of the accused is guilty and the accused are not required to prove that they are innocent. The prosecution should prove you the guilt of an accused beyond reasonable doubt in order to find him guilty. You must be sure of the accused person's guilt.
15. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offences against the accused beyond reasonable doubt. Having carefully considered the evidence if you have a reasonable doubt on whether the prosecution has proved a particular element of an offence against the accused, then you must find the accused not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
16. You are not required to decide every point the parties in this case have raised. You should only deal with the offences the accused are charged with and matters that will enable you to decide whether or not the charges are proved against the accused.
17. 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 a must.
18. Let us now look at the Information. The Director of Public Prosecutions has charged the accused of the following 3 offences;

COUNT 1

Statement of Offence

AGGRAVATED ROBBERY: contrary to section 311(1) (a) of the Crimes Act 2009.

Particulars of Offence

Saula Lalagavsesi, Apakuki Sowane, Joseph Nonu and others on the 14th day of April 2017 at Lautoka in the Western Division, robbed Anchorage Beach Resort of \$35,776.40 cash, the property of Anchorage Beach Resort.

COUNT 2

Statement of Offence

AGGRAVATED ROBBERY: contrary to section 311(1) (a) of the Crimes Act 2009.

Particulars of Offence

Saula Lalagavsesi, Apakuki Sowane, Joseph Nonu and others on the 14th day of April 2017 at Lautoka in the Western Division, robbed Nacanieli Cakacaka of 1 x Alcatel mobile phone valued at \$49.00, 1 x brown Knapsak bag valued at \$45.00, cash of \$30.00 and a USB valued at \$12.00, all to the value of \$136.00, the property of Nacanieli Cakacaka.

COUNT 3

Statement of Offence

AGGRAVATED ROBBERY: contrary to section 311(1) (a) of the Crimes Act 2009.

Particulars of Offence

Saula Lalagavsesi, Apakuki Sowane, Joseph Nonu and others on the 14th day of April 2017 at Lautoka in the Western Division, robbed Ratu Masivesi Seru of 1 x Samsung J5 mobile phone valued at \$650.00, the property of Ratu Masivesi Seru.

19. To prove the offence of Aggravated Robbery the prosecution must prove the following elements beyond reasonable doubt.
 - a) the accused;
 - b) committed robbery; and
 - c) at the time the robbery was committed,
 - the accused was in the company of 1 or more others; or
 - had an offensive weapon with him.
20. The first element involves the identity of the offender. The prosecution should prove beyond reasonable doubt that the accused committed the offence and no one else. This is the element contested in this trial. The stance of the accused is that they did not commit the alleged act. Though the accused do not contest them the prosecution has the burden of proving all the elements of the alleged offences. Therefore, I will explain them in little detail.
21. A person commits robbery if he;
 - immediately before committing theft; or
 - at the time of committing theft; or
 - immediately after committing theft,

uses force or
threatens to use force
on another person with intent to
commit theft or
to escape from the scene.

22. A person commits theft if that person;
Dishonestly;
Appropriates the property belonging to another;
With the intention of permanently depriving the other, of that property.
23. The element 'dishonestly' is about the state of mind of the accused. So is the element, 'intention to permanently deprive'. No witness can look into the mind of the accused and say what it was at the time of the incident. Therefore, inferences may be drawn from the conduct of the accused, with regard to an accused's state of mind.
24. 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. In law, property belongs to a person if that person has possession or control of the property.
25. Robbery becomes aggravated robbery, if the accused was in the company of one or more persons at the time of committing the robbery or had an offensive weapon with him.
26. Having considered the evidence, if you are of the view that a certain element set out above was not proved by the prosecution beyond a reasonable doubt, you must give the benefit of that doubt to the accused and find him not guilty.
27. The following were admitted as the agreed facts by the prosecution and the defense. You have to consider these as already proved.
 - (1) That Saula Lalagavesi, Apakuki Sowane and Joseph Nonu are the accused persons in this case.
 - (2) That complainants are Anchorage Beach Resort, Nacanieli Cakacaka and Ratu Masivesi Seru.
 - (3) that on the 14th of April 2017, masked men entered and robbed the front office of the Anchorage Beach Resort.
 - (4) That Nacanieli Cakacaka and Ratu Masivesi Seru were doing nightshift on the 14th of April 2017 at the Anchorage Beach Resort.
 - (5) That Nacanieli Cakacaka is a receptionist and Ratu Masivesi Seru is a security Guard.

- (6) That while Nacanieli Cakacaka and Ratu Masivesi Seru were on duty on the 14th of April 2017, masked men entered the Anchorage Beach Resort with cane knives and iron rod.
- (7) That Nacanieli Cakacaka was threatened by the masked men to give them the key to the safe which they opened and took \$35,776.40.

28. We all heard and saw the entirety of the evidence given by the witnesses. However, now I will briefly outline some of the evidence given in this case.

Summary of the evidence

29. The first witness (PW1) called on behalf of the prosecution was Mr. Atish Ratnesh Div. His evidence was that;
 - (a) He is the operations manager for the last 6 years at the Anchorage Beach Resort.
 - (b) On the 14th of April 2014, while at home he has received a call at 3.00am from Mr. Naca at the front office. He has informed of a robbery at the front office. He has rushed there immediately.
 - (c) The police officers were already there and Mr. Naca was seated looking shocked. He saw the locker opened and papers scattered around. There was nothing inside the safe.
 - (d) He was the accountant of the resort too. Following day he has he has calculated that about \$35,700.00 was robbed from the hotel.
30. The 2nd witness called by the prosecution was Mr. Nacanieli Cakacaka. In his evidence he said that;
 - (a) On the 14th of April 2017 while at duty at the front desk two robbers came in and went straight to the security guard and threatened him to not to move. He has seen an axe and a pinch bar with them. After a while another 3 came in and altogether there and been 5 robbers altogether. One of the robbers came to him and that person seems to be the leader as he was giving directions to the others.
 - (b) He has asked for the keys and the witness has given them to him as he had a cane knife with him. They have opened the safe and the till and taken the money from them. The robbers wanted to tie them up.
 - (c) By that time the rest of the security guards of the resort have taken notice of the incident and having come there, pelted stones at the robbers and the robbers have run away.
 - (d) The robbers have robbed his knapsack, his mobile phone and his wallet containing \$30.00. His knapsack was brown in color. The faces of the robbers were not seen by him as they were covered with scarfs. He has called and informed the police and the financial controller of the incident.

31. The 3rd witness called by the prosecution was Mr. Ratu Masivesi Seru. His evidence was that;
- (a) When the masked men entered the Anchorage on the 14th of April, 2017 he was at the front desk.
 - (b) At around 2.20am, three masked men came in and out of them two came to him while the other threatened the receptionist. They tied his hands to his back with a cloth and the other holding a cane knife went to the reception. Mr. Nacanieli was at the reception.
 - (c) Then they were taken to the back of the reception by the robbers and asked to sit down and to be quiet. After some time the robbers did their work and left. He could not see their faces as they were wearing masks. They have taken his Samsung J6 mobile phone with them.
32. The next witness (PW4) called by the prosecution was Mr. Josefa Vulaiqe. The prosecution case rests entirely on his evidence. As his evidence is very important, you should consider his evidence and his demeanor very carefully in deciding on the reliability and the credibility of his evidence. His evidence is that;
- (a) In 2017 he was driving a private car transporting passengers.
 - (b) on the 13th of April 2017, while he was at a job, transporting some passengers, he has received a call from around 1.00am in the night, from a person named Sachin, to pick up some passengers from Musuniwai and to take them to Vuda.
 - (c) Sachin has told him to take Kelevi, Saula Lalagavesi, and two coming from Suva, Joseph Nonu and Apakuki.
 - (d) Then he has gone to Sachin's place and Sachin has directed him to Musuniwai Street. At there, he has picked up 5 persons, namely Kelepi Ratu, Joseph Nonu, Saula Lalagavesi, Apakuki and another Apakuki.
 - (e) He knows Saula Lalagavesi as he has met him several times in Lautoka. He came to know Joseph Nonu from the time of the incident. Kelepi introduced him to the witness at the time they got into his car at Musuniwai. He came to know Apakuki too at that time on the introduction of Kelepi. He knew Kelepi as they used to live in the same area in Kashmir.
 - (f) He noticed one person holding to an Iron rod or wood, but on the way to Vuda they have picked up bag containing some items at Field 40 area. At Saweni, Apakuki (not the 2nd Accused) got down and a person called Tuivawa, has got into the vehicle.
 - (g) Then they have gone towards the Anchorage and Kelepi and the rest of the passengers got down beside the fence of the Anchorage Hotel and was asked to come back and pick them when called. He has gone and had a BBQ at the Caravan at Uni Fiji and after about ½ an hour, he has received a call to pick them back. When he went there they were standing there with the weapons, cane knife, Axe and the iron rod. Saula was holding on to a white sack. They have got

into the vehicle and come back on the tram line to Saweni. Tuivawa has got down at Saweni with the weapons and he has come with the rest to Field 40. At there, they all have got down and given him a fare of \$50.00 and Saula has threatened him to not to tell anyone.

- (h) He admits giving two statements to the police. The witness admits that in the 1st statement, he gave the name of the 2nd accused, including his second name, Sowane. However, the witness admits that he is unaware of the 2nd accused's 2nd name. He admits that he has given it as told by the police. The witness admits that a person named Kelepi Ratu was the leader who sat in the front passenger seat of his car and gave directions. It should be noted that name does not transpire in the witnesses' statement to the police. His explanation was, though he has given that name to the police, police has not taken it down.
 - (i) The witness admits that he gave the names of the accused in his statement as the police gave those names to him and wanted him to mention them, in his statement.
 - (j) The witness identifies the three accused. The witness states that they were travelling with him for close upon an hour and saw their faces well. Therefore it is not a fleeting glance and the identification of a known person is much more reliable than a fleeting glance. Still it is all right for you to consider the length of observation, lighting conditions distance between them etc. in considering the accuracy of the identification. However the main issue you will have to decide would be on the credibility and the reliability of this witnesses' evidence.
33. The PW4 answering the cross-examination by the accused states;
- (a) He did not informed the police of the incident because of the threat made by the Saula. The witness fails to give a clear answer to, before the alleged threat, why couldn't he report the matter. Further, the witness states that he knew Saula before knowing Sachin. It is inconsistent with his statement where he stated that he came to know Saula through Sachin. The witness admits that he has not mentioned the names of Kelepi Ratu and the Apakuki who got down at Saweni in his statement though they are well known to him.
 - (b) The witness denies giving any affidavit that police saying that they threatened him to sign the statement. Later admits signing such at the prison, on the insistence of the 1st accused. When such an affidavit is shown the witness denies his signature there. Later he admits that he signed it.
 - (c) In answering the cross examination by the 2nd accused, the witness states that he has never met the 2nd accused prior to the incident and 2nd accused was unknown to him previously. It is inconsistent with his statement to the police that 2nd accused is known to him through Sachin. He admits that he gave the name of the 2nd and 3rd accused on the insistence of police.

- (d) The witness states by the time he gave the statement to the police, the accused were already arrested and police just wanted confirmation. It should be noted that the accused were arrested in late April and this statement was given on the 02nd of May, 2017. In the light of it, Lady and Gentleman Assessors, you should seriously consider whether the police fabricated this evidence giving the names of these three accused just to cover up their inability to arrest the proper suspects.
 - (e) The witness admits signing two affidavits, one hand written in his own handwriting and the other computer printed, sworn before a commissioner of oath. Both these affidavits contain the same allegations against the police.
 - (f) In re-examination the witness states that some of the things that he stated to the police are not contained in his statement.
34. With leading the evidence of above witnesses the prosecution closed their case. The Court being satisfied that the prosecution has apparently (prima-facie) adduced sufficient evidence covering the elements of the alleged offence, acting under the virtue of Section 231 (2) of the Criminal Procedure Act, has called for the defense.
35. At the end of the prosecution case you heard me explain their rights and giving several options to the accused. They have those options because they do not have to prove anything. The burden of proving their guilt beyond reasonable doubt remains on the prosecution at all times.
36. The accused having understood their rights, elected to give evidence and to call witnesses on their behalf. The 1st accused's evidence is that;
- (a) In 2017, he was under curfew orders and was at home before 7.00pm on the 14th of April. On the early morning hours of the 14th at about 2.00- 2.30, his mother has woken him up stating the police have come in search of him. That was normal for them to come like that as he was on curfew orders.
 - (b) Thereafter he has stayed at home. He has no knowledge of this crime and was arrested after about 3 months from the date of the offense.
 - (c) Answering the cross examination of the prosecution, the 1st accused states that he does not know the PW4, Josefa and saw him for the 1st time when he came to give evidence before us. It should be noted that this is inconsistent with other evidence as the controversial affidavit of the Josefa was submitted to the court by the 1st accused.
 - (d) Even in case you disbelieve the evidence of the 1st Accused, you should not consider it to strengthen the prosecution case. The accused need not prove his innocence. Even if he lies, it is immaterial in consideration of the prosecution case.

- (e) The accused denies the prosecution version of events and denies any involvement with the robbery.
 - (f) The 1st accused called the commissioner of oaths who executed the affidavit in issue as one of his witnesses. Ms. Manueli, attached to the commission of Legal Aid confirmed that the PW4 came before her and sworn to the averments contained therein and having understood the contents had placed his signature before her.
 - (g) Though he called another witness, his mother to prove on his alibi, due to the old age she could not substantiate his alibi on many vital points.
37. The second Accused too elected to give evidence. His evidence was that;
- (a) He was arrested on 24th of May 2017 and was taken to Nadi police station and beaten there.
 - (b) On the following day his caution interview was recorded of this matter and he was unaware of the incident at all. The police have fabricated his caution interview and he is unaware of the happenings of this incident.
 - (c) In answering the cross examination by the prosecution, the 2nd accused states that, he cannot recall the 14th of April as he was arrested after about 40 days since then. He denies being with the 1st accused on that day. He did not file any notice of alibi as he could not recall that day. He denies any involvement with the alleged robberies.
38. The third accused also having understood his rights, elected to give evidence under oath. His evidence was that;
- (a) He has been complaining of this false accusation against him by the police since his arrest in 2017. Accordingly, he has written to the Human Rights Commission, Director of Public Prosecutions and the Commissioner of Police.
 - (b) The 3rd accused states that he was not involved in the alleged robberies.
 - (c) Answering the cross examination by the prosecution, he states that, He was arrested at Nadi on the 24th of May 2017.
 - (d) His permanent address is in Suva but in 2017, he was staying with a friend in Nasinu.
 - (e) He could not recall the 14th of April 2017 as there was nothing special about that day and he was arrested after about 40 days since then. He has never been to the Anchorage Hotel.
 - (f) The 3rd accused denies any involvement with the alleged robberies.
39. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you

consider important, you should still consider that evidence and give it such weight you may think fit. As I have already explained, which evidence you would accept and do not accept is a matter for you to decide.

40. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offences have been proven beyond reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.
41. When you consider the evidence of PW4, firstly you should consider whether he is an accomplice. PW4 testified firstly Sachin and thereafter Kelepi, introduced the robbers to him by their names. Lady and gentlemen Assessors, you should consider using your common sense that robbers must operate under a strict code of secrecy. Therefore, if the PW4 was just a driver, why the robbers should be introduced to him? In my view, the obvious inference is that PW4 was an accomplice. Anyway you are not obliged to follow my view. If you do not consider the PW4 to be an accomplice, you may give an appropriate weight to his evidence as for the directions given before.
42. If you consider the PW4 to be an accomplice then the law requires his evidence to not to be trusted or relied upon in absence of corroboration by independent evidence on material points. Therefore, you should consider whether his evidence is corroborated by the other evidence. The PW4 stated that the 1st Accused held a white sack when returned after the robbery. However the evidence of PW2 is the robbed knapsack was brown in color. Apart from the said inconsistency, you should be satisfied of the credibility and the reliability of the PW4's evidence and the fact whether they were adequately corroborated by other evidence, on the identity of the accused.
43. The PW4 testified that the accused were at the Anchorage Hotel at the time of the alleged robbery and also had offensive weapons with them. Having duly considered the entirety of the evidence before you, first you should decide whether the prosecution has adduced sufficient evidence to prove the essential elements of the alleged offences. If you are satisfied that they have done so, secondly you should consider whether the defence version creates a reasonable doubt in the prosecution case.
44. However, even in case you decide to not to accept the version of the accused, 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. You should remember that sometimes an accused may come out with a lie 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 the accused was involved in committing the offence of Aggravated Robbery.

45. I must again remind you that even though an accused person gives evidence, he does not bear any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

46. The accused's explanation was that they had no involvement in the robbery. Generally, when the accused give an explanation, one of the three situations given below would then arise;

- (i) You may believe their explanation and, if you believe them that means that prosecution has failed to convince you, and then your opinion must be that each of the accused is 'not guilty'.
- (ii) Without necessarily believing him you may think, 'well what they say might be true'. If that is so, it means that there is reasonable doubt in your mind regarding the prosecution case, and therefore, again your opinion must be 'not guilty'.
- (iii) The third possibility is that you reject their explanation. That is you disbelieve the accused, yet that itself does not make the accused guilty. The situation would then be the same as if he had not given any evidence at all. You should yet consider whether the prosecution has proved all the elements beyond a reasonable doubt.

47. Any re-directions? - none

48. 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 come back to court and you will be asked to state your opinion.

49. Your opinion should be whether each accused is guilty or not guilty of each of the 3 counts of Aggravated Robbery.



Chamath S. Morais
JUDGE

Solicitors for the State :
Solicitors for the Accused :

Office of the Director of Public Prosecutions, Lautoka
The Accused Appeared in Person