

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

Crim. Case No: HAC 288 of 2021

STATE

vs.

ISOA WAQA

Counsel : Ms. N. Ali with Ms. A. Devi for Prosecution
Accused in Person

Date of Hearing : 9 August 2022

Date of Judgment: 18 August 2022

JUDGMENT

1. The accused was charged with one count of Aggravated Robbery on the following information:

Statement of Offence

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

Particulars of Offence

ISOA WAQA with others on the 11th day of December, 2021 at Davula Road, Nasinu, in the Central Division, in the company of each other stole \$ 80 cash from RUSIATE TURAGABECI and immediately before stealing from RUSIATE TURAGABECI, used force on him.

2. Upon being explained his right to legal representation and legal aid, the accused elected to defend himself, waiving his constitutional rights. At the ensuing trial, the accused pleaded not guilty to the charge and the Prosecution presented the evidence of four witnesses. At the close of the case for the Prosecution, the accused was put to his defence. The accused elected to

give evidence under oath. Subsequently, the Court heard the oral submissions of the Counsel for the Prosecution and the accused.

3. The Judgment, in the presence of the accused, was originally fixed for 11 August 2022. When the matter was called for Judgment as scheduled, the accused was not present in Court thus a bench warrant was issued. The investigating officer PC Rarasea filed a report supported by an affidavit stating that the accused was willfully evading arrest and that the warrant of arrest could not be executed with reasonable effort. The Court, having been satisfied that the accused, with full knowledge of the court proceedings, is willfully absconding court proceedings, decides to pronounce the judgment *in absentia*.
4. Having considered the evidence presented during the hearing and the respective submissions of the parties, I now proceed to pronounce the judgment as follows.
5. Robbery is an aggravated form of theft. Theft is committed when a person dishonestly appropriates the property belonging to another with the intention of permanently depriving the other of that property. The elements of 'dishonestly' and "the intention of permanently depriving the other of the property" are the states of mind of the accused at the time of committing the offence which could be inferred from the conduct of the accused. 'Appropriation of property' is taking possession or control of the property belonging to another without the consent of the person who had possession or control of the property. Theft becomes robbery if the accused, immediately before or, at the time of or immediately after, committing theft uses force or threaten to use force on another person with the intent to commit theft or to escape. A robbery becomes aggravated when the robbery is committed in the company of others or a weapon is used to commit the offence.
6. In light of the Information in this case, the Prosecution must prove that:
 - (i) the accused Isoa Waqa
 - (ii) in the company of other persons,
 - (iii) did commit theft on Rusiate Turagabeci and stole \$80.00 cash and
 - (iv) Immediately before committing the theft, did use force of the Complainant.

7. The first element requires the proof of the identity of the offender. Accordingly, The Prosecution must prove beyond reasonable doubt that Isoa Waqa committed this offence in the company with others and he participated in some form in the commission of the offence, irrespective of the degree of his participation. Where two or more persons commit a criminal offence acting together as part of a joint plan or agreement to commit the offence, each one of them will be guilty of that offence. However, no formal plan or agreement is required. An agreement to commit an offence may arise on the spur of the moment. The essence of joint enterprise for a criminal offence is that each accused shared a common intention to commit the offence and played some part to achieve the aim.
8. The accused is presumed innocent until he is proven guilty. The onus or the burden of proof rests on the Prosecution throughout the trial, and it never shifts to the accused at any stage. There is no obligation or burden on the accused to prove his innocence. The Prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court is not sure of the accused's guilt, the accused must be found not guilty and acquitted.
9. Now I summarise the relevant and salient parts of the evidence adduced in trial.

The case for Prosecution

Rusiate Turagabeci

10. Rusiate testified that he is married to Adite Mainalulu. On 11th day of December 2021, at around 8:30 pm, he came with his wife to the canteen shop at Duvula in Nadera to buy some snacks for their children. When he was about to turn, Isoa Waqa came from behind and punched him in his face. He was afraid. He fell to the ground and when he was lying down, he saw Isoa Waqa's face in the light coming from the shop. Just a few seconds after that, some other boys came. He could not recognise them. One of them kicked his leg and punched his stomach. One of them tried to pull his pants, picked his pocket and took the money. He was

shocked. He had \$80.00 in his pocket. He did not see Waqa thereafter. His wife was standing by his side, screaming and shouting for help, but no one came for help.

11. He then stood up and ran towards Pita's Market, fearing his life as they were still following him. He stopped a car and went to Nadera Police Station. His wife was shouting and running to the police post. When he arrived at the police station, his wife was there. She made a report.
12. He received injuries to his leg, shoulder and ribs during this incident. He was taken to the Valelevu Health Centre and a medical examination was done.
13. Under cross examination, Rusiate said that he was not aware where Isoa Waqa was when the other two robbed him. He could not identify those who had robbed him. He admitted that Isoa Waqa only punched him and it was his friends that robbed him.
14. Under re-examination, Rusiate said that immediately after he was punched by Isoa Waqa, the other boys came to rob him. Before he reached Duvula canteen, he saw Isoa Waqa and other boys who robbed him drinking together at the Chinese Shop.

Adite Mainalulu

15. Adite is the wife of Rusiate. She testified that on 11th day of December 2021, at around 8:30 pm, she was at the Duvula shop at Nadera with his husband. He gave cash to his husband to buy some snacks for the kids and stood outside, beside him. While Rusiate was buying the snacks, Isoa Waqa and his gang suddenly appeared. They were drunk. Isoa Waqa punched her husband and the others attacked him when he fell down. One of them pulled the bag but his husband managed to handle it well. Others tried to hustle him. She was shocked. One of them touched his pocket. They had taken \$80 she had given to buy the snack. She was screaming on top of her voice. His husband didn't know what to do so he stood up and ran in the middle of the road, towards Pita's market.

16. She knew Isoa Waqa from childhood because he used to be her neighbour. Isoa Waqa's sister used to look after her when she was a kid. Her husband received injuries in his hand and the leg. When they were reaching the Duvula Canteen, Isoa Waqa and his group were drinking at the shop on the right hand side of the Duvula Canteen. They were calling out her husband's name and asking for money. Husband didn't want to hear them. While they were running after her husband, she ran to the Police Station in Nadera to lodge a report.
17. From Nadera Police Station, they went to Valelevu Police Station where the police officers asked them if they could get inside the cab and go to look for the drunk people. They came in a police vehicle with two officers to the Duvala Shop where the incident occurred. She saw Isoa Waqa covering his face, putting on a hat. She pointed out and told the officer that he was the person who first attacked her husband. The vehicle was stopped and Isoa Waqa was arrested. Isoa Waqa denied any involvement in the robbery.
18. Under cross-examination, Adite confirmed that Isoa Waqa was drinking with those who robbed her husband. She said that while they were coming towards the Duvula Canteen, they were calling out her husband's name but her husband wasn't looking at them. She saw them holding in their hands Woodstock and she knew they were drunk. She admitted that she didn't know who stole the money after her husband was punched by Isoa Waqa. Under re-examination she confirmed that Isoa Waqa was part of those who asked for money from her husband.

PC 7303 Waisea

19. On the 11th of December 2021, PC Waisea was stationed at Valelevu Police Station. He received instructions to attend to a report of aggravated robbery at Duvula shop in Nadera. His team rushed to the Nadera Police Post where the complainant was waiting. At Nadera Police Post, he had a conversation with Rusiate Turagabeci in which he identified Isoa Waqa by name as one of the offenders. Isoa Wanga was known to him from the past. They went in a vehicle with the complainant and his wife and approached the Duvula Shop. No one was

there in front of the Davula Shop. When looked towards the left, they saw Isoa Waqa standing in the shortcut towards Yasiyasi main road. The complainant pointed out Isoa Waqa as the one who attacked him. Upon being questioned, the suspect identified himself as Isoa Waqa, but denied any involvement in the robbery. He used reasonable force and brought Waqa to the vehicle and arrested, explaining the reason for arrest. Waqa was smelling alcohol and heavily drunk.

20. Under cross-examination, PC Waisea admitted that Waqa did not resist the arrest.

Doctor Christine Chand

21. Doctor Chand testified that on 11th of December 2021, she examined Rusiate at the Valelevu Health Centre and recorded the medical findings in the examination form. The patient had a bruising his right shoulder approximately 4 cm in size caused by a blunt trauma from a punch or any object. There was an abrasion on the left knee approximately 1.5 cm in size. Injury were approximately 1 hour old.
22. Under cross-examination, the doctor said that the information in A(4) of the Form was filled by the Police Officer.

The Case for Defence

Isoa Waqa

23. Isoa Waqa testified that on the day of the alleged incident, he came to the shop, but he came alone. When he came, he saw a group of youth. They were drinking. He saw two ladies and the wife of the complainant come. He was very drunk. He only knew that he punched him. But he didn't know why these boys robbed him. It was not his intention to rob. He was very drunk. He punched him but he didn't rob him. He never touched the complainant's pocket or

robbed the complainant. He did not take any money from him. Those boys ran away. He was just standing there. If he had robbed him, he too should have run away. When the police approached him. He told the police that he did not rob. But they took him to the police station. He wished the Police to charge him with assault but they never charged him for assault. They charged him with Aggravated Robbery. That's the truth about his case. He is a changed person now. He never did a robbery for the past ten years. His intention was not to rob. He got a family with two small daughters. One is one year old and the other is three years old and they are under his care. He does farming in Rewa now. He be forgiven because he just started a family.

24. Under cross- examination, Isoa Waqa admitted that he went to Duvula shop on the 11th day of December 2021. He admitted he was part of the drinking group. He also admitted that he punched Rusiate Turagabeci when he had not done anything to him. He denied that his intention was to rob when he punched Rusiate Turagabeci. He denied that when Rusiate Turagabeci arrived at Duvula shop with his wife, he was asking for money from Turagabeci. He denied that when the complainant did not give money, he came and assaulted Rusiate Turagabeci to steal from him. He denied that there was a plan for a robbery. He said that he was shocked when the boys touched Turagabeci's pocket. He admitted that he was arrested on the 11th day of December 2021 at the shortcut, 10 meters away from Duvula Shop. He admitted that when he was first produced in the Magistrate Court, he did not raise the issue that he only assaulted.

Analysis

25. The accused was unrepresented. He was given an opportunity to cross-examine each witness. Providing him with the previous statements of the witnesses for Prosecution, the accused was explained how he could impeach the credibility of the witnesses. His rights in his defence were properly explained and all the constitutional rights were afforded to ensure a fair trial. The accused competently exercised his right to cross-examine the witnesses called by the Prosecution.

26. The Prosecution substantially relies on the direct evidence of the complainant Rusiate Turagabeci and his wife Adite Mainalulu. The medical evidence and the evidence of the arresting police officer was adduced to support the version of the complainant and his wife.
27. The witnesses for Prosecution were straightforward and consistent. The evidence adduced through them is credible and reliable. I am satisfied that they told the truth in court.
28. In the course of cross-examination of the witnesses for the Prosecution (except of course for the expert witness), it was manifest that the accused was challenging the identification evidence of the Prosecution. However, when he took stand to give evidence under oath, he unequivocally admitted that he went to the Davula Canteen on the night of 11th day of December 2021, and punched the complainant in his face. The strong identification evidence given by the Prosecution witnesses would no doubt have forced him to change the course of his defence.
29. The accused also did not dispute that the boys drinking with him at the shop next to the Davula Canteen robbed the complainant and ran away with the loot. With that admission, the issues at the trial boiled down to only one issue. That is whether the accused was part of the joint enterprise that robbed the complainant. The position of the accused was that he was heavily drunk at that moment and he only punched the complainant but never intended to rob the complainant. He said he was shocked when he realized that boys were robbing the complainant. In a context of a strong Prosecution case on identification, the defence, the accused finally resorted to, was one of the prudent defences even a brilliant defence counsel would have taken.
30. The complainant- Rusiate's evidence was that when he received the punch from the accused, he fell to the ground. Just a few seconds that followed, some other boys came when he was still lying down and they were the ones who stole the money. The complainant frankly admitted that he could not recognise the others who attacked him and picked his pocket but was confident that it was accused's friends that robbed him. He also admitted that he did not see where the accused was when he was being robbed. Under re-examination, he confirmed

that, before he reached Duvula Canteen, he saw the accused and the other boys, who robbed him, drinking together at the Chinese Black Market Shop.

31. The complainant's wife Adite corroborated her husband's evidence in material particular. According to her, while her husband was buying the snacks, the accused and his gang arrived at the Duvula Canteen. Accused was the one who first punched her husband and the others attacked when he fell down. She knew the accused from childhood because he used to be her neighbour. She confirmed that when she was approaching the Duvula Canteen with her husband, the accused and his group were drinking at the shop on the right hand side of the Duvula Canteen. She further said that they were calling out her husband's name and asking for money from her husband but her husband didn't want to hear them.....
32. Under cross-examination, Adite confirmed that the accused was drinking with those who robbed her husband. She said that when they were coming towards the Duvula Canteen, they were calling out her husband's name but her husband wasn't looking at them. She saw them holding in their hands Woodstock and she knew they were drunk. She frankly admitted that she didn't know who actually stole the money after her husband was punched by the accused. Under re-examination she further confirmed that the accused was part of those who asked for money from her husband.
33. The accused too in his evidence, admitted that he was part of the drinking group although he denied that he was asking for money when the complainant was arriving at the Duvula Canteen with his wife.
34. There is of course no evidence that the accused himself touched the pocket and picked the money from the complainant. However, the evidence is overwhelming to come to the conclusion that the accused participated in the offence with those who had actually stole the money from the complainant.
35. Although the accused vehemently denied that he intended to rob the complainant, and took a great effort to disassociate himself with the group of boys who had eventually stolen money

from the complainant, the facts proved otherwise. He was drinking at the Chinese Shop with the boys who eventually stole the money from the complainant. When the complainant and his wife were arriving at the canteen, some of the boys in that drinking group demanded money from the complainant. Soon after that, the accused entered the Davula Canteen and punched the complainant in his face. In a few seconds, the others followed in and stole the money from the complainant. Despite accused's denial in participation, it is abundantly clear that he was the one who laid the ground work for the scheme that culminated in the robbery.

36. The accused argued that he too should have run away with the others without remaining at the Duvula Canteen if he had intended to rob the complainant. According to his own admission, he was in fact not arrested near the Canteen but at a shortcut, a place 10 meters away from Duvula Canteen. In view of strong undeniable identification by Adite, his former neighbor, he must have thought it futile for him to run away from the scene and more advantageous for him to assume responsibility only for the assault and deny the responsibility for robbery as he did in his defence.
37. The accused was unable to give a plausible explanation as to what prompted him to assault the complainant if he was not intending to rob. The only logical inference that could be drawn from the facts proved is that the accused shared with others (who stole from the complainant) a common intention to rob the complainant and, by punching the complainant, participated in the offence of robbery.
38. Before I conclude, in light that there is a credible narrative of evidence that the accused was drunk at the time of the alleged robbery, I thought I must address the issue, although not raised in trial by either party, whether the accused can claim the benefit of his drunkenness to escape the criminal liability for robbery. There is no doubt the accused's drunkenness was self-induced and the offence of robbery is one that involves basic intent and that the conduct of the accused was not accidental.
39. Section 30 of the Crimes Decree provides as follows;

(1) Evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed.

(2) A fault element of basic intent is a fault element of intention for a physical element that consists only of conduct.

(3) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental.

(4) This section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether a person had a mistaken belief about facts if the person had considered whether or not the facts existed.

(5) A person may be regarded as having considered whether or not facts existed if—

(a) he or she had considered, on a previous occasion, whether those facts existed in circumstances surrounding that occasion; and

(b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

40. According to this section, it is clear the accused is not entitled to claim the benefit of self-induced intoxication to escape the criminal liability for robbery even if his drunkenness had crossed the threshold of 'intoxication'.
41. In *DPP v Majewski* [1977] A.C.433, HL, the House of Lords (Lord Elwyn-Jones LC, p. 469G) explained as to why self-induced intoxication should not be a defence in crimes of basic intent. In that case, the appellant was involved in brawl at a public house and subsequently assaulted various police officers. He faced various charges of assault. His defence was that the offences had been committed while he was suffering from the effect of alcohol and drugs. Judge Petre directed the jury that, as no specific intent was required to be proved, self-induced intoxication by drink and drugs could not be a defence and was to be ignored in reaching verdicts. The appellant was convicted. An appeal based on misdirection of the jury was rejected both by the Court of Appeal and the House of Lords which reaffirmed the rule at common law that self-induced intoxication was not a defence to a criminal charge. It was accepted that while the rule had been mitigated for offences where a special intent had to be proved, it remained effective and had not been altered by s. 8 of the Criminal Justice Act 1967 and, accordingly, self-induced intoxication by drink or drugs or both was not a defence to the assaults alleged against the appellant. *See: R v Taj* [2018] EWCA Crim 1743
42. In *Majewski*, Lord Elwyn Jones LC (with whom Lord Diplock agreed) observed as follows:

If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases: see *Reg. v Venna* [1976] QB 421, per James L.J. at p. 429. The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim. Together they add up to criminal recklessness.

43. In *Majewski* the following five themes emerge from a close reading of their Lordships' judgments:

- i) The principle that self-induced intoxication does not amount to a defence to criminal responsibility is a long-standing common law principle.
- ii) The underlying rationale of the principle is recklessness, namely that persons should be criminally responsible for their reckless conduct in taking drink or drugs and their actions flowing therefrom.
- iii) The principle is founded in pragmatism and policy, namely the needs of society to maintain order and to keep public and private violence under control.
- iv) It would bring the law into contempt if the principle were otherwise and self-induced intoxication was a defence to criminal responsibility.
- v) Criminal behaviour as a result of drink and drugs is one of the serious menaces facing society today. *R v Taj* [2018] EWCA Crim 1743

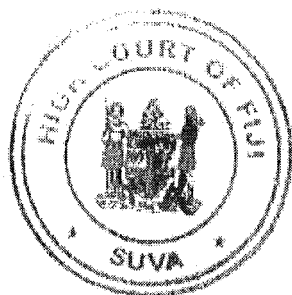
44. The Crimes Act does not define the notion of intoxication. The Oxford English Dictionary defines intoxication as:

"The action of rendering stupid, insensible, or disordered in intellect, with a drug or alcoholic liquor; the making drunk or inebriated; the condition of being so stupefied or disordered"

45. The evidence led in trial does not allow me to find that the accused has crossed this threshold to claim that he is intoxicated. He was quite conscious of what he was doing and he remembers what happened. In his evidence, he said that he was shocked when the boys were stealing from the complainant. He remembers that he was just standing there even after the boys who robbed had run away. He said that if he had robbed, he too should have run away.

46. I am satisfied that all the elements of the offence of Aggravated Robbery were proved by the Prosecution beyond a reasonable doubt. I find the accused guilty as charged.

47. The accused is convicted accordingly.



A handwritten signature in black ink, appearing to read "Aruna Aluthge".

Aruna Aluthge

Judge

18 August 2022

At Suva

Counsel:

- Office of the Director of Public Prosecution for State