

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE No: HAC 298 of 2021

STATE

vs.

1. JONACANI NACAGI

2. ALTAF HUSSEIN

Counsel : Ms. W. Elo for Prosecution
Ms. M. Ratidara for 1st Accused
Ms. L. David for 2nd Accused

Dates of Hearing : 6, 8 September 2022

Date of Judgment: 9 September 2022

JUDGMENT

1. The accused was charged with two counts of Aggravated Robbery on the following information:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

JONACANI NACAGI and ALTAF HUSSEIN on the 8th day of December, 2021 at Narere, in the Central Division, in the company of each other stole 1x Samsung S9 Plus Mobile Phone and 1x Samsung A10 Mobile Phone from AKANSHA PRASAD and immediately before stealing from AKANSHA PRASAD, used force on her.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

JONACANI NACAGI and ALTAF HUSSEIN on the 8th day of December, 2021 at Narere, in the Central Division, in the company of each other stole 1x Gold chain with a pendant from NAVEET LAL and immediately before stealing from NAVEET LAL, used force on him.

2. Both the accused pleaded not guilty to the charges. At the ensuing trial, the Prosecution presented the evidence of three witnesses. At the close of the case for the Prosecution, the Court, having been satisfied that there is a case for each accused to answer on each count, put the accused to their respective defences. Both the accused elected to give evidence under oath and in addition to which, the 1st accused called one witness and the 2nd accused two. Having heard the evidence and the submissions from the counsel from both sides, I now proceed to pronounce my Judgment as follows.

3. 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. In this case, the prosecution says the accused in the company of each other committed the robbery thus should be found guilty of the offence of Aggravated Robbery.

4. In light of the Information in this case, the Prosecution on the First Count must prove that:
 - (i) the accused
 - (ii) in the company of each other,
 - (iii) did commit theft on Akansha Prasad and stole 1x Samsung S9 Plus Mobile Phone and 1x Samsung A10 Mobile Phone and

(iv) Immediately before committing the theft, did use force of the Complainant, Akansha Prasad.

5. In light of the Information in this case, the Prosecution on the first count must prove on the Second Count that:
 - (i) the accused
 - (ii) in the company of each other,
 - (iii) did commit theft on Naveet Lal and stole a gold chain with a pendent and
 - (iv) Immediately before committing the theft, did use force of the Complainant, Naveet Lal.
6. The first element requires the proof of the identity of the offender. Accordingly, The Prosecution must prove beyond reasonable doubt that the accused Jonacani Nacani and Altaf Hussein committed this offence in the company of each other and they participated in some form in the commission of the offence, irrespective of the degree of their 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 objective.
7. 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, even where an *alibi* is raised as a defence. There is no obligation or burden on the accused to prove his innocence or the *alibi* raised. The Prosecution must prove that each accused was present at the crime scene, participated in the crime and the guilt thereof, 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.
8. Now I summarise the relevant and salient parts of the evidence adduced in trial.

Case for Prosecution

Navneet Lal (1st Complainant)

9. On 8 December 2021, after receiving a call from his friend Shiva regarding money for his rental, Lal, in his car, headed with his wife at around 6-7 pm to the River Road to collect the money. Shiva told them to wait at the junction close to his house because he had some visitors in his house. He parked the car just in front the River Road Junction.
10. Whilst sitting in the car with his wife, all of a sudden someone clad in a red hoodie came from the back and took out the key of the car. That person had a torch and started turning the torch on and off at his eyes so that he could not see that person's face. That person asked him to move out of the vehicle, so he complied. His wife, who was seated in the front passenger seat, started yelling. At the same time someone else opened the back door and got inside the vehicle and started searching the vehicle, including the counsel box. When this entrant could not find anything, he just grabbed his and his wife's phone from her lap.
11. The door was open and he could see what happened inside the car very clearly as the two door lights were on. The person who got in was an Indian with a beard. While he was looking at the car, the person who was in front of him, pulled the gold chain from his neck with the pendant. Both of them then started walking away from the car towards the main road as if nothing had happened. The iTaukei man who snatched the chain threw the key to him when he started yelling at them.
12. According to his evidence, the lighting condition outside the car was not that dark as the incident happened at around 7 pm. The lights of the nearby houses were shining the road. By the time he picked up the keys, the neighbours, upon hearing the yelling, came out. They told the neighbours what happened and the neighbours told them who they were.
13. Under cross examination by Ms. Ratidara, Lal agreed that he reported the matter to police on the same day right after the incident and that everything was fresh in his mind when he was giving his statement to police. He admitted having told police that he received the call from Shiva at about 2100 hours and reached the River Road around 2130 hours. He agreed that there was no street lights at the River Road at that time.

14. Under cross -examination by Ms. David, Lal admitted that, in his statement to police, he had told that there were two iTaukei males came from the back of the car and pulled out the key from the car.
15. Under re-examination, he could remember now that there were street lights along that road. He told the police that both were iTaukei people because those two were communicating in Fijian.

Akansha Prasad

16. Akansha, the wife of the 1st complainant Lal, narrated almost the same story as that of her husband except that they left home for River Road after 9 pm. She said that the person who snatched the keys was an iTaukei man and that the one who got in the car from the back door was part Indian or 'half caste'. She was shocked at that time and started shouting "chor"... "chor" meaning thieves..thieves...
17. Under cross- examination by Ms. David, she agreed that in the statement to police, the man who snatched her phones had been referred to as an Indo-Fijian and not as part Indian or 'half caste'.

Katarina Tinai

18. Katrina was a resident at River Road, Narere for approximately 20 years. On the 8 December 2021, she had visited one of her neighbours and, whilst sitting there at around 7.30 pm., she heard a woman shout "chor" "chor", asking for help. She then stood up and went outside. She could see one iTaukei man and an Indian man, one of them was holding onto a torch. When she made this observation, those two persons were just 4-5 metres away from her. At one time, they were walking in front at a distance of 2 metres from where she was standing. There was a street light and apart from the street light, the lights outside the houses were also turned on. The houses are situated not far from each other- around 7-8 metres apart. The iTaukei man was shining the torch light at the driver. She could recognise those two people. Apart from those iTaukei man and Indian man, there were other people also on the road at that time.

19. The i-Taukei person who was shining the torch at the driver was always called by the name of Joe Black. She knew, Joe Black. Once a week, she would go past his house on her way to his brother's house and used to meet him along the road when she goes to store. She used to greet him good morning. The person accompanying Joe Black was Altaf. He had been living at River Road for the past 20 years. She knew Altaf from the time he was small. He would go past her home, usually 2-3 times a week and has even spoken to him.
20. She knew that Joe Black and Altaf had done something wrong because they were shining the light along the way towards the married couple who had come out from the car. The couple said those two had stolen from them. That's when she started to follow them. Altaf was wearing a red jacket and Joe Black a blue jacket. She, when a dock identification was allowed, recognised the 1st accused as Joe Black and the 2nd accused as Altaf.
21. Under cross examination, she agreed that the incident would have happened around 9.30 pm. She agreed that she gave the statement to police on the same day right after the incident when everything was fresh in her mind. She admitted that she had not mentioned in her statement that the 'big man' who was shooting the torch light was Joe Black and what he was wearing. She admitted that she had not mentioned the name Joe Black anywhere in her statement and that this name was mentioned for the first time in Court. She denied the proposition that Joe Black was at his home with his wife on that particular day.
22. She has been living in River Road for the past 20 years. She agreed that the person she had pointed out had just moved in to River Road 2 years prior to the alleged incident. Having agreed that, in her statement, she had stated that the observation was made at a distance of 8 metres, and not 2 metres, she explained and said that she followed them and got closer to them at one time.
23. Under cross- examination by Ms. David, Katrina admitted that Altaf was covering his face with the red hoodie so that she could not see his face clearly. However, she denied she was mistaken that it was Altaf that was present at River Road that night. She said she followed them and at one time Altaf put his hoodie down and that's when she saw him. She admitted that there is no mention in her statement that the person wearing the red hoodie at one time had taken off the hoodie. She denied that on the 8 December 2021, Altaf was residing with his father in Kinoya and that she was mistaken.

Case for Defence

Jonacani Nacagi (1st Accused)

24. Nacagi testified that he was living in a squatter settlement at Navosai in Narere with his wife and daughter for 2-3 years before being remanded. On 8 December 2021, he was living at the same address. On that particular day, he returned home at around 7.30 pm. from training and had dinner with his family and was watching TV. At around 9.30 pm. he was home and had never been present at River Road, as Katarina said. He never knew Katarina and had never seen her in his settlement before.
25. Under cross- examination, Nacagi admitted that he was familiar with the short cuts from Navosai connecting to River Road and the houses there were situated close to each other. There were no street lights in that area and because it's a squatter settlement there was little light on the road coming from the houses. Answering a question posed by the Court, whether he had any special reason he should remember this particular day, Nacagi's answer was that because it was during curfew hours, his wife had asked him to make some things for tea. He completely denied having robbed the complainants that particular night.

Cila Maramanivalu

26. Cila is the wife of the 1st accused Nacagi. In December 2021, she was living at home in Navosai with her daughter and her husband. On the night of 8 December 2021, she was home, with his daughter and husband, watching television.

Altaf Hussein (2nd Accused)

27. Altaf is currently residing in Kinoya with his father and step mother Miriama. His mother stays at River Road, Narere. On 8 December 2021, he was at his dad's place in Kinoya with his girlfriend and had not at any time gone to see his mum at River Road. He denied Katarina's evidence that he was at River Road on 8 December. She has seen Katarina because she stays near to where his mum stays in River Road Narere.

28. Under cross-examination, he admitted stating in his statement to police that he was staying at his father's place over the past two weeks prior to the alleged incident. He has no idea as to why Katarina should lie to this court.

Alfred Hussein

29. Alfred is the father of the 2nd accused, Altaf. He resides at Tivi Road, Kinoya with his wife Miriama Waqa and his uncle. His son Altaf and his girlfriend came to his house on the 5 December and was staying with them. On 8 December 2021, he had dinner and had a grog session with his wife, Altaf and his girlfriend. Altaf went to sleep in his room at around 8.30 pm and never left the house at any time after that. The grog session finished at around 10.30 pm. when Altaf was asleep. Altaf was staying at his house in Kinoya with his wife a few days and whet back to his mother after which he had been arrested.
30. Under cross- examination, Alfred said that Altaf would never go to his mother's place when he was residing with him.

Miriama Waqa

31. Miriama said that, in December 2021, she was living at Tivi Road in Kinoya with Alfred Hussein, his uncle and her kids. Altaf and his girlfriend came to her house on 5 December 2021 and on the night of 8 December 2021, they had a grog session at night. Altaf and his girlfriend were sleeping in the room. Altaf was staying at home that whole night and never left. The day he left for Kinoya to see his mother, Altaf was arrested.

Analysis

32. The Prosecution says that a robbery happened at River Road in Narere on the night of 08 December 2021 in which property belonging to the two complainants were stolen and that the accused were the culprits. The defence does not dispute that the alleged robbery occurred on that particular day. Their contention is that the Prosecution failed to prove beyond reasonable doubt that the accused were involved in the said robbery.

33. In support of their respective defences each accused advanced an alibi. Both accused took stand and produced sworn evidence although they had nothing to prove in this case. If the evidence of the defence that they were not there is believed, then the Court must acquit them. And also, even if the Court is in doubt whether they were there or not, the Court must acquit them.
34. This is a case whose outcome is solely or substantially dependent on the correctness of visual identification evidence. The case turns on whether the Prosecution has proved beyond reasonable doubt the identity of each accused connecting them to the offence.
35. To prove the prosecution case, three witnesses were called including the two complainants who happened to be the husband and the wife. They produced direct evidence as the only eye witnesses to the robbery. As far as the main contested issue is concerned, the evidence given by the two complainants is of little help as both of them terribly failed to identify the culprits. Their evidence, if at all, is important so far as the ethnicity of the culprits and the lighting condition of the crime scene are concerned.
36. The 1st complainant Vineet Lal, had told the police that there were two iTaukei males came from the back of the car and pulled out the keys. Lal had given his statement to police soon after the incident when the things were still fresh in his mind. According to this statement, both the culprits were of iTaukei origin. The appearance of the 2nd accused standing in the dock did not match that description at all. It is admitted that the mother of the 2nd accused is Nazreen Nisha and his father Alfred Hussein, both of them are of Indian origin.
37. The second plaintiff Prasad in her evidence described the person who got into the car from the back door as half Indian or half-caste. She had given her statement to police six days after the incident. In that statement, she describes this person as an 'Indo-Fijian boy'. The two complainants have not been consistent in describing the ethnicity of the culprits. This inconsistency may perhaps be due either to the poor lighting condition or the shocking sudden turn of events during the robbery. The end result is that none of the complainants was able to give plausible evidence, linking the accused to the River Road robbery.

38. The most crucial witness the Prosecution relies on is Katarina. Although she had not witnessed the robbery itself, the final outcome of this case is entirely dependent on the credibility and the reliability of her visual identification evidence.
39. On that particular day, Katarina had visited one of her neighbours at the River Road when she was alerted by a yelling of an Indian woman whose shouting had sounded 'chor'..'chor'. When she came out, she could see one i-Taukei man and an Indian man, one of them holding onto a torch while flashing it towards the complainants, walking along the road. When she made these observations, those two persons were just 4-5 metres away from her. At one point, they were seen walking as close as 2 metres from where she was standing. She had even followed them. According to her evidence-in-chief, this incident had occurred at around 7.30 pm., though she later agreed under cross-examination, that the time would have been around 10 pm.
40. According to her, she could recognise those two people whom she believed were the robbers. The iTaukei man holding on to the torch was always called as Joe Black and the Indo- Fijian, Altaf. She described the lighting condition that had helped her to recognise those two people at that night. There was street light and, apart from the street light, the lights outside the houses were also turned on. The houses are situated not far from each other, around 7-8 meters apart. The iTaukei man was shining the torch light at the driver.
41. Katarina described how Joe Black and Altaf had become known to her. Joe Black was residing close to her brother's house where she visited once a week. She would go past his house on her way to his brother's house and used to meet him along the road when she goes to store. She used to greet him- good morning. The person accompanying Joe Black was Altaf. Altaf had been living at River Road where she also lived for the past 20 years. She knew Altaf from the time he was small. He would go past her home, usually 2-3 times a week and has even spoken to him. However, she admits that he visits at times his father at Kinoya.

42. In the admitted facts, the 1st accused, admits that he is also known as 'Joe Black' and the 2nd accused admits that Katarina is known to her as a person residing at River Road, Narera. In light of the aforesaid narrative elicited from Katarina in her evidence-in-chief, and the admitted facts, it appeared to Court that it was dealing with a case of recognition.
43. In *R v Turaki* [2009] NZCA 310 at [63], the Court referred to the risk in recognition cases that the witness will pick out the person the witness mistakenly believed he recognised. In *R v Turnbull* [1977] QB 224 (CA), the court observed that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
44. In *Turnbull*, the court gave advice as to how a judge might sum up more generally on identification evidence whether the case is one recognition or not:

[T]he judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

45. In resolving the issue of identification in this case, the Court should remind itself of any specific weaknesses which had appeared in the identification evidence. Towards the end of Katarina's evidence-in-chief, the State made an application for a dock identification to which the Defence objected. The objection was overruled because, in light of her recognition evidence, the Court took the view that a proper foundation had been laid by the Prosecution for a dock identification.
46. Usually, a dock identification would be allowed only when the court is satisfied that there is a proper foundation for such a course. A proper foundation would be a police identification

parade or a prior photo identification done closer to the alleged date of crime. No dock identification will be allowed in what legalese describes as 'fleeting glance' cases. In some extreme cases, there can also be situations where a dock identification would be allowed when the witness, in a credible narrative, claims the offender to have been a known person and in 'non -fleeting glance' cases.

47. This is not a case in which an identification parade or a prior photo montage identification had been conducted. However, by the time the application for dock identification was made, there was a credible narrative available in Katarina's evidence-in-chief to allow a dock identification in respect of both the accused as she claimed that both of them were known to her prior to the incident. However, her evidence in cross-examination destroyed that foundation in respect of the first accused.
48. Katarina had given her statement soon after the robbery and she concedes that everything was fresh in her mind at that time. However, she has never mentioned the name Joe Black in her statement to police although she in her evidence said that this person was always called by the name Joe Black. Under cross-examination, she admitted that she had never mentioned the name Joe Black in her statement to police. It was not her evidence that she recognized this person because he was one of the neighbour's of his brother. It was not her evidence that she knew him but did not know his name. Instead, she referred to him by his name as a known person. If she had known Joe Black by his name, she should have mentioned that name in her statement to police and how Joe Black came to be known. She has never done that.
49. This is what she had told police in her statement.... "*At the same time, I stood up and went outside I could see two men went pass and they were walking very fast. Then I followed them I could see one of them is slim and tall and the other one is big. The big man was shooting torch light to us*". She has referred to the torch carrier as the 'big man' and not by name Joe Black. In her evidence she concedes that she was mentioning the name Joe Black for the first time in Court. She gave evidence almost nine months after the incident. This is a remarkable omission, in my opinion, amounting to a material contradiction as far as the identity of the 1st accused is concerned. The credibility of Katarina is impeached in respect of her identification evidence of the 1st accused thus her evidence in that regard should be rejected.

50. In view of the statement given by Katarina to police in which no narrative of recognition was present, the proper course of action the police investigators should have taken was to conduct either an identification parade or a photo montage without delay so that a proper foundation as to the identity could be established at the ensuing trial. Unfortunately, the laxity on the part of the police has left room for a reasonable doubt in respect of the 1st accused.
51. Now I turn to Katarina's evidence in respect of the 2nd accused, Altaf. There is nothing in her evidence for the Court to conclude that she is not credible in her claim that Altaf was known to her prior to the incident. Even the 2nd accused in his evidence concedes and in the admitted facts admits that Katarina was known to him. However, as was observed in *Turnbull*, even an honest witness can be mistaken even where the case is one of recognition.
52. Where the suspect is known to the witness and especially by proper name, and for a very long time, an identification parade would usually be seen as unnecessary. (Privy Council decision in *Irvin Goldson and Devon McGlashan v The Queen* PCA No 64 of 1998, judgment delivered 23 March 2000). In the case against the 2nd accused, as opposed to the case against the 1st accused, it would serve no useful purpose to hold an identification parade.
53. In *Ronald John v The State of Trinidad and Tobago* [2009] UKPC 12, Lord Brown of Eaton – Under-Heywood held that where the witness and suspect are well known to each other and neither of them disputes it, an identification parade could not help the situation and may be misleading. This is so because the witness would naturally pick out the person she knows and a positive identification may mislead the jury into thinking that it confirmed the identification as the assailant, in circumstances where the witness might in fact be mistaken in thinking it was the appellant who committed the offence.
54. In the circumstances where Katarina claimed to have known Altaf since childhood, and there was no clear challenge to this fact, the purpose of the parade with regard his case would be simply to confirm that Altaf was the person she claimed to know.

55. It is important here to appreciate the sharp distinction drawn in law between the notion of credibility upon which the rejection of her evidence was already based in respect of the first accused's case and the notion of reliability which I now delve into in respect of the 2nd accused's case.

56. In *State v Qurai* Crim. Case No: HAC 14 of 2022 (6 June 2022) Kulatunga J, having referred to several English Judgments, succinctly discussed about these two notions as follows:

..[c]onsidering the testimonial trustworthiness of a witness there are two aspects that a court is required to consider. One is the credibility or veracity and the other is the accuracy and reliability. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns and relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, an honest witness, may, however, still be unreliable. [vide; *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), *Doherty J.A.* (at p. 526); 2014 MBCA 74 (CanLII) and *R. v. H.C.*, 2009 ONCA 56, 244 O.A.C. 288 *R. v. H.C.*, 2009 ONCA 56, 244 O.A.C. 288]

57. What basically at stake in Altaf's case is reliability. It is possible that a mistaken witness may be a convincing one. Was Katarina able to correctly identify the person whom she claims as Altaf in the circumstances in which the identification or recognition was made? In finding answer to this question, I would now be guided by the Turnbull Guidelines which I have already referred to.

58. There is no dispute that the robbery occurred during night time although the 1st complainant Lal tried to impress that there was still some (natural) light at the time of the robbery. According to him the robbery took place around 7-730 pm. He too in his statement to police stated that he reached the River Road around 2130 hours. Apart from Lal, all other witnesses, including his wife confirmed the incident happened after 9 pm. In view of that, my assessment on the condition of light will proceed on the basis that the robbery happened in night time and not in broad day light.

59. Lal in his evidence admitted that there was no street light in that area at that time. He had made his observations from the door lights of the car and the light shining from the nearby houses. There was no basis for him to change his evidence under re-examination in which he said he could now remember there was a street light. According to Katarina, there was a street light and apart from that, the lights outside the houses were also turned on and the houses in the settlement are situated not far from each other- around 7-8 meters apart. However, she has not mentioned about the street light in her statement to police. According to 2nd accused, who had resided somewhere at River Road for more than 20 years, there are no street lights in that area. There is no consistency in evidence as to the availability of street light where the robbery took place. The credibility of Katarina with respect to the lighting is therefore called into question. It is doubtful if the light shining from the houses in a settlement would have been bright enough for one to recognise, not to mention identify, a person on the road correctly in the circumstances which are delved into in a short while.
60. As per Katarina's evidence, the two people whom she believed were the robbers had been observed in close proximity as close as 2 meters. However, in her statement to police, she had put this distance at 8 meters. Her explanation for the discrepancy was that she made the closer observation only when she started following them. She had in fact told police that she followed the suspects. She did not however describe in her statement or evidence what prompted her to follow the suspects. She was a lady in her late thirties and the purpose for her pursuit could never have been to apprehend the suspects. It should be to get a better glimpse of the fast moving suspects.
61. Katarina admitted that this man was wearing a red hoodie. In cross-examination by Ms. David, she admitted that his face was covered with the red hoodie so that she could not see his face clearly. Face is the only pointer what made her believe that it was Altaf, not his voice, not the body language. What is particularly crucial is whether she was able to properly recognise this person when his face was covered with a hoodie. In her explanation, she said she followed them and Altaf at one time put his hoodie down and that's when she saw him. However, she admitted that there is no mention in her statement to police that the person wearing the hoodie had taken off his hoodie at one time to facilitate his identification. Apart from this inconsistency, it is highly implausible that a robber would uncover and expose his

face when he is being pursued by another person, especially when he knew the person following him is known to him.

62. It was admitted that there was a lot of foot traffic on the road at that time and apart from these two men, there were other people too on the road. The robbers are supposed to be moving fast after a robbery and she did not say for how long she was able to observe the face of the culprits. The chances are high one to make mistakes. I am not convinced that the circumstances in which the recognition was made did allow Katarina to make a correct identification of a fast moving person in that light, at that distance and particularly when the view was obstructed by a hoodie.
63. The circumstances under which the identification/recognition was made raise a reasonable doubt as to the correctness of the identity of the 2nd accused. I find Katarina to be unreliable on the issue of identity of the 2nd accused.
64. There were several areas of contradiction and inconsistency relating to the identification evidence. These included the issues of: whether the witness knew the 1st accused before as Joe Black, whether there was adequate lighting, what distance the accused were observed and the time the observation lasted.
65. The Prosecution's case stands or falls on the evidence of the Katarina, whose evidence on the issue of identification, so vital to the Prosecution's case, was so riddled with weaknesses that her credit was almost impeached. I reject the evidence of the Prosecution.
66. Both the accused set up a defence of alibi. The accused are saying they were elsewhere on that fateful night. Nacagi said he was in a squatter settlement at Navosai in Narere with his wife and daughter and from 7.30 pm. to 9.30 pm. he was home and had never been present at River Road. His wife was called to support his evidence. Altaf said on that particular day, he was with his father and step mother in Kinoya and was staying there for the whole night after a grog session. His father and step mother were called to support his evidence.
67. The accused did not have to prove where they say they were. The Prosecution must disprove the *alibi* advanced by the accused. Even if the Court conclude that the alibis were false, that

does not by itself entitle the Court to convict the accused. I bear in mind that an alibi is sometimes invented to bolster a genuine defence.

68. It has to be accepted that each accused had an interest in this case so did the witnesses they have called, being their close relatives. The State Counsel pointed out certain discrepancies between the statements and the inconsistencies amongst witnesses themselves. The alibis advanced by the accused are not appealing to me. However, a rejection of the alibi evidence does not mean that it supported the identification evidence.
69. In a case in which the identification of the assailants depends solely on the evidence of a single eyewitness, whose evidence was flawed in several material respects, it is dangerous for the Court to record a conviction. The Prosecution in this case failed to establish identity of the accused so as to connect them to the River Road Robbery. I find the accused not guilty of each count.
70. The accused are acquitted accordingly.



Aruna Aluthge

Judge

9 September 2022

At Suva

Counsel:

- Office of the Director of Public Prosecution for State

-Legal Aid Commission for Defence