

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 49 OF 2022

STATE
vs.

1. TUPOU WAQABACA
2. SENIJELE PUAMAU

Counsel:

<i>Ms. Kantharia B and Ms. Sharma T</i>	-	<i>for State</i>
<i>Ms. Boseiwaqa K and Ms. Pratap N</i>	-	<i>for Accused 1</i>
<i>Mr. Veibataki E</i>	-	<i>for Accused 2</i>

Date of hearing: 26 – 29.09.23
Date of Judgment: 18.10.2023

JUDGMENT

1. The accused in this matter, 1. TUPOU WAQABACA; 2. SENIJELE PUAMAU were charged with one count of **Aggravated Robbery** by the **Director of Public Prosecutions**, as below:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

TUPOU WAQABACA and **SENIJELE PUAMAU** with another on 12th day of June 2021 at Lami in the Central Division in the company of each other stole \$70 cash and 1 x Samsung mobile phone from the taxi of **TULSI RAM** and at the time of committing theft used force on **TULSI RAM**.

2. Two Accused in this matter pleaded not guilty to the charge filed against them by the Director of Public Prosecutions on 22nd of March 2022. The Voire Dire inquiry in this matter in relation to the caution interview of the 1st Accused commenced on the 26th of September 2023 and was concluded on the 27th September 2023. Thereafter, on this Court admitting the caution interview of the 1st Accused on 28/09/2023, the proper

trial commenced on the same day and for the Prosecution 5 witnesses gave evidence. At the end of the Prosecution case since the Court was satisfied that a prima facie case has been established against the Accused, acting under **Section 231** of the **Criminal Procedure Act of 2009**, the Defense was called from the Accused and the standard options available for the Defense were spelt out. For the Defense case both Accused opted to remain silent on the dock and 1 witness was summoned for the 1st Accused. Today this matter is coming up for the Judgement.

Nature of the Offence

3. The offence of Robbery is defined in **Section 310** of the **Crimes Act 2009**; accordingly, 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. According to **Section 291** of the **Crimes Act 2009**, a person commits theft if that person; a. dishonestly; b. appropriates the property belonging to another; c. with the intention of permanently depriving the other of that property.

Elements of the Offence of Aggravated Robbery

4. The elements of the offence that need to be established by the Prosecution beyond reasonable doubt, are as follows:
 - a. the accused,
 - b. committed robbery; and
 - c. the robbery was committed in the company of one or more other persons; or at the time of robbery, has an offensive weapon with him.

Burden of Proof

5. The Accused is presumed to be innocent until proven guilty. As a matter of law, the onus or burden of proof rests on the Prosecution throughout the trial, and it never shifts to the Accused. There is no obligation or burden on the Accused to prove his innocence. The Prosecution must prove the guilt of the Accused, beyond reasonable doubt. If there is a reasonable doubt, so that the Court was not sure of the guilt of the Accused, or if there be any hesitation on the part of the Court of the establishment of the elements of the offence or on the evidence led by the Prosecution the Accused must be found not guilty of the relevant charge and accordingly acquitted. Accused has given evidence in this case. Thus, if this court accepts the Defense evidence or is unable to reject or accept the Defence evidence, then too the Accused is entitled to a finding in his favour.

Prosecution Case

6. The first witness for the Prosecution (**PW1**) at the trial was the victim taxi driver **Tulsi Ram**. According to him, he is occupied as a taxi driver and even in 2021 he had been doing the same job driving vehicle LT 3351 owned by one Maria. He claims that on

12/06/2021, when he was driving the taxi, he had got a job to drive to Valelevu and on the way back a boy wearing a black t-shirt and a white cap had stopped his cab and got in front. At the same time, two other boys also had got into the back of the car. He remembered that out of them one was wearing a red t-shirt and the other was wearing a gray t-shirt. All these boys had been i-taukei and had directed him to take them to **Wailea**. He alluded that on the way they had wanted him to stop near a bus shelter, but when he failed to do that one boy had punched him from the back and the boy wearing the gray t-shirt had come from the right side of the vehicle and punched him.

7. At that juncture, the boy who was seated in the front had taken his money and watch from the council box. Further, though the boy wearing the red t-shirt tried to take his meter, he had stopped that. He testified that when this was happening, he raised cries for help and a car came from the front and the boys ran towards the cassava patch. According to him, after a while the boys have come out and the boy in the gray t-shirt had grabbed his phone. He claimed that the robbers took \$70 in total from him. He claimed that hearing this altercation boys from the nearby village had come and searched for the Accused and had helped him to go to the police station and police had sent him for a medical inspection.
8. The second witness for the Prosecution (**PW2**) was doctor **Niumataiwalu**, who conducted the medical examination of the victim **Tulsi Ram**. This witness claimed that she is a general medical practitioner and in 2021 she was attached to the Lami Health Centre. According to this witness, on 12/06/2021 at 2 pm she had examined Tulsi Ram when produced by the police. She marked the Police Medical Examination Form as PEX4, which had been signed by her and the patient Tulsi Ram. She submitted that the victim was produced to her with a history of assault. When she examined the victim, he had been calm and there had been no visible injuries. However, she had noticed blunt force trauma on the victim, where she had observed tenderness on the right side of his face, though there were no brushing or cuts.
9. **Manasa Mavoamailepanoni**, who had been residing in Lami for 14 years was summoned as the third witness (**PW3**) for the Prosecution. He alluded that on 12/06/2021 he was at home, and he noticed 3 young i-taukei boys in wet cloths of the age around 16 to 18 crossing the river when he was sitting in his porch after lunch at around 1.30 pm. He further clarified that his house faces the river located about 10 to 15 meters away from the river. He claimed that he noticed that these boys were in a hurry, where he identified **Puamau**, who had been residing in his village Govia ever since he came to this village. When the boys were approaching towards his house, he had noticed **Puamau** wearing a white round neck shirt and the boys had been talking about money. At that point, he had heard **Puamau** say, 'we have \$50'. This witness further claimed that after about 3 minutes of the 3 boys passing his house police arrived and asked him whether he had seen 3 boys passing, which he had affirmed. This witness identified the 2nd Accused on the dock as **Puamau**.
10. The next witness for the Prosecution (**PW4**) was **Detective Corporal Joji Dakuwaqa** who conducted the admitted caution interview of the First Accused **TUPOU**

WAQABACA. In his evidence this witness marked the caution interview conducted by him of the 1st Accused by questions and answers as **PEX3**. According to this witness, in **PEX3** from question **20 to 39** the 1st Accused had admitted how himself and two others hired a taxi to go to Qauia, where he sat at the rear seat wearing a black T-shirt and requested the Indo-Fijian driver to take them to Lami and approaching Matata requested the driver to stop near a bus stop. Further, from questions **47 to 54** of **PEX3** this witness claimed that the 1st Accused admitted how he walked towards the bus stop when the taxi stopped. Thereafter, the 1st Accused had mentioned hearing the taxi driver yelling and how the two other colleagues came running towards him. However, the 1st Accused had further mentioned in his caution interview that he doesn't know anybody stealing money from the taxi driver. As per this caution interview, though the 1st Accused had admitted acting aggressively towards the taxi driver, there is no mention of him robbing the taxi driver.

11. The last witness for the Prosecution was **(PW5) Detective Constable 4548 Jiutasa Veremalua**, who interviewed the 2nd Accused **SENIJIELI PUAMAU** on 20/07/2021 at the Lami police station. In the statement made by the 2nd Accused to the police officer, nowhere he had admitted committing this crime. In answering to question **18**, he had mentioned that he was there at the scene of the crime, but he didn't do anything. In answering to question **38**, he had mentioned Waqa punched the driver. Further, answering questions **40 and 41**, the 2nd Accused had mentioned "Juicy" took the money and tried to take the meter. However, surprisingly, the Defense did not challenge the evidence of this police witness in any manner. Moreover, during this trial, no one was identified as "Waqa" or "Juicy".

Evaluation of Prosecution Evidence

12. For the Prosecution case no witness identified the two Accused charged in this matter committing the crime of robbery of the taxi driver **Tulsi Ram** on 12/06/2021. To establish the case beyond reasonable doubt, Prosecution mainly relied on the statements made by the two Accused when they were in police custody in relation to this offence. From the evidence led in this Court, both Accused have not admitted committing the crime themselves but have admitted their presence at the scene of the crime. Even in the evidence of **(PW3) Manasa**, nothing transpired of the two Accused committing robbery.
13. In the absence of direct evidence of the commission of the crime by the two Accused or any admissions of the commission of the crimes by them, Prosecution relied on the legal concept of Joint Enterprise to establish the guilt of the two Accused. In this regard,

Prosecution highlights the Fiji Supreme Court decision of *Rasaku v State [2013]*¹, where the Court had stated as below:

“If two people jointly commit an unlawful act, each is equally liable no matter who did what. There does not have to be any prior agreement either written or oral. It can be spontaneous. The doctrine of common enterprise has been applied consistently in a large number of criminal cases in England and other common law jurisdictions, including those such as Fiji in which the Penal Code is structured on the foundations of the Common Law of England. The formation of a joint enterprise may be spontaneous, and the fact that the participants acted on the spur of the moment does not negative their criminal liability on the basis of joint enterprise.”

14. In considering the application of the concept of joint enterprise in this matter, this Court identifies that there is a need to commit the unlawful act jointly, regardless of the individual actions of the members of the joint enterprise. For this end, in the absence of evidence of a prior agreement between the parties to commit the offence, the presence of each individual at the time of commission of the offence is required. In the caution interview of the 1st Accused, while admitting that himself and two others hired a taxi to go to Qauia, where he sat at the rear seat wearing a black T-shirt, he had stated that he walked towards the bus stop when the taxi stopped. According to him, thereafter he had heard the taxi driver yelling and his two colleagues running towards him. He also mentioned in the caution interview that he doesn't know anybody stealing money from the taxi driver. With this evidence, there is no clear connection of the presence of the 1st Accused at the scene of the crime when the taxi driver was robbed.
15. In relation to the 2nd Accused, in his statement made to the police, he had mentioned that he was there at the scene of the crime, but he didn't do anything. However, in this statement he had mentioned that “Juicy” took the money and tried to take the meter. In this light, he had admitted his presence when the taxi driver was robbed by “Juicy”. Therefore, since he had been there when “Juicy” took money from the taxi driver, he becomes liable under the concept of joint enterprise for what “Juicy” did in his presence, though “Juicy” is unknown.
16. In reaching this conclusion, this Court intend to follow the decision of the **Privy Council** of the **United Kingdom** in the case of *Chan Wing-siu and others v The Queen [1984]*², where His Lordship **SIR ROBIN COOKE** stated, as below:

“The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the

¹ [2013] FJSC 4 (24th April 2013)

² [1984] 3 All ER 877

common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."

Defense Case

17. For the Defense case both Accused remained silent on the dock and one witness gave evidence for the 1st Accused. Giving evidence witness **Teguilagi Vakatokoi** mentioned that she lives in Wailea for 20 years and in 2021 she was residing there with her family. She alluded that the 1st Accused stayed inside the house on 12/06/2021 with her other members of the family.

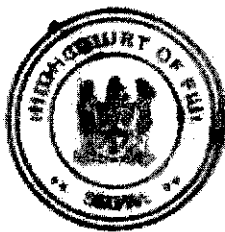
Evaluation of Defense evidence

18. Though the Defense witness **Teguilagi Vakatokoi** attempted to claim that the 1st Accused remained at home on 12/06/2021, the 1st Accused had admitted that himself and two others hired a taxi to go to Qauia on 12/06/2021 in his caution interview admitted in evidence by this Court. Therefore, in this light, this Court rejects the evidence of the Defense witness **Teguilagi Vakatokoi**.

Finding of Court

19. On the evidence analyzed above, this Court finds that all the required elements to establish the commission of the offence of **AGGRAVATED ROBBERY** in furtherance of a joint enterprise has been established against the 2nd Accused. However, this Court is unable to identify evidence beyond reasonable doubt that the 1st Accused committed the robbery or that he was a part of the joint enterprise that committed the robbery of taxi driver **Tulsi Ram**. Therefore, while convicting the **SENIJIELI PUAMAU** of **AGGRAVATED ROBBERY** contrary to **Section 311(1) (a)** of the **Crimes Act 2009**, **TUPOU WAQABACA** is acquitted from this charge.

20. You have 30 days to appeal to the Court of Appeal of Fiji.



A handwritten signature in black ink, appearing to read "Thushara Kumaraage".

Hon. Justice Dr. Thushara Kumaraage

At Suva

This 18th day of October 2023

*Cc: Office of Director of Public Prosecutions
Office of Legal Aid Commission*