

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 13 OF 2018

STATE

-v-

- 1. DESHWAR DUTT**
- 2. SAVENACA VUNISA**

Counsel: Mr S. Seruvatu for Prosecution
Accused in Person.

Dates of Hearing : 03-09 October 2023
Closing Submissions: 06 November 2023
Date of Judgment : 04 December 2023

JUDGMENT

1. This case involves another most heinous Robbery committed in Fiji. The Reddy family returned to Fiji from the United States to invest their hard-earned money and was running a supermarket in Namaka. After closing their business for the day, Ms Muni Lakshmi Reddy (Lakshmi), who is the complainant in this case (PW2), returned home around midnight on 29 December 2017 together with her husband, Jai, and her son Brendan. They were ambushed by three masked robbers who had already gained entry to the house by assaulting

the security guard (PW1). After brutally assaulting and tying up the security guard, Jai and Brendan, the house was ransacked. The branded clothes purchased in the USA, valuable jewellery and cash were among the property stolen from the complainant's house. The robbers fled the scene in the car stolen from the complainant.

2. The Accused persons (The Accused) were arraigned on the following information filed by the Director of Public Prosecution:

FIRST COUNT
Statement of Offence

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

Particulars of Offence

DESHWAR KISHORE DUTT, SAVENACA VUNISA and another between the 29th day of December 2019 and 30th day of December 2017 stole one Alcatel one touch mobile phone valued \$49.00 and one torch valued \$60.00, properties of BHAGUTY PRASAD, all to the total value of approximately FJD \$109.00 and at the time of such theft, the said DESHWAR KISHORE DUTT, SAVENACA VUNISA and another were armed with a kitchen knife, axe and pinch bar and had also applied force on the said BHAGUTY PRASAD.

SECOND COUNT
Statement of Offence

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

Particulars of Offence

DESHWAR KISHORE DUTT, SAVENACA VUNISA and another between the 29th day of December, 2019 and 30th day of December 2017 stole, \$10,000 cash in Fijian and US currencies, Samsung J7 brand mobile phone valued \$250USD and Samsung one brand mobile phone valued \$350USD, 1 Vido brand mobile phone valued \$100FJD, 1 Forme brand Mobile phone valued \$100FJD and a Toyota Prius motor vehicle registration number JC 367 valued \$17,000, properties of JAI REDDY, all to the total value of approximately FJD\$28,400.00 and at the time of such theft, the said DESHWAR KISHORE DUTT, SAVENACA VUNISA and another were armed with a kitchen knife, axe and pinch bar and had also applied force on the said JAI REDDY.

THIRD COUNT
Statement of Offence

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

Particulars of Offence

DESHWAR KISHORE DUTT, SAVENACA VUNISA and another between the 29th day of December 2019 and 30th day of December 2019 stole about 50 assorted jewelries and watches valued approximately USD\$102,000,\$2000 cash in Fijian and US currencies, ELIZABETH ARDEN RED DOOR perfume valued at USD\$79.00, the properties of MUNI LAKSHMI REDDY, all to the total value of approximately FJD\$206,160.00 and at the time of such theft, the said DESHWAR KISHORE DUTT, SAVENACA VUNISA and another were armed with a kitchen knife, axe and pinch bar and had also applied on the said MUNI LAKSHMI REDDY.

FOURTH COUNT
Statement of Offence

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

Particulars of Offence

DESHWAR KISHORE DUTT, SAVENACA VUNISA and another between the 29th day of December 2017 and 30th day of December 2017 stole a gold Samsung J7 brand mobile phone valued \$250USD, USD \$100 cash, Adidas backpack valued \$80USD, OLD SPICE brand deodorant valued \$10USD, TOMMY BAHAMA brand body spray valued \$20USD and a white mobile phone charger valued at \$10USD, the properties of BRANDON REDDY, all to the total value of approximately FJD\$940.00 and at the time of such theft, the said DESHWAR KISHORE DUTT, SAVENACA VUNISA and another were armed with a kitchen knife, axe and pinch bar and had also applied force on the said BRANDON REDDY.

3. The Accused pleaded not guilty to the charges. At the ensuing trial, the Prosecution presented the evidence of 7 witnesses and tendered 14 exhibits and documents. At the close of the case for the Prosecution, the Court, being satisfied that there was a case for each Accused to answer on each count, put the Accused to their defence. Both Accused elected to give evidence under oath.
4. The Accused were unrepresented at the trial. They were properly explained their rights and the right to cross-examine the witnesses called by the Prosecution. They waived their right to legal representation and legal aid. They were even allowed to sit at the Bar table and the 1st Accused, who is a serving prisoner, was permitted to wear the dress of his choice. He appeared to be a lawyer without the black gown and the wig. They exercised their right to cross-examine and proved themselves to be able cross-examiners, doing justice to the permission they received to sit at the Bar table. I believe I am not exaggerating if I were to

say that the 1st Accused is far better than some of the legal practitioners in terms of his ability to cross-examine. He identified all the vital issues involved in the trial and had done a thorough research. His cross-examination is right to the point and impeccable.

5. Soon after the *voir dire* inquiry, the Ruling was pronounced in open court, holding the confessions allegedly made by the 1st Accused to be inadmissible at the trial proper. At that stage, the 1st Accused to my surprise indicated that he was willing to take a progressive approach and plead guilty to the charges. However, when the case was taken up for trial proper, he retracted his statement and said that he would fight and defend the case. He explained that he expressed his willingness to plead guilty to the charges in the belief (from what he heard) that the confessions in the caution interview were held to be admissible by the Court in its Ruling.
6. Being a prisoner already serving a long prison term, it would have been reasonable for the 1st Accused to expect a concurrent imprisonment term in the event of him pleading guilty to the present charges even though he may not have been involved in the robbery. Therefore, I must emphasize that I completely erased from my mind the 1st Accused's indication to plead guilty to the charges. The findings of facts in this judgment are purely based on the evidence led in the trial.
7. After the trial was concluded and on the day the matter was fixed for closing submissions, the second Accused chose not to attend Court. The bench warrant issued to arrest him could not be executed. The Court decided to proceed to judgment *in absentia* after having been satisfied that the 2nd Accused's failure to attend Court was deliberate. The written submissions were filed by the State Counsel and by the 1st Accused comprehensively. On 6 November 2023, they were supplemented by oral submissions. Having considered the evidence presented at the hearing and the respective submissions of the parties, I now proceed to pronounce the judgment as follows.

Burden of Proof and Standard of Proof

8. The Accused are presumed innocent until they are proven guilty. The onus or the 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 their innocence. The Prosecution must prove each 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.

The Elements of Offence of Aggravated Robbery

9. The Prosecution must prove beyond reasonable doubt that the 1st and the 2nd Accused in the company of each other committed robbery. A person commits robbery if he immediately before or at the time 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. 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.
10. After a *voir dire* inquiry, the confession allegedly made by the 1st Accused to police was held inadmissible. The Prosecution relies on the identification evidence of the complainant and circumstantial evidence to prove the charges. The factual presumption arising out of possession of recently stolen property is relied upon by the Prosecution in respect of each Accused.
11. There are two Accused, and they are charged jointly on the doctrine of joint enterprise. However, the evidence against each Accused must be considered separately.

Circumstantial Evidence

12. The circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. Firstly, the primary facts from which the inference of guilt is to be drawn must be proved. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts that are so proved. Equally, it must be shown that when taken together, the only reasonable inference that can be drawn is incompatible with the innocence of the Accused. The drawing of the inference is not a matter of evidence: it is solely a function of this court based on its critical judgment of men and affairs, common sense, experience and reason.
13. In a circumstantial case, the factfinder must look to the combined effect of several independent items of evidence when considering the charge. While each separate piece of evidence must be assessed as part of the inquiry, the ultimate verdict on each charge will turn on an assessment of all items of evidence viewed in combination. The underlying principle is that the probative value of several items of evidence is greater in combination than the sum of the parts. The analogy that is often drawn is that of a rope. One strand of the rope may not support a particular weight, but the combined strands are sufficient to do so.
14. The State relies on the factual presumption arising from the possession of the recently stolen Property to prove the charges against each Accused. In **Rokodreu v State** [2022] FJSC 36; (25 August 2022), the Supreme Court, comprehensively discussed the common law principle of recent possession of stolen property as follows:

In common law jurisdictions there is a presumption that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. In order to apply this presumption, the prosecution is required to establish several requirements.

- i. Stolen property
 - ii. Recent possession
 - iii. Exclusive and conscious possession
- When the above factors are established, the possessor has to give an account as to how he came to possess. In other words, he should give a reasonable or plausible explanation.

15. The case of Wainigolo v State [2006] FJCA 49; AAU0061.2005 [28 July 2006] is relevant to this case. It states:

The principal ground relates to the so-called doctrine of recent possession which is that where property has been stolen and is found in the possession of the Accused shortly after the theft, it is open to the Court to convict the person in whose possession the property is found of theft or receiving. It is no more than a matter of common sense and a Court can expect assessors properly directed to look at all the surrounding circumstances shown on the evidence in reaching their decision. Clearly the type of circumstances which will be relevant are the length of time between the taking and the finding of the property with the Accused, the nature of the property and the lack of any reasonable or credible explanation for the Accused's possession of the property. What is recent in these terms is also to be measured against the surrounding evidence.

16. Having discussed the legal principles involved in this case, I shall now summarise the salient parts of evidence led in the trial which I consider to be important to resolve the issues in this case.

Case for Prosecution

PW 1: Bhaguty Prasad

17. Prasad was employed as a security guard. On 29 December 2017, he was guarding three housing units at Sonaisali, Nadi. Lakshmi, her husband and their son were the people residing in one of the houses. At around 9 p.m., he was held by three masked men. They assaulted him and took his phone and the torch. Having locked him inside Lakshmi's house, they started to search the house.
18. Lakshmi and her family arrived home at around midnight. The robbers got hold of them and brought Lakshmi's husband and her son to where he was and tied them up. They were asking Lakshmi about the money and the cards and threatened to rape her if she didn't comply. They took the car key from Lakshmi and drove it off. After a while, the police arrived.

PW 2: Muni Lakshmi Reddy

19. In 2017, Lakshmi was residing at Sonaisali in Nadi with her husband Jai Reddy. Her son Brandon Reddy had come for a vacation from the USA. On the night of 29 December 2017, at around 11.50 p.m., they returned home after closing their supermarket. The security guard was not to be seen at the entrance to open the gate. She told her son to open the gate. As soon as her son got to the gate, three masked men came and snatched her bag. They started punching her son and her husband. The masked men badly tortured her son in front of her. They dragged all of them into the house and closed the door.
20. She couldn't see their faces as they were all masked. The first one was short and husky, the second one was slim and a little taller than the first one and the other one was a little bit more built. They all spoke Fijian. One of them was Indian for sure, as certain words were spoken in Hindi. But he too spoke fluent Fijian. While the two were punching her son, one of them came to her and demanded money and jewellery. They were armed with a hammer, a knife, a sickle and a pinch bar. The sickle was put on her neck and asked for the PINs of the bank cards. They threatened to kill her if she had provided the wrong PINs. Her son and her husband were tied up and they put in a room where the security guard was.
21. When they demanded jewellery, she took them to the drawer where she had kept some fake jewellery. One of them said, no that's fake jewellery. She was sure he was an Indian man because he said, *nahi, nahi, nahi*, and then he asked where the rest of the money was. They made her sit on the toilet pan and threatened to kill her husband and her son if she didn't show them the money. She gave them five bank cards and four incorrect PINs. They took all the phones, the rings, necklaces. As they were leaving, one of them said that if she had given incorrect PINs, they would come back and kill her.
22. One of them tried to close the door but he could not completely close it. Two of them took their car JC 367 Toyota Prius and left. The one who remained inside the house was sitting on a chair, probably watching them. She knew somebody was still in the house but, after 5 to 10 minutes, she started screaming. The one who remained in the house left quickly. She locked the door and switched on all the lights, untied the hands and the mouth of her husband and the son. She went to the toilet window and started screaming as loud as she could.

23. She couldn't hear anybody in the vicinity, but she saw the light of a car. When she saw the car's reflection, she quickly opened the bedroom door and sat on the floor. She could hear somebody coming towards the garage door. This person said, *oh, oh, kon karis, kon bun dis, (who tied you up, what happened? I'm getting the police.* It was him...the witness said, while pointing to the first Accused, Dutt who was seated at the Bar table. She identified the 1st Accused as the person who had spoken to her in Hindi the night she was robbed. She could identify him as his mask was pulled down by that time. She saw his face clearly at a distance of 4-5 metres. All the other lights were turned on and the hallway light was very bright. He just turned around and ran to the car that was parked. He then jumped into the car and fled away. That's when she noticed that it was her car, JC 367. This incident happened roughly one or two hours after the robbers had left the house.
24. She said she did not know the name of this person until she came to Namaka Police Station a few days after the robbery. Before the robbery, she had never seen the first Accused. She explained how she came to know the 1st Accused's name at the police station.
25. She came to Namaka Police Station when the stolen items were being retrieved roughly 5 to 7 days after the robbery. She was having a conversation with Mr Abdul Khan and was seated facing Mr Abdul Khan. A lady came in with a bag of jewellery. Mr Khan asked her, whether she could identify the jewellery. She said 'Yes'. While she was looking at the jewellery, that lady started crying and said, *'Sorry, I did not know it was yours'*. At the same time, she heard somebody saying *"sorry, qalti hoique hum se"* (...), from behind. She turned around and saw that those words were being uttered by the 1st Accused. The 1st Accused had been standing at the back, but she saw him only when she turned around. The 1st Accused was crying and said to her, *'I'm sorry'*. She told the 1st Accused, *'You could have stolen everything, but you should not have tortured my son'*. She saw the 1st Accused limping and his face swollen with bruises. Abdul Khan then asked her, was this the guy? She said 'yes'.
26. She said she went to the police station several times within the course of two weeks after the robbery to identify her belongings that were stolen, and she made several statements. The

first statement was recorded when the police arrived soon after the robbery in the early morning (30 December 2017). She said she recorded another statement after identifying the Accused at the police station. She recognised the green shirt and the black pants and told the police that those were the clothing that the 1st Accused was wearing that night.

27. She further said that she saw the 1st Accused in the newspapers and when she watched the CCTV footage installed at her supermarket roughly two weeks after the robbery, she realized that this man had come to the supermarket before the robbery. By the time she watched the CCTV footage, she had already seen the 1st Accused at the Police Station.
28. She identified the following items in Court as the ones stolen from her house: six wrist watches including a Michael Kors two-tone silver and rose gold watch (MFI-1), Red Door perfume (MFI 3) - Old Spice deodorant (MFI – 4), a gold bracelet MFI 6- Gold earrings with amethyst pendant MFI 7 Calvin Klein suits and 4 pants of her husband (MFI 8), Amasco suitcase with name tag J Reddy with home address MFI 9, Cherry Blossom spray MF110 Samsung Samsung Galaxy phone of her son MF111 – blue long jeans Gloria Vandae MFI 12- Jovan Musk perfume MF113, 14: Resort vehicle key MFI 15 Docker's brand, shoes MFI 16 brought for her husband.
29. Under cross-examination, Lakshmi said that she is 101% positive that she identified the 1st Accused at the scene, and at the Namaka Police Station. She mentioned it to the police but not in her statement dated 29 December 2017.
30. In her clarification, the witness agreed that she did not identify the 1st Accused at the scene by his name as Deshwar Dutt. However, when she saw him at the police station, she told the police that this person had come unmasked. When she recorded her statement, she did not mention the 1st Accused's name because she did not know his name then. Mr Abdul Khan asked, 'This is Deshwar Dutt, was he the person?' At that time the 1st Accused was standing at the back with two other guys. The witness denied that it was Mr Khan who had told her that it was the 1st Accused who had robbed her. She agreed that there was no identification

parade conducted at which she identified the 1st Accused. The witness denied that she was mistaken in her identification.

31. Lakshmi denied that she had not told the police that she could identify the robbers if she saw them again. She hoped that the police would have written everything that she had said. She did not read word by word. She believed the police officers wouldn't lie. So, she signed it. She was traumatized already as she gave the statement just 2-3 hours after the robbery. But she clearly remembered everything that had happened.
32. She described to the police the clothes the 1st Accused was wearing. In the first statement that she gave to the police on 30 December 2017, she mentioned that she saw one unmasked Indian man coming into the house and that the same man ran and sat in the car. She did inform the police of everything and, if it's not in her statement, the police must have missed it. At the police station, she identified the person who came unmasked and the man she saw outside was the same person she saw at the Namaka Police Station. She did mention to the police that the person who came unmasked was wearing a green shirt. She could say that the man she saw unmasked was one of the three intruders who came inside her house because his shirt matched that of one of the masked intruders.
33. She could say that one of the masked men was Indian because he said, *nahi, nahi, nahi*, referring to the jewellery as being fake. She could confidently say he is an Indian from the way he said *nahi, nahi*, (the Indian accent).
34. She mentioned to the police about the watches and the suits that were robbed. Those brands were not available in Fiji. Some of the jewellery was custom-made, but the receipts are not available. She identified those items on 31 December 2017 and on 5 January 2018 because she owned them for a long time. She stated in her statement about \$2,000.00 cash in her hand. The figure of \$ 20,000.00 was the total money stolen from her, her son and her husband.

35. Under cross-examination by the 2nd Accused, the witness said that she gave the description to police of the watches that were stolen although it is not in the statement given on 30 December 2017.
36. Under re-examination, the witness said that, in her statement, she talked about the Indian man who came to her house, and that he was the one whom she identified at the police station. The robbers said that if the PINs were not correct, they would come and kill her. When the Indian man came unmasked, she identified his green shirt and the black pants.

PW3: PC Josua Cakausesa

37. PC Josua was a member of the joint operation team which investigated the robbery that happened on 30 December 2017 at Sonaisali. Cpl Silio of the Operation Team brought in one Savenaca Vunisa to Namaka Police Station. He had known Vunisa since 2004. He searched Vunisa at the Namaka Police Bure at around 9 p.m. on 30 December 2017. He found a silver and rose gold plated Michael Kors wristwatch in his front pocket. He said it was given to him by his girlfriend, who just come back from overseas.
38. The watch was taken to Sonaisali for identification purposes and was identified by the complainant. It was brought back, and a search list was prepared the next morning which was 31 December 2017. The team came back from Sonaisali on that night and Savenaca was locked at Nadi Police Station. That's why the search list was prepared the next day in the presence of Savenaca Vunisa, DC Saiasi, DC Nabeqa and DC Gavidu. He tendered the search list (PE 1A) signed by Savenaca Vunisa voluntarily and the wristwatch as PE1(B) in evidence. In Court, he identified the 2nd Accused as Savenaca Vunisa on whom he had conducted the search.
39. Under cross-examination by the 2nd Accused, the witness agreed that the search list had not been signed by the officers who were present during the search to verify their presence. He agreed that the failure to prepare the search list at the time of the search breached the

procedure. He has no idea if the Operation Team followed up on the information that the wristwatch was given to Vunisa by his girlfriend.

PW 4: Meli Doughty

40. In 2017, Meli was based at the Namaka Police Station as the Crime Officer. He was part of the operation to recapture the escapee Deshwar Dutt.
41. On 02 January 2018, his team received information from Cpl. Silio that the vehicle used by the escapee was left abundant at Saweni on a sugar cane field. They all went to check on the information and he saw the vehicle 4 x 4 Toyota Hilux twin cab parked inside the sugar cane field. A team was deployed in the vicinity, and he left for Lomolomo where he was awaiting a call from his team regarding the movements of the escapee. Cpl. Silio had received a call at night between 9 to 10 p.m. about a suspicious vehicle. His driver drove him and Saimoni Qase to follow up on the information.
42. Cpl. Silio called and informed that he saw three people coming out of the sugar cane field, dropping the suitcase on the grass, and running towards the mangrove but he didn't see those people fleeing. When he went to the scene, he saw only the suitcases lying down there. There were two suitcases and one pink Puma brand knapsack. The officer-in-command Abdul Khan arrived at around midnight and instructed them to take them down to Namaka Police Station. One suitcase had a name tag Reddy, the victim from Sonaisali. The witness identified the Forecast brand black suitcase (PE2) and the Puma brand knapsack (PE 3) in Court.
43. He took the bags to Namaka Police Station, kept the bags in the police bure and headed back to the scene. A search list was prepared when the 1st Accused was arrested and brought to Namaka Police Station the next morning. In the presence of the escorting officers, he started filling the search list at around 1 p.m. on 3 January 2018 with the suspect by opening all the bags. The 1st Accused identified all the items that were inside. He could not fill in the search

list on 2 January 2018 because the whole team was engaged in searching for the Accused that night.

44. The search lists were prepared for the items found in each bag on the suspicion that they were the ones left behind by the people who ran into the mangroves. The witness identified those items in Court with reference to the search list. The search list was voluntarily signed by the 1st Accused Deshwar Dutt after the items were identified by him. The bags and the items were later handed over to the interviewing team. The search lists were marked and tendered as 4A, 4B and 4C.
45. Under cross-examination by the 1st Accused, Meli agreed that the 1st Accused was escorted to the hospital but denied that he was escorted back to the Station after 3 p.m. and denied that the 1st Accused was not present at 1 p.m. to sign the search list. The witness agreed that, according to the medical report, the 1st Accused had been at the Nadi Hospital from 12.15 p.m. to 3 p.m. on 3 January 2018. He agreed that no witnessing officer signed the search list and that he put a dash on the search list because the occupant of the property was not present at the time of the search. Cpl. Silio is the one who recognized Deshwar Dutt.
46. He agreed that in his witness statement, he had stated that at about 1.30 a.m. on 3 January 2018, he loaded the said suitcases and the knapsack with the suspects namely Dhirendra and Nirmal to Namaka Police Station where he prepared the search list and handed the bags over to the Investigating Officer Saiyasi.
47. He prepared the search list at Namaka Police Station at 1 a.m., he agreed that the 1st Accused was not present at Nadi Police Station to witness the same. He agreed that the bags were taken to the Station in another vehicle. When he arrived at the scene, he just saw the bags and nothing else.
48. He denied that he had forced and assaulted the 1st Accused to sign the search list. He agreed handing the bags over to Saiyasi, after filling the search list and signed by the 1st Accused. He agreed that, according to his statement, he had handed over the bags at 1.30 a.m. He then

said the time mentioned in his statement was the time he escorted those bags and arrestees to the Station. He just off-loaded all the bags at the Station and went back to the scene at Vuda Point. Before leaving the station, the bags were left at the Namaka *bure* and entrusted them to an orderly without checking their contents. He said he prepared the search list at 1:30 p.m. on 3 January 2018 when bags were opened in front of the 1st Accused. He is not sure if anything had been planted inside the bags during that period.

49. He denied that the date on the search list had been altered later by somebody from the 2nd to the 3rd to suit the circumstances of the case. He agreed that the suitcase for which he had prepared the search list was never found in 1st Accused's possession.
50. He agreed that he gave a second statement on 30 January 2019 after approximately one year. He denied that the signature of the 1st Accused on the search list was obtained by force putting pressure on the 1st Accused.
51. He confirmed that he did not see anyone running away from the twin cab although his statement stated otherwise. After taking that luggage to Namaka police bure, he came back to Vuda and that was when he saw the two arrestees, Dharendra and Nirmal. They had been with Dutt when the team was chasing them, but Dutt was arrested in the morning.

PW5: Cpl. Silio Finau

52. In 2017, Silio was based at the Crime Intelligence Unit of the Lautoka Police Station. He was part of the day and night operation to arrest the escapee Deshwar Dutt, headed by the Deputy Divisional Police Commander Abdul Khan.
53. On 30 December 2017 his team received information that Savenaca Vunisa was involved with Deshwar Dutt in the robbery at Sonaisali and some of the stolen items were kept in Savenaca's residence at Votualevu. Savenaca was not arrested yet by that time. It was in the night at around 2100 Hrs that they were given instructions to go to Savenaca's house. He went with Cpl. Savenaca and the driver Isoa Donaldson to Savenaca's house. At his

residence, only the mother was present, and they questioned the mother Salote Maraiwai on the items that were brought by Savenaca. Maraiwai informed them that Savenaca threw the bag into the cassava patch beside the house. Then she pointed out the cassava patch which was just beside the house where the bag was. He picked up the bag from 5 to 7 meters away from the Savenaca's residence. It was a black Adidas knapsack. The bag was brought into her residence. The witness identified the bag in Court as the one he retrieved that night. The bag which was earlier identified by the complainant [MFI 5(2)] was tendered in evidence as PE5. They opened the bag in front of Maraiwai and the items contained therein were displayed to her. A search list was prepared and Maraiwai signed it. They brought the bag with the items in the bag to the police station and handed them over to the investigating officer. The search list dated 30 December 2017 was tendered in evidence as PE 11.

54. The contents of that bag were identified by the witness. A black belt (leather), a white Samsung charger port, a gold- coloured small jewelry box, a gold chain with a pendant, a purple silver pair of earrings, silver studs, rose gold plated wristwatch, styled rose gold-plated wristwatch, a gold bracelet, Elizabeth Arden Red Door Perfume, Tommy Bahama body spray, Old Spice deodorant, a small brown bag, jewellery bags and a piece of gold pendants. Altogether 14 items were tendered in evidence. The gold chain and the pendant (MFI -7) were tendered as PE 6. Studio silver rose gold plated wristwatch (MFI 5) as PE 7, Elizabeth Arden Red Door Perfume (MFI- 3) as PE 8, Tommy Bahama body spray Old Spice Deodorant (MFI- 4) as PE 9, a piece of gold bangle (MFI- 6) as PE 10. He also brought the vehicle that was used in that robbery from the road next to the hospital in Nadi.
55. Under Cross-Examination by the 2nd Accused, the witness agreed that the fact that the 2nd Accused brought that bag home is not recorded in the statement. He agreed that everything listed in the search list (PE 11) was not found in 2nd Accused's possession. He agreed that the complainant in her statement had not reported the items listed on the search list.

PW 6: Salote Maraiwai

56. Salote Maraiwai is the 2nd Accused's mother. In 2017, Maraiwai was living in Votualevu Low Cost. On the evening of 30 December 2017, a police team came home, and they wanted to search the house without a search warrant. They asked her if Savenaca had brought home any stolen items, and she said 'no'. From 28 December 2017, Savenaca was missing from home and returned home on 30 December 2017 after the police had come. When she asked him where you were, he did not say anything, and he went to the back of the house with a bag.
57. The police officers did not find anything. She went to have a bath and when she came out from the house, she saw Savenaca coming outside of the house with a black knapsack and the police officers were escorting Savenaca into a police vehicle. Then she went to where Savenaca had gone. She met Savenaca's friend, Meli, sitting over there. She asked Meli, 'Can I please get the bag that Savenaca brought here?', because she thought that he had packed some of the clothes that she had bought for him in that bag. Meli gave the bag to her.
58. When PE 5, was shown to the witness, she denied that it was the same bag that Savenaca had brought home on 30 December 2017. It did not have Adidas written on it. It was black with white stripes. She opened the bag and saw the clothes that she had bought for Savenaca. Apart from the clothing, she saw Savenaca holding a spray in his hand and a black charger and a ¾ pants. She threw the bag into the bush because she feared of what had happened. She did not know why the police had come home to search her house.
59. After that, the police officers came again and then she told them that she had thrown the bag into the bush. She was the one who showed them where the bag was. The police officers took the bag with them. She did not sign a search list on the 30 December 2017. She was called to the Namaka Police Station the day after and that was when she signed a statement that was already written. She was told to sign it but was not even read back to her. When the search list was shown, she admitted that it was her statement but denied its contents because it was not read to her. She denied having seen a brownish jewellery box and denied that the black knapsack was one of Adidas although in her statement dated 30 December 2017 she had given a description to that effect.

60. At this stage, the witness was declared hostile to the Prosecution and allowed her to be cross-examined by the Prosecution. Under cross-examination, she denied seeing a gold jewellery box in the bag. She denied seeing or signing any search list. When PE 11 was shown, she admitted her signature and denied the contents of the document. She was called the next day to the police station and asked to sign a statement that was already prepared.

PW 7: Dhirendra Singh

61. In 2018, Dhirendra was living in Naikabula. On 1st January 2018, his neighbour Nirmal came home and drank grog with him. The next day (2 January 2018), he picked up one Ronald from Lautoka town and, brought him in a Probox and went straight towards Vuda for construction work. When they reached Vuda, Ronald and Nirmal got out of the car and went into the sugarcane field. When he was sitting in the driver's seat, police officers emerged from the cane field and he was arrested at Vuda that night. He later came to know that Ronald's real name is Deshwar Dutt. He had not seen Ronald before. He was cautioned interviewed by the police who asked numerous questions after assaulting him. When they went to that place in Vuda, they did not take anything with them. The witness identified Deshwar Dutt whom he knew as Ronald.
62. Under cross-examination by the 1st Accused, the witness admitted that the 1st Accused was not carrying any suitcase.

Case for Defence

DW 1: Deshwar Dutt (1st Accused)

63. Deshwar said that, the complainant in her evidence alleged that a robbery took place at her house on 28 or 29 December 2017. He was not involved in that robbery. He had not robbed anybody. Neither was in his possession any of the stolen goods. The only reason why he has been subjected to the allegation was because he was an escapee. The identification, which

Ms Reddy made was mistaken. He wasn't subjected to any identification parade. All he could remember is that when he was at the Station, the then Police Commander, Western, Mr Abdul Khan brought some ladies to the Station, and he (Mr. Khan) was the one who was pointing at him saying that he (Dutt) was the one who had robbed the Sonaisali house.

64. Under cross-examination, Deshwar Dutt disagreed that he was an escapee. He agreed that he was serving for 18 months in a robbery case and was just released on 15 December. He agreed that he was arrested on 3 January 2018. Deshwar denied that he had ever gone to the complainant Muni Lakshmi Reddy's house with two others on 29 December 2017 and robbed her house. He denied that he went to withdraw money from her account using her ATM card and that he returned to the robbed house and ran to the door, and at that time he was identified by the complainant. He denied that he had pretended as if he was not the robber and that he asked the complainant what happened, who robbed you? He denied that he had run to the car and fled the scene.
65. Deshwar denied that he had dropped a bag of stolen items while fleeing in Vuda. He denied that Nirmal and Dharendra had planned to go and pick up the stolen property that he had left in the abandoned vehicle. He denied that, while he was on his way to pick up that property at the abandoned vehicle, the police caught Dharendra, but he managed to run away. He said that on the morning of 3 January 2018, he was arrested, tortured, his ankle broken and then brought to Namaka Police Station.

DW 2: Savenaca Vunisa (2nd Accused)

66. Vunisa said that, on 30 December 2017, he was arrested as a suspect in another matter where he was later acquitted by the Nadi Magistrates Court. When he was arrested for that matter, the police colluded amongst themselves and made him a scapegoat for this matter because there were plenty of unsolved cases. He admitted that he was in possession of the wristwatch PE 1. He told the police that it was a gift from his girlfriend who came from overseas before Christmas. He filed an affidavit at the High Court Registry from his girlfriend, which was

emailed from Australia. He tendered a copy of the passport of her girlfriend who arrived in the country on 20 December 2017 and left on the 31 December 2017.

67. Under cross-examination, Vunisa admitted that he was not home on the 29 and 30 of December 2017 and that he returned home on the evening of 30 December 2017. He admitted that he had a black Adidas bag in his possession. He denied that there was a box of jewellery in that bag. He agreed that when he was arrested, he had a Michael Kors silver- and gold-plated wristwatch in his possession. He did not know if it was a ladies' watch. The watch was a gift from Bernadette Pal, his girlfriend. He denied that that watch belonged to Muni Lakshmi Reddy and that he had robbed her home with Deshwar Dutt and another on 28 and 29 of December 2017. He denied that he had ever gone to Sonaisali on those days. He denied that he forged a copy of the affidavit that he claims to be from his girlfriend.

DW 3: Saiyasi Muturugu

68. In 2017, Saiyasi was based at Nadi Police Station. He received a report of an aggravated robbery in Sonaisali on 28 and 29 December 2017 and was appointed the investigating officer. He did not record any statement of the complainant. There was no ID parade conducted because to his knowledge, the complainant could not identify anyone during the incident. He is not aware whether the complainant has identified anyone at the scene.

Analysis/Evaluation

69. The case of the Defence is one of denial. However, the Accused don't deny that the offences as charged in the information took place on 29/30 December 2017 at Sonaisali. The position of the Defence is that they were never present at the crime scene on 29 or 30 December 2017 and not involved in the offences. The Accused persons deny that the stolen property was found in their possession.
70. It is for the Prosecution to prove beyond reasonable doubt that the Accused were present at the crime scene, and that they committed the offences as charged. The State relies on the

factual presumption arising out of possession of the recently stolen Property to prove the charges against each Accused and the identification evidence of the complainant against the 1st Accused.

The Application of the Presumption of Possession of the recently stolen Property

Identity of the stolen property

71. The Prosecution called the Complainant-Muni Lakshmi Reddy (PW2) to establish the identity of the property. The following items were tendered in evidence after being identified by PW2 as the property stolen from her home.

PE 1 (b) Ladies Michael Kors watch

PE 2 Forecast (black) suitcase

PE 3 Puma Knapsack (pink)

PE 5 Black Adidas Knapsack

PE 6 Gold Box of Amethyst with pair of earrings and pendant

PE 7 Rose Gold branded Style & Co. watch

PE 8 Red Door Perfume

PE 9 Old Spice deodorant

PE 10 Gold plated bracelet

72. The case for the Prosecution is that PE1(b) above was found in the possession of the 2nd Accused on 30 December 2017 and PE 5 to PE 10 above were recovered on the same day from a cassava patch beside the house of the 2nd Accused upon the information provided by the mother of the 2nd Accused- Salote Maraiwai (PW 6). The Prosecution appears to say that PE2 and PE3 were left behind by the 1st Accused when he ran into the mangrove at Vuda on 2 January 2018 to evade his arrest and therefore he was in possession of those bags and the items contained therein as listed in search lists PE 4(a), 4(b) and 4(c).

73. PW2 testified that she gave the description to the police about the stolen items that were robbed. The brands of most of those items were not available in Fiji at that time and had been purchased from leading stores like Macy's in the USA. Some of the jewellery were custom-made. She was very familiar with those items because she herself had bought some of them and some of them were being used by her, her husband and her son. One bag had a name tag put by the airline with her husband's name (J Reddy) on it. She confirmed that those were the items that were stolen from her home. She had identified some of those items on 31 December 2017 and on 5 January 2018 when they were displayed by the police.
74. The 1st Accused cross-examined PW-2 to challenge the identity of the property tendered in evidence on the basis that (i) a full description of the items that were stolen had not been given to the police in her statement dated 30 December 2017 (ii) those items did not have any specific identification mark so as to confirm the identity and (iii) those items were freely available in Fiji for anyone to buy.
75. PW2 had given her statement soon after the robbery when the police visited the scene. She described how traumatised she was after going through the ordeal that night. I do not think, having faced such a situation a few hours ago, she was in a proper state of mind and had time to check for and give a detailed account of each and every item that was stolen.
76. It is highly unlikely that some of those valuable branded items were available in Fiji back in 2017. The bag tagged with the complainant's husband's name clearly established that it belonged to the complainant's husband. The fact that Jai Reddy was not in court to identify that bag and his suits does not affect the credibility of PW 2's evidence as they had been there in her house for some time and some of the items had been purchased by the complainant herself. Therefore, the omission highlighted by the defence should be disregarded. I am sure that the items identified by the complainant in Court are the property stolen from the complainant's house.

‘Recent’ Possession

77. The 2nd Accused admitted that PE1 (b) [Ladies Michael Kors watch] was recovered from his possession upon his arrest on 30 December 2017. According to PW 3 (Cpl. Silio), PE 5 to PE 10 had also been recovered on 30 December 2017 for which a search list (PE11) was prepared. The search list signed by the mother of the 2nd Accused -Maraiwai (PW6) is dated 30 December 2017. The PW 6 does not deny that a police team visited her house and a black knapsack was recovered from a cassava patch although she denied that it was an Adidas bag and that it contained items listed in the search list. (I shall analyse her evidence to test her credibility under the heading ‘Exclusive Possession’). I am satisfied that PE1 (b) and PE 5-PE10 were recovered by police on 30 December 2017 just within a day after the robbery. According to Meli (PE 4), PE 2 and PE 3 were retrieved on 2 January 2018 from a sugarcane field in Vuda just two days after the robbery.

‘Exclusive’ Possession

(2nd Accused)

78. Cpl. Josua (PW3) said that PE 1(b) was retrieved from the front pocket of the 2nd Accused. There is no dispute that PE1(b) was in the exclusive possession of the 2nd Accused. The 2nd Accused however disputes that PE 5- PE 10 were recovered from his possession. Cpl. Silio (PE 5) indeed admitted that those items were not recovered from the physical custody or possession of the 2nd Accused. Possession is an elusive concept in law and includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person (Section 4 of the Crimes Act).
79. In light of the Crimes Act definition, I shall now endeavour to see if the items PE5-PE10 were in the exclusive possession of the 2nd Accused. In this regard, I find the evidence of Cpl. Silio (PE 3), Maraiwai (PE6) and that of the 2nd Accused to be important.

80. According to Cpl. Silio, Maraiwai had informed him that the 2nd Accused threw the bag into the cassava patch beside the house. He had picked up a black Adidas knapsack from 5 to 7 meters away from the 2nd Accused's residence. He had opened the bag in front of Maraiwai and the items contained therein were displayed to her for which a search list (PE11) was prepared and the same was signed by Maraiwai.
81. PW 5 (Cpl. Silio) agreed that the fact that the 2nd Accused brought that bag home is not recorded in his witness statement. It is an important omission. However, the 2nd Accused in his evidence admitted that he had a black Adidas knapsack. Maraiwai (PW 6) had seen the 2nd Accused coming outside the house with a black knapsack when the police officers were escorting him into a police vehicle. Upon PE 5 being shown, Maraiwai however denied that it was the same bag that the 2nd Accused had brought home on 30 December 2017. She said it did not have Adidas written on it. However, in her witness statement, Maraiwai had specifically mentioned that the knapsack was Adidas and that, upon one compartment being checked, she had seen a brownish box and that she threw the bag into the bush out of fear and that it was later recovered by the police officers.
82. Maraiwai's evidence is consistent with that of Cpl. Silio who said that a black knapsack was recovered from a cassava patch upon being pointed out by Maraiwai. Maraiwai confirmed later that her signature appears on the search list (PE 11) but she denied its contents because it was not read over to her. She denied having seen a brownish jewellery box despite her witness statement stating otherwise.
83. Maraiwai was declared hostile to the Prosecution. She is the mother of the 2nd Accused and her presence in Court was not secured easily. It was natural for her to concoct her evidence to support her son's defence. She obviously contradicted her own version given to the police soon after the recovery of PE 5. Having first denied the signature on the search list (PE11), Maraiwai later admitted that it was her signature. I am unable to accept that she signed PW11 without knowing its content. I would reject her evidence that PE 5 was not the knapsack that was recovered from the cassava patch and that she was not aware of its content that included the brownish jewellery box.

84. I accept the evidence of Cpl. Silio that PE 5 was recovered from the cassava patch 4-5 metres away from the 2nd Accused's house, upon being pointed out by Maraiwai. I accept that Maraiwai had informed Cpl. Silio that PE 5 was brought home by the 2nd Accused on 30 December 2017 when he returned home after him having gone missing from home since 27 December 2017 and that it contained stolen items PE 6 to PE 10. I am satisfied that the 2nd Accused knew where PE 5 was and it was under his control although it was not recovered from his physical custody. The Prosecution established that PE 5 and its contents (PE 6-PE10) were in the possession of the 2nd Accused soon after the robbery.

(1st Accused)

85. The Prosecution appears to say that PE 2 and PE 3 were in the possession of the 1st Accused although they were not in the physical custody of the 1st Accused at the time they were recovered by the police. In those bags, the police found a lot of stolen items as listed in the search lists PE4 (a), (b) & (c) whose identities were established by the complainant. Let me now analyse the evidence of Meli Doughty (PW 4) and Dharendra Singh (PE 7) in this regard.

86. PW 4 admitted that PE 2, PE 3 and the contents therein were not in the (physical) possession of the 1st Accused although he (the 1st Accused) signed the search lists PE4 (a),(b) & (c) on 3 January 2018. There is no dispute that the 1st Accused was taken to Namaka Police Station having been arrested from the mangrove in Vuda on 3 January 2018. PW 4 says that the 1st Accused signed the search lists voluntarily when the bags were opened in front of him on the same day.

87. According to PW 4, he had received information from Cpl. Silio on 2 January 2018 that the vehicle used by the 1st Accused was left abandoned at Saweni on a sugar cane field and Cpl. Silio had seen three people coming out of the sugar cane Field, dropping the suitcase on the grass, and running towards the mangrove. Contrary to his witness statement, PW 4 admitted that he had never seen those people fleeing but had only seen the two suitcases and one pink Puma brand knapsack lying there. The witness identified in Court the Forecast brand black

suitcase (PE 2) and the Puma brand knapsack (PE 3) but not the third bag. There is no doubt that those bags contained a lot of stolen property listed in the search lists. They were identified by the complainant and one of the suitcases even had a name tag of 'R Reddy', indicating that it belonged to the husband of the complainant. However, the Prosecution failed to establish the link between those bags and the 1st Accused.

88. The Prosecution appears to rely on the search lists [PE4 (a), (b) & (c)] to establish that the items listed in them were in the control of the 1st Accused because he had signed them. However, for the reasons given below, I am unable to accept the version of the Prosecution in that regard.
89. PW 4 said that the 1st Accused signed the search lists at around 1p.m. on 3 January 2018 after he was arrested and taken to Namaka Police Station. However, upon being shown the medical certificate, PW 4 admitted that the 1st Accused had been in Nadi Hospital until 3 p.m. on 3rd January. Therefore, PW 4's evidence that the search lists were signed by the 1st Accused at 1 p.m. on 3 January 2018 cannot be true.
90. In his evidence, PW 4 said that the bags (PE 2&PE 3) were left behind at the Namaka *bure* and entrusted them to an orderly without checking their contents. According to his witness statement (which he made admittedly approximately one year after the incident), he, at about 1.30 a.m. on 2 January 2018, had escorted the suitcases and the knapsack with the suspects namely Dhirenda (PW7) and Nirmal to Namaka Police Station where he prepared the search list and handed the bags over to the Investigating Officer Saiyasi. In court, he agreed that the 1st Accused was not present at Nadi Police Station to witness the same. When Saiyasi (DW3) was called by the Defence, he did not say that he received those bags from PW 4. The Station Orderly was not called to tell what happened to the bags until PW 4 opened the bag the next day. There is no evidence that the bags were properly locked. PW 4 did not rule out the possibility of the contents of the bags being contaminated or anything being planted inside the bags whilst they were sitting in the bure.

91. It is clear, that the search lists were not prepared and signed when the bags (PE2 & PE3) and the items contained therein were retrieved and not certainly in the presence of the 1st Accused. They were prepared on the assumption that they were the bags left behind by the people who ran into the mangrove and that one of them was the 1st Accused.
92. Contrary to what Meli (PW4) said, Cpl. Sillio (PW 5) in his evidence did not say that he saw three people running into the cane field leaving some bags behind and that he recognized the 1st Accused as one of them. Although Dhirendra (PW 07) said that the 1st Accused went into the sugarcane field in Vuda, he did not say that he (the 1st Accused) carried any bags. Therefore, the possibility that the 1st Accused ran into the sugarcane field because he was an escapee (to avoid his arrest) and not because he was guilty of Sonaisali robbery was not eliminated.
93. Although the Prosecution failed to call the arresting officers of the 1st Accused at the trial proper, the Court can accept that he (the 1st Accused) was arrested while hiding in the mangrove in Vuda on the morning of 3 January 2018 as that fact was not disputed at the *voir dire* hearing. However, in the absence of cogent evidence connecting the 1st Accused to the bags (PE2, PE3), the Court is unable to draw the only inference that they were in the control of the 1st Accused and that they were found in his possession.
94. Further, the Prosecution failed to prove the admissibility and the truthfulness of the search lists PE4 (a), (b) & (c). Before the arrest, the 1st Accused had been hiding in the mangrove the whole night and he had remarkable injuries on his body, a black eye (*periorbital haematoma*) and a broken leg. Upon his arrest on 3 January 2018, the 1st Accused was carried by two officers to the police station because he could not walk properly. Despite those medical conditions, the interview had been conducted a few hours after his arrest.
95. After the *voir dire* inquiry, the confessions allegedly made by the 1st Accused in his caution interview were held inadmissible because the Prosecution failed to prove beyond reasonable doubt that they had been made voluntarily and recorded fairly. However, a *voir dire* inquiry was not run to test the admissibility of the admissions allegedly made by the 1st Accused to

police in the search lists. According to PW 4, the search lists were signed a few hours after his arrest (at around 1 p.m.) when the condition of the 1st Accused should have remained the same. Having heard the evidence at the *voir dire* proceedings and the trial proper, I am compelled to reject the evidence of PW 4 that the 1st Accused signed the search list voluntarily.

96. Further, the protocols needed to be followed as per the Police FSO's in respect of search lists were not admittedly followed by PW 4. No officer had witnessed the preparation or the signing of the search lists. The part 2 of the search lists under the heading- '*Name of the Occupant and whether present during Search*' has been left blank suggesting that the items listed therein were not retrieved from the possession of the 1st Accused. In addition to the observations made by the Court regarding the inconsistencies of PW 4's evidence, a careful observation of the search lists would reveal that the date has been altered from 2 to 3 to suit the version of the Prosecution that the items listed therein were in the possession of the 1st Accused upon his arrest. I should reject the evidence of PW 4. Having considered the evidence which I alluded to above, I am not satisfied that the PE 2, PE 3 and the contents therein were in the possession of the 1st Accused soon after the robbery.

Identification of Person

-At the crime scene

97. Apart from the circumstantial evidence touching the factual presumption on recent possession of stolen items, the Prosecution relies on the identification evidence of the complainant (PW 2) to establish the link between the alleged crime and the 1st Accused, Mr Deshwar Dutt. The challenge to the identification evidence appears to be twofold. First, the 1st Accused submits that PW 2 is not honest and therefore not credible. Second, he says that her identification is mistaken. Accordingly, both PW 2's testimonial credibility and reliability on identification are being challenged.
98. Let me first deal with the issue of credibility. In her evidence-in-chief, PW 2 said that all three robbers were fully masked so she couldn't see their faces; they all spoke Fijian. She

was however sure that one of them was Indian because he spoke certain words in Hindi; when she showed her fake jewellery to one of the robbers, he said *nahi, nahi, nahi* and she recognized his accent to be Indian; but he too spoke fluent Fijian. She denied that she had failed to tell the police that she could identify this person if she were to see him again.

99. The 1st Accused submitted that PW 2 is not consistent and had not talked about an Indian man in her statement to police given soon after the robbery. I agree that PW 2 in her witness statement had not told the police that one of the masked men was Indian. But in the latter part of her statement, she talked about an Indian man.
100. It has to be accepted that PW 2 had given her statement soon after a traumatic night invasion in which she was threatened with death and rape at the point of a sickle. Her husband and son had been brutally assaulted and threatened in front of her. She said that she was already traumatized when she gave the statement, but she clearly remembered everything that had happened. Faced with such a traumatic situation, I do not expect her to tell everything in detail to the police in her witness statement given soon after the robbery.
101. Furthermore, PW 2 said that she hoped that the police officers would have written everything she said and that she did not read her statement word by word before signing. She believed the police officers wouldn't lie. So she just signed the statement. Under these circumstances, I do not consider the inconsistencies as to the ethnicity of one of the masked robbers to be material enough to reject PW 2's evidence on identification.
102. I would agree that the ethnicity of the robbers, when it comes to identification, is important information she should have provided to the police if she believed that one of them was Indian. However, it is clear, that her assessment of the ethnicity of the robbers should have been based purely on what she heard them talk and not what she saw, because all of them were fully masked. Based on the assessment of what the robbers talked about, it was reasonable for her to tell the police in that traumatic condition that all the masked men were of iTaukei origin because they all spoke fluent Fijian. In these circumstances, the possibility

of one of the masked robbers being Indian cannot be ruled out although this fact is not stated in her statement.

103. Although PW 2 did not mention that one of the masked men was Indian, in the latter part of her statement given to police soon after the robbery on 30 December 2017, she did mention an unmasked Indian man, who spoke to her when she managed to come out of the house, roughly 45 minutes after the robbery. *She said in her statement the following ...I then ran to the window and started shouting saying help us and also started to bang the door and I could hear someone running out of the house then about I think 45 mins I saw one car coming inside our gate I thought it was them they are back. At the 1st those 2 iTaukei took our vehicle (car) so I thought they are back I then got afraid that again they will do something to us so I came to open the door [main] I could hear one Indian man voice so I came out and opened the door. And all of a sudden I saw one Indian man asking me what happened to us when the door locked who punched us. He told me to wait he is going to call the police for help. I just knew he left in the car...after that Indian man left, all three of us ran to Relax Resort as we were very afraid....* In that statement, however, she had not told the police that this Indian man was one of the masked robbers. At first blush, there is an inconsistency here. Should that inconsistency affect the credibility of PW 2?
104. The 1st Accused argued that even if the Indian man whom PW 2 identified was him, there was no evidence that he was one of the robbers who had robbed her house approximately 45 minutes ago. That is a valid argument. However, it has to be accepted that once it has been established that the unmasked Indian man was the 1st Accused, a plausible explanation is required from him as to what he was doing at around 1 am in the premises that was robbed and why he ran back to the vehicle parked in the vicinity and fled the scene without helping to bring down the police, as he had pretended to PW 2 being his reason to be there. If he fails to raise a reasonable doubt either by adducing evidence or pointing to Prosecution evidence, I cannot help but conclude that the 1st Accused was one of the robbers.
105. The question is whether PW 2 had any reasonable basis to believe and thus support her evidence that this Indian man was one of the masked robbers. I can see two justifications for her belief and her evidence.

106. First, it is possible that, in the circumstances that transpired later, she realised that this Indian man was one of the robbers. She could recollect that the clothes of one of the masked robbers matched those of the Indian man she saw outside the house. PW2 said she described to the police the clothes which the robbers were wearing and that the Indian man who came unmasked was wearing a green shirt. She said she was shown a green shirt and black pants at the Namaka Police Station and she recognized them to be the clothing that the Indian man was wearing that night. She said that her first statement was recorded the same night, (towards the morning of 30 December 2017), when the police visited the house and that she recorded another statement after identifying the 1st Accused at the police station. However, no such statement had been disclosed. Although she in her first witness statement had not given a description of the clothing, and those clothes were not exhibited and tendered in Court for identification, in the circumstances which I shall further describe in the following paragraphs, I accept her evidence as being capable of providing a reasonable basis to link the Indian man to the robbery.
107. Second, PW 2 said that the robbers, after leaving the room where they were all detained, locked the door but she realized that the lock was not properly done. She was the only person in the room whose hands were not tied. Sometimes after the robbers had left the room, PW 2 took advantage of the slack locking and managed to come out and untie her husband and her son. She came out of the house and, when she was sitting outside at the garage door, one Indian man came towards her and asked, *oh, oh, kon karis, kon bun dis, (who has done this who had tied you up, I'm getting the police)*. PW 2, confidently said, 'It was him'.... pointing to the 1st Accused who was seated at the Bar table. He identified the 1st Accused as the person who had spoken to her in Hindi that night.
108. Although by the time she gave her statement on 30 December 2017, PW 2 may not have been able to figure out the connection between the masked robbers and the Indian man who later showed up in her compound, there was a reasonable basis for her to construct that connection belatedly in the circumstances she was in as they transpired in evidence.

109. PW 2 said that when she was threatened to reveal the PINs of her bank access cards, she gave the false PINs despite the robber's warning that if they found the PINs to be false, they would come back and kill her. She further said that two of the robbers drove off while the third one was left behind perhaps to guard or watch them. When she started shouting, she said she heard the third one also leaving the premises. Under these circumstances, it is reasonable for her to assume that the two robbers drove off to an ATM to check the PINs and draw money from her account and came back when they found the PINs to be false. That was the case theory of the Prosecution. By the time the Indian man appeared, PW 2 and her family had managed to come out and the robber who was entrusted to guard the premises had already left. Without knowing what had transpired in their absence, it is possible that the two robbers could return to the robbed house to get the correct PINs from PW2. That provides a plausible answer to the question posed by the 1st Accused - Would a sensible robber ever return to the robbed house after 45 minutes?
110. Even though PW 2 could not identify any of the robbers because they were all masked, I am sure that she positively identified the Indian man who came unmasked to her house later that night. I applied the Turnbull Guidelines on visual identification to satisfy myself that PW 2 was not mistaken in her identification. PW 2 said she could identify the Indian man as his mask was pulled down. She saw his face clearly at a distance of 4-5 metres. All the lights were turned on and the hallway light was very bright. He came towards her and even spoke to her in Hindi. It was not a fleeting glance identification. No doubt, there is a reasonable basis for a dock identification.

Identification at the Namaka Police Station

111. PW 2 said she did not know that the name of this Indian man who approached her after the robbery was Deshwer Dutt until she came to Namaka Police Station a few days after the robbery. She explained the events that transpired at the police station where she came to know the name of the 1st Accused.

112. A few days after the robbery, she was at the Namaka Police Station when the stolen items were being retrieved by the police. She was conversing with Abdul Khan (Divisional Police Commander) face-to-face at the police station when a lady came in with a bag of jewellery. Abdul Khan asked PW 2, whether she could identify the jewellery to which she answered in the affirmative. As she was examining the jewellery, that lady started crying and said, '*Sorry, I did not know it was yours*'. At the same time, she heard somebody say from behind, "*sorry, qalti hoique hum se*" (*sorry, I have done something wrong*). She turned around to see who uttered those words. Then she saw the 1st Accused who said to her, '*I'm sorry*'. She told the 1st Accused '*You could have stolen everything, but you should not have tortured my son*'. The 1st Accused was crying, limping and his face was a bit swollen with bruises. Abdul Khan then asked her, was this the guy? PW 2 said 'yes'. The 1st Accused in his evidence admitted that this incident took place at the police station, but he denied that he was picked (identified) by PW 2 on her own. His position is that it was Abdul Khan who pointed him out as one of the robbers.
113. I observed the demeanour of PW 2 who was so confident that it was the 1st Accused who approached her after the robbery. I am inclined to believe that PW 2 told the truth in Court and having considered my assessment based on the Turnbull Guidelines which I alluded to above, I find that PW 2 positively identified the 1st Accused at the police station as the Indian man who approached her and talked to her 45 minutes after the robbery.
114. Even if I were to accept what the 1st Accused said in Court was the truth when he said that Abdul Khan pointed him out at the police station, there is still a strong evidential basis to implicate the 1st Accused in the Sonaisali Robbery which I would like to describe now. Having denied that he was picked by PW 2 on her own at the police station, the 1st Accused did not challenge the admission he is said to have made to PW2 by saying, "*sorry, qalti hoique hum se*" (*sorry, I have done something wrong*). PW 2 said she was sure it was the 1st Accused because he apologized to her at the police station.
115. It is established law that an admission made by a suspect to a police officer or a person in authority is not admitted in evidence unless it has passed the test of voluntariness. Although

made at the police station, the admission by the 1st Accused was not made to a police officer but to PW 2 and it came naturally from the 1st Accused on his own free will. He would not have tendered an apology to PW2 if he was not involved in the robbery. Therefore, I accept that the 1st Accused made the said admission to the complainant because he was guilty.

116. Although the 1st Accused said that he was not an escapee, at one point he said that he was being falsely implicated in this matter because he was an escapee. Therefore, I accept that the 1st Accused was an escapee at the time of the Sonaisali robbery. The 1st Accused, being an escapee, failed to give a plausible explanation of his presence at the crime scene roughly about 45 minutes after the robbery. Therefore, it is reasonable for the Court to infer that the 1st Accused was one of the robbers.

117. The Investigating Officer Saiyasi (DW3) who was called by the Defence said that no identification parade was conducted because to his knowledge, the complainant could not identify anyone during the incident. There was no basis for an identification parade as the witnesses had not identified the masked robbers. That was rational because in her statement PW 2 had not identified any of the robbers and had not stated that she could identify the robbers if she were to see them again. Saiyasi was sure that no identification parade was conducted. However, he said he is not aware whether the complainant had identified anyone at the scene. It is noteworthy that Saiyasi was not referred to the incident that took place in front of Abdul Khan a few days after the robbery. After that incident, there was no point in holding an identification parade as PW 2 had accidentally identified the 1st Accused at the police station.

The Dock Identification

118. Before the robbery, PW 2 had never seen the 1st Accused. She identified the 1st Accused at the crime scene roughly forty-five minutes after the robbery. After seeing the 1st Accused at the police station a few days after the robbery (roughly two weeks after the robbery), she watched the CCTV footage of her supermarket. She realized that this man had come to the supermarket before the robbery. She also saw him in the newspapers. There was a solid

foundation for dock identification. PW 2 pointed at the 1st Accused even before she was asked to identify the Indian man whom she had seen at the crime scene. It is worthy of note that at the time the identification was made in Court, the 1st Accused was not standing in the dock. He was seated at the Bar table, wearing a black tie and a white shirt.

119. The Prosecution proved beyond reasonable doubt that the Indian man whom PW 2 identified at the crime scene roughly 45 minutes after the robbery is the 1st Accused and that he is the Indian man who had demanded genuine jewellery from PW 2 during the robbery. The Prosecution proved the case against the 1st Accused beyond reasonable doubt.

Explanation of the 2nd Accused

120. The 2nd Accused admitted that he had Ladies Michael Kors wristwatch PE 1(b) in his possession when he was arrested on 30 December 2017, soon after the robbery. It was also proved that PE 5- PE 10 were in the possession of the 2nd Accused soon after the robbery. When the above factors have been established, the possessor is required to give an account as to how he came to possess. In other words, he should give a reasonable and plausible explanation. He does not have to prove anything, but he has to discharge an evidential burden either by adducing evidence or pointing to the evidence of the Prosecution case to create a reasonable doubt in the version of event of the Prosecution case. When he has done that only, the burden will shift to the Prosecution to discharge the overall burden of proof beyond a reasonable doubt.
121. The 2nd Accused told the police that PE1(b) was a gift from his girlfriend who had come from overseas before Christmas. He said he filed an affidavit at the High Court Registry from his girlfriend, which was emailed from Australia. He tendered a photocopy of the so called affidavit and the passport.
122. However, he failed to tender the original of the so-called affidavit or the passport. His girlfriend was not in Court for her to be subjected to cross-examination. The photocopy tendered in Court shows that the so called affidavit was not stamped by a JP. It is dated 03

February 2021. The 2nd Accused had been arrested on 30 December 2017 before his girlfriend departed. She could have stated to the police that the Michael Kors wristwatch was a Christmas gift given by her to the 2nd Accused before she left for Sydney and saved him from prosecution. Even after her departure, she waited approximately four years to give the so-called affidavit. Therefore, it is not reasonable for him to blame the police for not following his information and investigating the truth of it.

123. The PE 1 (b) was a lady's wristwatch. It was in 2nd Accused's front pocket when it was retrieved by the police. There are two questions unanswered- Why would his girlfriend give him a lady's wristwatch as a Christmas gift? If it was a gift from her girlfriend, why did he keep such a valuable watch in his pocket instead of wearing it proudly? The explanation is not appealing, implausible and cannot be true.

124. The 2nd Accused admitted that he was not home on the 29 and 30 of December 2017 and that he returned home on the evening of 30 December 2017. This fact was confirmed by his mother Maraiwai. He admitted that he had a black Adidas bag in his possession. He failed to account for PE 5 and PE6- PE10 found in the knapsack he had brought home on 30 February 2017. The 2nd Accused failed to create a reasonable doubt in the Prosecution's version of events. The only inference the Court can draw is that the 2nd Accused is one of the robbers. The Prosecution proved the case against the 2nd Accused beyond a reasonable doubt.

125. I find the Accused persons guilty on each count. I convict both accused on all four counts of Aggravated Robbery as charged.



Aruna Aluthge
Judge

4 December 2023
At Lautoka

Solicitors:

Office of the Director of Public Prosecution for State

The Accused in Person