

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 253 of 2013

STATE

v.

1. PENI TUKAI
2. MICHAEL SCOTT
3. PENI MATAIRAVULA

Counsel: Ms. Kumar D. with Mr. Kumar R. for State
Mr. Tawake P for 1st Accused
Mr. Savou J for 2nd Accused
Mr. Yunus M for 3rd Accused

Hearing: 09th, 10th, 11th, 12th, 13th, 16th, 17th, 18th February 2015
Summing Up: 20th February 2015
Judgment: 25th February 2015

JUDGMENT

1. The three accused persons were charged with one count of Theft of Motor Vehicle and two counts of Aggravated Robbery.
2. The assessors expressed their majority opinion that all three accused persons are not guilty on Counts 1 and 3 and expressed their unanimous opinion that all three accused persons are not guilty on Count No. 2. I direct myself in accordance with my summing up and the evidence adduced at the trial.

3. On each Count, apart from the other elements, the prosecution has to prove the identity of the accused persons beyond reasonable doubt.
4. On Count No. 1, the victim Mohammed Sherab Haris Khan identified all three accused persons from the dock as the persons who stole his car (Count No. 1), and as the persons who robbed him (Count No. 2).
5. An identification parade was conducted only on the 1st accused. However, the defence challenged the identification parade stating that it was not fairly conducted. In that, Defence suggested that the 1st accused was shown to the witness at the police station by the police officers before the parade was conducted, which was denied by the prosecution witnesses. However, the witness Inspector Krishna Nair who conducted the identification parade admitted that the laid down procedure was not followed by him due to the reasons given. He admitted that the age of the 1st accused was 41 years and the 9 persons from members of the public taken for the parade line up were between 20 – 28 years of age. However, he said that the parade was fairly conducted. In a parade an accused of 41 years of age can be easily distinguished and recognized from the other persons in the line-up who are aged below 28 years.
6. Further, the 1st accused giving evidence said that he was the only person who was wearing long pants and all other young persons who were in the line-up wore short pants. This was not challenged by the prosecution. When consider these two aspects, I find that the identification parade was not conducted fairly.
7. Caution Interview Statement of the 1st accused was produced as Prosecution Exhibit 2 and the 1st accused denied that it was his caution interview statement. However, he has not admitted that he committed any of the

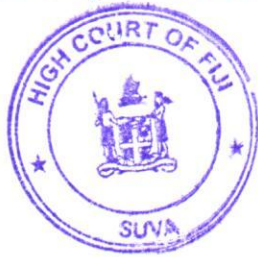
offences, except for sharing the loot mentioned in Count No. 3. However, in the same caution interview he has said that his share was taken by the police officers who arrested him, (Q 210 and answer) which was never produced in Court. Prosecution has not challenged this portion of evidence, nor called any evidence to show that such money was not taken from him, although they relied on the statement Prosecution Exhibit 2.

8. In Prosecution Exhibit 2, the officer recorded the caution interview, in Q. 163 and 230 suggested to the 1st Accused that he was identified by Police Officer Seru Qaranivalu when 1st Accused was carrying the bag and running away from the Indian man. However, the said police officer witness Seru Qaranivalu testified in court and said that he could not identify the two 'I-taukei' men who grabbed the bag and ran away. He said that he even cannot remember what they looked like.
9. The final witness who identified the accused persons was the witness Inoke Turaganivalu who was a taxi driver. According to his evidence he heard the discussion the three accused persons had about the Safeway bank run and the Westpac bank. Even after hearing the discussion, he has exchanged the telephone numbers with the accused persons and later he has picked them again in his taxi. He never charged taxi fare from them and his taxi meter was never on. Even after he saw the green bag being cut open to see the money inside the bag, although he suspected, he had not reported the matter to police until he was arrested. On the above, I find that he is an accomplice and therefore his evidence cannot be relied upon unless corroborated by reliable independent testimony.
10. Although witness police officer Seru Qaranivalu said that he identified 2nd Accused in the car in which the two robbers got away, he had seen the 2nd Accused in the passing car for about 7 seconds. However, he contradicted

himself in Court on the place where 2nd accused was seated in the car. First he said the 2nd Accused was in the front passenger seat. The following day after looking at his statement to police he said that the 2nd accused was in the driving seat. Therefore his evidence on identification of the 2nd accused cannot be relied upon. No evidence was placed in Court as to why no identification parade was held on 2nd Accused.

11. There is no reliable and credible evidence of identification of the 3rd accused. The only evidence was the dock identification of the witness Mohammed Shareb Haris Khan and the witness Inoke Turaganivalu, the accomplice. Mohammed Shareb Haris Khan also contradicted himself *per se* in his own evidence about where the accused persons were seated in his car. Once he said that the passenger who was in the back seat wanted him to put off the air condition as he was unwell.
12. Again when cross examined by the counsel for 1st Accused, he said that the accused who was in the front passenger seat wanted him to switch off the air condition. With this contradictory evidence, I find it is unsafe and dangerous to convict the accused persons whom he identified from the dock.
13. Witness Mohammed Azim Shah's evidence on the registration number of the vehicle was inconsistent. He said that he saw the registration number as LT 6805. However, he had told the police in his statement that another taxi driver told him that the number was LT6805. To circumvent the situation he then said that he saw the number and he confirmed it with a taxi driver. Further he said that at the police station when he was giving the statement, the owner of the vehicle also came and that he confirmed from him as well. On this evidence I find that his evidence on seeing the registration number of the getaway vehicle is unreliable.

14. I find that none of the three accused persons were properly identified by the witnesses to the standard expected by the law. Hence, I find that the assessors were correct when they opined all three accused persons not guilty on all three counts charged.
15. I agree with the majority opinion of the assessors on Counts No. 1 and 3, and the unanimous opinion of the assessors on Count No. 2 that the three accused persons were not guilty of all three counts.
16. Therefore I acquit all three accused persons on Counts 1, 2 and 3.



Priyantha Fernando
JUDGE

At Suva

Office of the Director of Public Prosecution for the State
Office of the Legal Aid Commission for the 3 Accuseds