

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 69 OF 2013

BETWEEN : STATE

AND : 1. JOSEPH KING
2. JOSATEKI LABALABA

Counsel : Ms J. Fatiaki for Prosecution
Ms V. Narara for 1st Accused
Miss S. Nasedra for 2nd Accused

Date of Hearing : 13th and 14th of June 2016

Date of Closing Submissions : 15th of June 2016

Date of Summing Up : 16th of June 2016

SUMMING UP

1. It is my duty to sum up the case to you. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. You are to determine the facts of the case, based on the evidence that has been placed before you during the course of the hearing. That involves deciding what

evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give you as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion. I say so because you are the sole judges of the facts.
4. You all have been chosen from the community and represent a pool of common sense, knowledge and experience of the conduct of human beings in our community. Accordingly, you are required to use your experience, common sense and knowledge of the community and the human conduct in your deliberating of facts of this case.
5. You must reach your opinion on evidence. Evidence is what the witnesses said from the witness box, documents and other materials received as exhibits and agreed fact. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the learned counsel of the prosecution is not evidence. The purpose of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the accused are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.

6. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony, agreed facts and the exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation.
7. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that your opinion will assist me in reaching my judgment.
8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.
9. Matters which will concern you are the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.

10. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You then should consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his own evidence but also with other evidence presented in the case.
11. It is your duty as judges of facts to consider the demeanor of the witnesses, how they react to being cross examined and re-examined, where they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you have to consider the knowledge of the witness on the facts that he testifying, his disinterestedness, his integrity, and his veracity in order to determine the credibility of the witness and his evidence.

Burden and Standard of Proof

12. I now draw your attention to the issue of burden and standard of proof. The two accused persons are presumed to be innocent until they are proven guilty. The presumption of innocence is in force until you form your own opinion that the two accused persons are guilty for the offence.
13. The burden of proof of the charge against the two accused person are on the prosecution. It is because the accused persons are presumed to be innocent until they are proven guilty. Accordingly, the burden of proof rest on the prosecution throughout the trial and it never shifts to the accused person. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.

14. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused person’s guilt. If there is a riddle in your mind as to the guilt of the accused person after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused person beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information

15. The first and second accused persons are charged with one count of Aggravated Robbery contrary to Section 311 (1) (a) and (b) of the Crimes Decree. The particulars of the offence are before you. Hence, I do not wish to reproduce it in my summing up.
16. The Prosecution alleges that the two accused persons in company with each other have robbed Mr. Sachinda Anand Pillay on the 1st of February 2010. The two accused persons deny the allegation and claim that they were at their respective residences during the time that was material for this alleged crime.
17. Section 311 (1) (a) of the Crimes Decree states that;

A person commits an indictable offence if he or she —

a) commits a robbery in company with one or more other persons; or

18. The robbery is an aggravated form of theft. If the accused person used any form of force on a person or threatened to use such force either immediately before the committing the offence of theft or with intent to escape from the scene, then he commits an offence of robbery. If the accused person commits such robbery in company with one or more other persons, then such act constitutes the offence of Aggravated Robbery. Hence, the main elements of the offence as charged in the information are that;

i) The two accused persons,

ii) In company with each other,

iii) Steal the items from Mr. Pillay as stated in the information,

iv) used or threatened to use any force on Mr. Pillay before committing the offence of theft or with intent to escape from the scene,

19. The prosecution alleges that the two accused person committed this offence in joint enterprise. If two or more people form a common intention to execute an unlawful purpose in conjunction with one another and in execution of such purpose an offence is committed in a nature that its commission was a probable consequence of the execution of the said unlawful purpose, each of them is deemed to have committed the offence. Those who commit crime together may play different parts to achieve their purpose. The prosecution must prove that each defendant took some part. The essence of joint responsibility for a criminal offence is that each accused persons shared a common intention to commit the offence and played his part in it [however great or small] so as to achieve that aim.

Evidence of Prosecution

20. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.
21. The first witness of the prosecution is Sachida Nandan Pillay. He is a salesman and employed by Autocare Fiji Limited. He has been working at Autocare Fiji Limited for about five to six years. He sells recharge cards for mobile phones. He goes to shop to shop and sells them. He sells recharge cards of the mobile phone companies such as Vodafone, Inkk, etc.
22. Mr. Pillay stated in his evidence that he went to his office on the morning of 1st of February 2010 and picked the stock of recharge cards. They were packed in a black suitcase. Some of them were in sealed packs. He went towards Nadi in his office vehicle. The registration number of the vehicle is FL028. After visiting few shops and selling some cards, he finally came to a shop at Votualevu. The name of the shop is Zing Store. While he parked his vehicle at the said shop, he saw two people were coming along the pathway. There was a village. He thought that two people were going to the shop. One of them was carrying a stick in his hand. Mr. Pillay then straight away went to the shop.
23. While he was talking to the shop owner, he heard some noise coming from his back. He then suddenly felt that someone had grabbed him from his back. They took him to the corner and asked for the key of his vehicle. One of them found the key in his pocket. The person who found the key went to the van and started it. Other person asked him money. He had some notes of \$2 in his pocket. He tried to prevent him taking those money from his pocket. That person then asked

for a knife. Mr. Pillay then let him to take that money as he was scared of the person as he asked for a knife. He took his mobile phone as well. It was an Alcatel mobile phone. He pushed him to the corner and made him to sit there. That person then ran to the vehicle where other person was already in the vehicle. When Mr. Pillay came to outside, he found that his van was not there with those two men. The suitcase with the recharge cards and some money was inside the van. Mr. Pillay cannot recall the value of those recharge cards. He then called the Namaka and Nadi police Stations.

24. The second witness of the prosecution is DC 4445 Timoci. He is the arresting officer of the second accused person. He stated that he was assisting the police's strike back team on the 14th of February 2010. They received information that the second accused person was dealing with large amount of recharge cards at the Mobile Service Station. D.C. Timoci with another officer, went in a CID vehicle to the Mobile Service Station, there he saw the vehicle of the second accused person. They then followed the said vehicle and managed to stop it at Anupam. DC Timoci found the second accused person was sitting in front at the passenger seat. Having seeing DC Timoci was approaching, the second accused person had tried to hide the recharge cards under the seat. DC Timoci had found recharge cards, laying down on the seat. They were Vodafone recharge cards. DC Timoci then arrested the second accused person and escorted him to Lautoka Police Station.
25. During the cross examination, DC Timoci said that they received the information about the second accused from the service station. He further stated that he did not check who called the police and gave the said information. DC Timoci stated that he had been following the vehicle that the second accused was traveling in

since the morning. He stated that according to the statement that he gave to the police the vehicle that the second accused person was travelling in at the time of the arrest was FC 286. That vehicle does not belong to the second accused person.

26. DC Timoci stated that he saw the second accused was trying to hide the recharge cards while he was approaching to the vehicle. The door was still closed at that time. The vehicle was a seven seater van. The second accused person was seated on the front passenger seat. An Indian man was driving the van.
27. DC Timoci had not cautioned the second accused person at the time of his arrest. He explained the second accused the reason for his arrest. DC Timoci stated that he did not assault the accused person on his back, stomach and head at the time of his arrest. When the learned counsel for the second accused person questioned him whether the recharge cards were belonged to Krishneel, the driver of the van, DC Timoci stated that he cannot recall. DC Timoci stated that any items seized from an accused person are required to be listed in the search list.
28. The third witness of the prosecution is Vijaydra Nair. He is the Manager of Autocare Fiji Limited. He stated that he could recall that he was called to the Namaka Police Station to verify some of the stolen recharge cards. He had produced the police the invoices and serial numbers of the records he had with him.
29. The fourth witness of the prosecution is D/Sgt Timoci. He is the interviewing officer of the second accused person. He has conducted the caution interview of the second accused person at Namaka Police Station on the 15th and 16th of February 2010. It was conducted in English Language and in question and

answer format. The investigators were present during the recording of the caution interview. D/Sgt Timoci and the second accused person had signed the caution interview. D/Sgt Timoci stated that neither him nor anyone else assaulted or verbally threatened the accused person during the interview or during the reconstruction. According to the evidence of D/Sgt Timoci, the accused was not forced to answer the questions during the interview. D/Sgt Timoci asked the questions and second accused person gave his answers. He had given the second accused person an opportunity to read the record of the caution interview.

30. D/Sgt Timoci stated during the cross examination, that the accused was supposed to sign immediately after certain questions in the caution interview. However, he did not actually sign immediately after those certain questions. At the conclusion of the interview, he took the print out of the interview. The accused then put his signature at all relevant places of the caution interview. Moreover, D/Sgt Timoci stated that he cautioned the second accused person before the reconstruction, but it was not recorded. He further said that he did not caution the second accused person at the recommencement of the caution interview subsequent to the reconstruction.
31. Moreover, D/Sgt Timoci stated during the cross examination that the second accused person denied the allegation at question 26 and 54 of the caution interview. He has denied the allegation from question 1 to 54. The interview was suspended to check the alibi of the second accused person at 18.30 on the 15th of February 2010. D/Sgt Timoci stated in his evidence that apart from the confession made by the second accused person in his caution interview, there is no material evidence against the second accused.

32. When the learned counsel for the second accused person questioned the witness whether he assaulted the second accused person on his stomach, on his back and on his head during the course of the interview, D/Sgt Timoci answered that he did not assault the second accused. The second accused was not given any breaks for two to three hours during the interview on the first day. On the second day, the second accused was not given break for three hours. D/Sgt Timoci further stated that there was no witnessing officer during the recording of the caution interview, hence there is no one to verify or confirm the truthfulness of his evidence.
33. D/Sgt Timoci stated that the station diary of the police station would record everything that happened in the police station. However, he stated that neither the movements of the second accused person nor the recording of his caution interview have been recorded in the station diary.
34. During the re-examination, D/Sgt Timoci stated that the second accused was informed that he will be given the record of the caution interview at the conclusion of the interview for him to sign. He further stated that he did not make entries in the station diary as it was done by the station orderly.
35. The fifth witness of the prosecution is DC Avinesh. He is the investigation officer and the interviewing officer of the first accused person. He stated in his evidence that he first saw the first accused person at the crime office of Namaka Police Station on the 16th of February 2010 around 14.00. He then interrogated the first accused person and then conducted his caution interview. The caution interview was commenced at 14.30. The purpose of interrogation was to get the story of the accused person. The witnessing officer for the caution interview was DC Inoke.

DC Inoke is now deceased. The caution interview was conducted in question and answer format. DC Avinesh asked the question and the first accused person answered. He then wrote them down. It was conducted in English language.

36. DC Avinesh stated in his evidence that neither him nor anyone else assaulted, threatened or forced the first accused person during the caution interview. During the caution interview the first accused person was taken for reconstruction of the crime scene. The accused agreed to go for the reconstruction. The stolen vehicle was found near the junction of Kontiki hotel on the same day of this alleged crime took place.
37. As the investigation officer, DC Avinesh has recorded the statements of the witnesses and exhibited the original of them. He then prepared the file for the prosecution. He stated that the recharge cards were shown to the accused person. It was not shown to any another persons. Those recharge cards are now at the exhibit room under the supervision of the exhibit writer.
38. During the cross examination, DC Avinesh stated that he cannot recall whether other officers were present during the interrogation. He further stated that he recorded the interrogation on a piece of paper, but it was not included to the file. He has cautioned the accused person during the interrogation. It was recorded on the said piece of paper. DC Avinesh stated that the accused was not sitting on the floor when he first saw him at the crime office of Namaka Police Station. He cannot recall whether he was handcuffed at that time.
39. When the learned counsel for the first accused person questioned him whether he and officer Kaliova assaulted the accused person during the interrogation, DC

Avinesh said that it was not true. DC Avinesh stated that he gave the accused person his rights to consult a lawyer. However he forgot to explain him about the legal aid. He has not asked the accused person whether he was fit enough to conduct the caution interview when the accused informed him that he took Panadol. The first accused was given a break two hours after the commencement of the caution interview. He further stated that there is no record in the station diary about the accused was leaving for reconstruction with the police. DC Avinesh stated that he took the accused for reconstruction, though it was not recorded in the station diary. The accused person had opted not to read the caution interview when he was given the opportunity.

40. DC Avinesh further stated that all the records of the exhibits are with the exhibit writer at the police station. He was not aware whether any recovery was made from the first accused person. He went on and stated that no identification parade was conducted to identify the two accused persons. He said that apart from the admission in the caution interview, there is no material evidence against the first accused person in respect of this alleged offence.
41. During the cross examination by the learned counsel for the second accused person, DC Avinesh stated that Krishneel Kumar is the owner of vehicle registration number FC 286. He was one of the state witnesses for this matter. DC Avinesh stated that he cannot recall whether the said Krishneel was in Namaka Police Station when the second accused person was brought in for questioning.
42. During the re-examination, DC Avinesh stated that the entries to the station diary are normally entered by the station orderly. He further stated that he tried to locate the said Krishneel, but failed. According to DC Avinesh there was no

need to conduct an identification parade as the two accused persons have already admitted the offence in their respective caution interviews.

43. The sixth witness of the prosecution is DC Kaliova. He was only presented for cross examination. DC Kaliova stated that he did not interrogate the first accused person with DC Avinesh. He was present inside the crime office, when DC Avinesh conducted the caution interview of the first accused person. He did not know anything about the interrogation. He was present at the crime office when the first accused person was brought into the police station. He has heard that DC Avinesh was explaining the first accused person about the reasons for his arrest and what he was cautioned for. Kaliova then left the crime room. He stated that he did not assault or threaten the first accused person with DC Avinesh.
44. The last witness of the prosecution is Sanjay Arvind Lal. He was also presented by the prosecution only for cross examination. He has reported to the police about an Indian boy who came to his shop to sell stolen recharge cards. He cannot clearly recall the date of this incident took place. He has noticed the vehicle registration number in which the said Indian boy came in as FC 286. The Police and Army then came to his shop after he informed them. The police then went towards SM Koya Road. They came back with plastic of cards. Police had told him that they found that plastic of cards and caught three Indian boys. The vehicle was a seven seater van and that Indian boy was the driver of that van.

Evidence of the Defence

45. At the conclusion of the prosecution case, the two accused persons were explained about their rights in defence. The accused persons opted to give

evidence on oaths. However none of them called any other witness for their defence.

46. The first accused person in his evidence stated that he was at home looking after his sickly mother on the 1st of February 2010. He was staying at Natokowaqa. He stated that he did not go anywhere, specially to Votualevu, Nadi on the 1st of February 2010.
47. On the 15th of February 2010, two police officers came to his house and took him to Namaka police station. They told him just accompany them and they will take him back soon. He was not assaulted or threatened during the journey to Namaka Police Station. He was then taken to the Crime office, where he met DC Avinesh and DC Kaliova. They started to question him over this alleged incident. He told them that he was with his mother. But they kept on asking and started to threaten and assault him. They used abusive language. They then rubbed chilies on his private parts. He was not cautioned by the police at that time. This happened before the caution interview. During the caution interview, he was asked to sign what was written on the caution interview. He was not given an opportunity to read it. He was never taken to reconstruction. No recharge cards were ever recovered from him.
48. During the cross examination, he stated that he could understand English. He was given an opportunity to contact his neighbour after the caution interview. It was almost nearly one hour after the conclusion of the caution interview. According to the evidence of the first accused person, there was no witnessing officer present during the caution interview. Only DC Avinesh and DC Kaliova were present. He further stated that he did not give the answers that were

recorded in the caution interview. The caution interview was prepared and he was assaulted to sign it. He explained that he was thinking of his mother and did not complain to the Magistrate when he was produced in court. He was never taken to a doctor to medically examine.

49. The second accused person in his evidence stated that he was called by one Krishneel on his phone on the 14th of February 2010. He was at home at that time. He then went to road side to meet him. Krishneel came and picked him in his van. While they were traveling near Anupam, two police vehicles came and stopped them. Two police officers came and assaulted him. He was then taken to police station. While he was escorted to the police station, the police still assaulted him. The Police found recharge cards in the van, which he was not aware of it.
50. The second accused person was caution interviewed on 15th of February 2010. He was given a break during his alibi. He was given an opportunity to read the caution interview and signed the caution interview at the end of the interview. The second accused person stated in his evidence that he was assaulted and forced to admit to the offence during the caution interview. He was at home on the 1st of February 2010 with his parents.
51. During the cross examination, he stated that he gave answers to the question number 1 to 25, but he was forced and assaulted to give his answers. He further said that he forgot to complain to the magistrate about the assault by the police. He was not aware of the recharge cards that were found in the van. He said he did not commit this crime.

52. I have summarised the evidence presented during the course of this hearing. However, I might have missed some. It is not because they are not important. You have heard every item of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

Analyses

53. The prosecution case is mainly founded on the confessions made by the two accused persons in their respective caution interviews. The prosecution tendered the caution interviews of the first and second accused persons in evidence as prosecution's exhibits. The first accused person disputes the confession in his caution statement stating that he was assaulted and forced to sign on the caution interview that was written by the police. Hence, he alleges that the confession in his caution interview is a fabrication and not true. He further alleges that he was interrogated by DC Avinesh and DC Kaliova without cautioning him prior to the recording of his caution interview. During the said interrogation he was assaulted by these two officers. The defence further alleges that the first and second accused persons were never taken to reconstruction of the scene of the crime as there is no record in the station diary about their movements or anything about the respective caution interviews.
54. The second accused person claims that he was assaulted during the arrest on the 14th of February 2010. He was then assaulted and forced to admit the offence during the caution interview. Hence, the second accused person alleges that his admission to the offence was due to assault and force inflicted on him by the police. D/Sgt Timoci in his evidence stated that the second accused had denied

the allegation in question number 26 and 54 of the caution interview. However, on the second day of the caution interview, the second accused has changed his denial and admitted that he committed this offence.

55. Meanwhile, the prosecution states that the two accused persons were not assaulted, threatened or forced to admit in their respective caution interviews. They made their respective admission voluntarily. To prove it, the prosecution presented the evidence of DC Avinesh, DC Timoci, D/Sgt Timoci, and DC Kaliova.
56. In order to determine whether you can safely rely upon the admissions of the two accused persons, you must decide two issues,
57. Firstly, did the first and second accused persons in fact make the admissions? Having considered the evidence presented during the course of the hearing, if you are not satisfied or not sure of that the two accused persons or one of them have actually made the confessions in their respective caution interviews, you must ignore either the both or the one that you are not sure or not satisfied. Secondly, If you are satisfied, that the two accused persons or one of them have given their respective caution interviews and they have done that without any pressure, then it is for you to decide whether the contents on the caution interviews are truthful, and what weight you give them as evidence. It is for you to decide whether you consider the whole of the caution interview or part of it or none of it as truthful and credible. You must consider all other evidence adduced during the course of the hearing in deciding the truthfulness and the reliability of the confessions and its acceptability.

58. The caution interview of an accused person are only admissible against the maker of the statements. What the first accused person said in his caution statements is evidence against him only. If the first accused has implicated or mentioned about the second accused person in his caution statements, that is not evidence against the second accused person. The same principle applies in respect of the caution interview of the second accused person. When you come to consider the case against the one particular accused, you must disregard everything he said in his caution statements against other accused person. The caution statements of the accused person can only be used against him.
59. Mr. Pillay in his evidence did not explain the description of the two person who came and robbed him. No explanation given by him in his evidence why he could not provide any description of that two persons. DC Avinesh stated in his evidence that no identification parade was conducted as the two accused person have already admitted the offence in their respective caution interviews. The prosecution did not provide the recharge cards that they claimed as found in the possession of the second accused person in evidence. Mr. Nair in his evidence stated that he was called to the police to verify some stolen recharge cards. However, DC Avinesh in his evidence stated that only the first accused person was shown the recharge cards and no one else.
60. Both DC Avinesh and D/Sgt Timoci stated that everything taking place in the police station are required to record in the Station Diary. They both stated that the movements of the two accused persons and the conduct of their respective caution interviews have not been recorded in the station diary. You must consider these evidence together with the evidence of the interviewing officers, arresting officer and the evidence of accused persons in order to determine

whether you can safely rely on the respective caution interviews of the two accused persons.

61. You must consider the case of each accused persons separately. It is open for you to conclude that your verdicts should be the same in each case but it does not require that they have to be. Provided that, if you are sure that this alleged offence was committed by more than one person and you are sure that one of the accused persons actually took some part in that offence and you are not sure about the other accused, you are then allowed to find only the person whom you found that took part in committing the offence is guilty.
62. You heard the evidence presented by the two accused persons, where they denied this allegation. If you accepted the versions of the two accused persons as reliable and truthful, or it creates a reasonable doubt in your mind about the prosecution case, though you neither believe nor disbelieve their versions, then the case of the prosecution fails. You must then acquit the both accused persons from this charge.
63. Even if you reject the version of the two accused persons that does not mean that the prosecution has established that the accused persons are guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused persons have committed this offence as charged in the information.
64. Upon consideration of all evidence, if you believe that the count of aggravated robbery is proved beyond reasonable doubt, you can find the accused persons

