

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 019 OF 2016S

STATE

vs

EPARAMA NAGALU

Counsels : Ms. S. Tivao for State
Mr. A. K. Singh for Accused
Hearings : 7, 8 and 9 June, 2017
Summing Up : 12 June, 2017

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound

by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victims. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, and I will now read the same to you:

"... [read from the information]..."

D. THE MAIN ISSUES

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:

- (i) On count no. 1, did the accused, in company with others, on 3 January 2016, at Samabula in the Central Division, steal complainant no. 1's properties as itemized in count no. 1 of the information, and before such stealing, use force on complainant no. 1?
- (ii) On count no. 2, did the accused, in company with others, on 3 January 2016, at Nasinu in the Central Division, steal complainant no. 2's property as itemized in count no. 2 of the information, and before such stealing, use force on complainant no. 2?

E. THE OFFENCE AND IT'S ELEMENTS

9. On Count No. 1 and 2, the accused was charged with "aggravated robbery", contrary to section 311(1)(a) of the Crimes Act 2009. On Count No. 1, it was alleged that, the accused, in company with others, on 3 January 2016, at Samabula in the Central Division, stole complainant no. 1's properties worth \$23,850, and before such theft, used force on him. On count no. 2, a similar allegation was leveled at the accused, but it involved complainant no. 2, and properties worth \$340. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused,
- (ii) in company with one or more persons,
- (iii) steals,
- (iv) the complainant's property or properties, and
- (v) before the theft,
- (vi) uses force or threatens to use force,
- (vii) on another person,
- (viii) with intent to commit theft.

10. "Stealing" is the act of taking away someone's property or properties without his permission, and with an intention to permanently deprive him of the ownership of that property or properties. "Force" means "any type of force, whether or not done physically or verbally, for example, beating someone with a stick or threatening to do the same".

11. Before stealing the complainant's properties, the accused, in company with one or more persons, must use force or threaten to use force to subdue the complainant or others' resistance, and at the time, had the intention to steal. For example, I and my friend saw you withdrawing \$1,000 cash from an ANZ Bank ATM machine. I and my friend immediately came to you, told you to hand over the \$1,000 cash to me or I will punch you in the face. You refused, I punched you in the face and stole your \$1,000 cash. That was "aggravated robbery".
12. You will notice in the information that the prosecution, in their particulars of offence on both counts, began with the phrase, "...**EPARAMA NAGALU with others**,..." The prosecution is alleging that the accused committed the offence as part of a group. In other words, the offence was allegedly committed by the accused, while offending in company with others. To make them jointly liable, the prosecution appeared to be relying on the concept of "complicity and common purpose".
13. "Complicity and common purpose" means as follows. When a person aids, abets, counsels or procures the commission of an offence by another person, he is deemed, as a matter of law, to have committed that offence also, and is punishable accordingly. To aid a person is simply helping a person do something easily. To abet is to help or encourage somebody do something wrong. To counsel is to advise someone to do something. To procure is to obtain something that's difficult. The prosecution was alleging in this case that the accused aided and abetted the others to commit "aggravated robbery" on the complainants, at the material time. The fact that the State was not charging the "others", does not affect the validity of the information.
14. There are two counts in the information. You must consider each count separately and come to a considered decision on each count, in the light of the whole evidence presented at the trial.

F. THE PROSECUTION'S CASE

15. The prosecution's case were as follows. On 3 January 2016, Mr. Karun Dutt (PW1), a sales executive, arrived home at Naganivatu Road, Wailoku at about 3.30 am. He arrived home in his company car, a silver coloured Toyota Fielder registration no. HW 936. He stopped the car in front of his house and walked up the gravel road. Suddenly four assailants, dressed in dark clothes and wearing hoods, approached him. The four jointly attacked him. They wrestled him to the ground

and punched his mouth. When he wanted to raise the alarm, they gagged him and threatened to kill him, if he didn't hand the car keys to them. He struggled against them to no avail. They repeatedly kicked him in the left ribs. They forcefully took his car keys, stole \$100, his wallet containing his driving licenses, a mobile phone and fled in his car. PW1 was injured as a result.

16. According to the prosecution, the assailants drove to a Nasinu gas station at about 4.55am on the same day, that is, 3 January 2016. Mr Aysheal Kumar (PW2) was working at the gas station at the time. The assailants came in PW1's stolen car, that is, the silver coloured Toyota Fielder registration number HW 936. The car parked at the refilling space. According to the prosecution, the assailant in the front passenger seat came out of the car armed with a bolt cutter and his face covered with a scarf. He approached PW2 and forcefully put him to the ground. Another assailant, with his face covered with a scarf, came to assist the first assailant. The assailant threatened to kill PW2 if he raised the alarm. They later broke the money box and stole \$340 cash. They later fled in PW1's car.
17. On 6 January 2016, Mr. Tomasi Tukana (PW3), a detective sergeant at Samabula Police Station, received information that a grey silver Toyota Fielder, registration number FU 783 was abandoned at the junction of Caubati and Tunuloa Road. PW3 went to the scene and observed the car. Mr. Anasa Korea (PW4), a police officer based at the Suva Forensic Science Service, also arrived at the scene. Both PW3 and PW4 found two other number plates, that is, HW 936 and HR 580, in the grey silver Toyota Fielder. It was later confirmed that this was the car stolen from PW1 on 3 January 2016 at 3.30am.
18. According to the prosecution, Corporal 3279 Peniasi Naqaranikula (PW7) and PC 5596 Joeli Nabogikolo (PW8) saw the accused driving a grey silver Toyota Fielder registration number HR 580 after 1.45am on 6 January 2016. PW7 and PW8 received information that the car was involved in an alleged robbery at a Nabua Kava shop at the time and they were searching for the same in another government vehicle, registration number GP 155. It was the prosecution's case that the accused, because he was driving PW1's car on 6 January 2016, was involved in the robbery against PW1 and PW2 on 3 January 2016.

19. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

20. On 8 June 2017, the first day of the trial, the information was put to the accused in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to give sworn evidence in his defence and called no witness. That was his right.

21. The accused's case was very simple. On oath, he denied robbing Mr. Karun Dutt (PW1) and Mr. Aysheal Kumar (PW2), at the material time. He said, on 3 January 2016, he was at his home at Lot 3, Balolo Street, Narere. He said, he doesn't know how to drive and doesn't have a driving license. When cross-examined by the prosecution, the accused said that, on 6 January 2016, he was not driving the Toyota Fielder registration no. HR 508.

22. Because of the above, the accused asks you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the accused.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

23. In analyzing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analysing the evidence, we will first discussed the "Agreed Facts" and its significance. Then we will discuss the State's case against the Accused. Then, we will discuss the defence's case. Lastly, we will discuss the need to consider all the evidence.

(b) The "Agreed Facts":

24. The parties submitted an "Agreed Facts", dated 25 May 2017. A copy of the same is with you. Please, read it carefully. There are 32 paragraphs of "Agreed Facts". These facts are not disputed

by the parties, and consequently they had agreed to it. The significance of these facts were that the parties do not dispute that Mr. Karun Dutt (PW1 and complainant no. 1) and Mr. Aysheal Kumar (PW2 and complainant no. 2) were violently robbed of the properties mentioned in count no. 1 and 2, at the material time. It was also not disputed that neither complainants identified their assailants, at the material time. In terms of the elements of "aggravated robbery", as described in paragraph 9(ii) to 9(viii) hereof, these elements are not disputed by the parties in this case.

25. Furthermore, it was not disputed by the parties that PW1's car, the Toyota Fielder registration number HW 936, was found abandoned at the junction of Caubati and Tunuloa Road, on 6 January 2016. It was also not disputed by the parties that when PW1's car was found, another registration number plate FU 783 was found attached to the car. It was also not disputed by the parties that, when the vehicle was found, 4 number plates bearing the number HR 580 and HW 936, were found under the drivers vehicle foot mat. Note that when the vehicle was stolen on 3 January 2016, it had registration number plate HW 936 attached to it. Now that number plate HW 936 was found under the driver's foot mat, when the vehicle was found at Caubati. The inferences from the "Agreed Facts", was that someone was driving PW1's car around between 3 to 6 January 2016, and changing its number plates.

26. So, the fundamental question in this case was, whoever was driving PW1's car between 3 to 6 January 2016 and changing its number plates, must be connected to the aggravated robberies on Mr. Dutt (PW1) and Mr. Kumar (PW2) on 3 January 2016. In any event, because the "Agreed Facts" are not disputed by the parties, you may treat the same as established facts, and that the prosecution had proven those facts beyond a reasonable doubt.

(c) The State's Case Against the Accused:

27. The difficulty for the prosecution in this case was that both complainants (ie. PW1 and PW2) were not able to identify any of the assailants, at the material time. This is not unusual in most robbery cases, especially so when the robbers had dressed themselves well in order to hide their identity. Thus the prosecution was not able to produce an eye witness to connect the accused to the violent robberies on Mr. Dutt and Mr. Kumar on 3 January 2016.

28. But that does not mean a crime cannot be proven by the use of other types of evidence to connect the accused to the crimes alleged. In this case, the State is relying on a combination of two types of evidence to connect the accused to the crime. First, they rely on identification evidence, that is, according to the State, two police officers saw the accused driving Mr. Karun Dutt's stolen Toyota fielder, with a different number plate HR 580 attached, on 6 January 2016 after 3am. Second, the State relied on circumstantial evidence, that is, their contention was that if the accused was driving Mr. Dutt's Toyota fielder 3 days after the robberies, then he must be involved in the robberies. He was in possession of the stolen car 3 days after the robberies, and that was strong inferences that he was part of the group of assailants who robbed the victims violently on 3 January 2016. We will now consider the two types of evidence in turn.
29. Corporal 3279 Peniasi Naqaranikula (PW7) was one of the officers who allegedly saw the accused driving Mr. Dutt's Toyota fielder, with a different number plate HR 580 attached, on 6 January 2016. PW7 said, he had spent 20 years in the police force. He said, he was based with the Police Task Force at Totogo Police Station, and they monitor criminal activities. He said, he started work on 5 January 2016 at 6pm and was to finish at 6am on 6 January 2016. He said, they were patrolling between the Suva – Nausori corridor in a government vehicle, registration number GP 155, at the time. He said, there were 4 police officers in the vehicle, and PC 5596 Joeli Nabogikolo (PW8) was the front seat passenger. PW7 said, while patrolling, they received information that a Toyota vehicle registration number HR 508 was involved in a robbery at a Nabua Kava shop. PW7 said, this was after 3 am on 6 January 2016. They started looking around for the vehicle. PW7 said, at Nadawa, he saw the Toyota fielder registration number HR 508 coming towards him from the right in a T intersection. PW7 said, his car light was on full beam and HR 508 moved slowly in front of him. The full beam from his car shown on HR 508 as it was passing in front of him.
30. PW7 said, he saw the driver's face for 2 to 3 seconds. PW7 said, the full beam light from his car shown on the driver's face. PW7 said, the face was 8 footsteps away from him. PW7 said, there was no obstacle in the way to block his view. PW7 said, the vehicle was moving at 10 kmph. The vehicle was coming from Tiri Road towards Nadawa Road. PW7 said, he had seen the driver's face before. PW7 said, he previously saw his face at Valelevu Police Station for 10 minutes. PW7 said, he knows the driver. PW7 said, it was the accused. PW7 identified the accused in the

courtroom as the person he saw that day. PW7 said, they followed the Toyota fielder HR 508 around Nasinu but later lost it. When cross-examined by defence, PW7 said, HR 508 approached from the right to his left at 10 kmph, and the driver's car window was down. PW7 said, he saw the driver's face for 2 to 3 seconds and there was no impediment in the way. PW7 said, it was the accused. PW7 said, when he saw his face, he was 8 footsteps away and the full beam light of his car exposed his face.

31. PC 5596 Joeli (PW8) was the front seat passenger in the car PW7 was driving. PW8 said, he was in the same shift as PW7 and they were patrolling in the Suva – Nausori corridor at the time in the government vehicle GP 155. PW8 said they were looking around for HR 508 because they received information that it was involved in a robbery at Nabua earlier on. PW8 said the same thing as PW7. PW8 said, he saw the driver's face. PW8 said, he was driving HR 508 and it was travelling slowly in front of them. The high beam from their vehicle lit the driver's face up. PW8 said, nothing blocked his view. PW8 said, the face was 6 footsteps away from him. PW8 said, he saw the face for 3 to 4 seconds. PW8 said, he had met the person 7 times before. PW8 said, he met him at Valelevu and Nabua Police Station. PW8 said, when he saw him at the police station, he observed him for 1 to 2 hours. PW8 said, the driver was the accused. PW8 said, a special reason for remembering his face was that he was previously involved in big robberies.
32. When cross-examined by defence, PW8 said he knew the accused and met him 7 times. PW8 said, in 2010 and 2011, he met the accused at Nabua Police Station. PW8 said, he was not mistaken in his identification of the accused. PW8 said, the driver of HR 508 looked at them and the full beam of the car exposed his face. PW8 said, he saw the accused face for 3 to 4 seconds.
33. In considering PW7 and PW8's identification evidence of the accused, I must direct you as follows. First, whenever the case against the accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, I should warn you of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications because an honest and convincing witness could be mistaken. Secondly, you should examine closely the circumstances in which the identification was made. How long did the witness have the accused under observation? At what distance? In what light?

Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? Was there any police identification parade? Finally, are there any specific weakness in the identification evidence? The answers to the above questions will determine the quality of PW7 and PW8's identification evidence. If the quality is high, you may use it against the accused. If its otherwise, you may reject it against the accused.

34. In this case, PW7 said, he observed the accused's face for 2 to 3 seconds. PW8 said, he observed the accused's face for 3 to 4 seconds. PW7 said, when he saw the accused's face, he was 8 footsteps away. PW8 said, when he saw the accused's face, he was 6 footsteps away. Both PW7 and PW8 said, the accused's face was exposed by the high beam of their vehicle light. Both PW7 and PW8 said, there was no impediment in the way when they saw the accused's face. PW7 said, he had seen the accused before at Valelevu Police Station and observed his face there for 10 minutes. PW8 said, he had seen the accused before at Valelevu Police Station and Nabua Police Station 7 times before. PW8 said, he observed him for 1 to 2 hours. PW8 said, a special reason for remembering his face was that he was involved in big robberies previously. It would appear that PW7 and PW8's identification of the accused was that of a case of recognition and thus a police identification parade is not required, as it is more prejudicial to the accused than probative. Are there any weaknesses in PW7 and PW8's identification evidence? If you see any weakness in PW7 and PW8's identification evidence, you must assess its impact on the quality of their identification evidence. If the quality is still good, you may use the identification evidence. If otherwise, you may reject the same. It is a matter entirely for you.
35. Furthermore, the accused's alleged previous bad character and his appearing in various police stations had been mentioned in the evidence of PW7 and PW8. These assertion of facts may lead you to reason that these are indicative of a disposition to crime on the part of the accused. I must direct you, as a matter of law, that you cannot use his alleged previous bad character and his alleged appearing in various police stations, as a reason to say that these are indicative of a disposition to crime on the part of the accused. The accused is entitled to a fair trial and these evidence must not be used against him in the manner described above. Just because he may have previous bad character and his alleged appearing at various police station does not

necessarily mean he committed the alleged crime. The above evidence are admitted to test the quality of PW7 and PW8's identification evidence alone, and it must not be for any other purpose.

36. If you find the quality of PW7 and PW8's identification evidence of a low quality and you reject the same, you must find the accused not guilty as charged on both counts. If, however, you find PW7 and PW8's identification evidence to be of a high quality, then we move on to discussing the second type of evidence the state is relying on to connect the accused to the crime.
37. The State is relying on what is often called "circumstantial evidence". That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which a jury can say "We now know everything there is to know about this case". But the evidence must lead you to the sure conclusion that the charge which the defendant faces is proved against him. Circumstantial evidence can be powerful evidence, but it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution case. Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.
38. In considering the State's circumstantial evidence, you will have to look at and consider the parties "Agreed Facts", dated 25 May 2017. In the "Agreed Facts", it was not disputed that Mr. Karun Dutt (PW1) and Mr. Aysheal Kumar (PW2) were violently robbed, at the material time, of the properties itemized in count no. 1 and 2 of the information. It was not disputed that PW1's car Toyota fielder registration number HW 936 was stolen by the robbers on 3 January 2016, after 3.30 am, as their getaway vehicle. It was not disputed that PW1's car HW 936, was used by the robbers in violently

robbing PW2 at about 4.55am on 3 January 2016. They also used the car as their getaway vehicle. It was not disputed by the parties that PW1's car HW 936 was found abandoned at Caubati on 6 January 2016, 3 days after the robberies on PW1 and PW2. The car had a different number plate FU 783 at the time. In the car was found two number plates HR 580 and the car's real number plate HW 936. If you accept PW7 and PW8's identification evidence that the accused was seen driving PW1's car, with the altered number plate HR 580, on 6 January 2016 after 3 am, what does the circumstantial evidence tell you? Was it possible that the accused was involved in the robberies against PW1 and PW2 at the material time? How come he was driving PW1's car on 6 January 2016 after 3am in the morning? How you answer the above questions is a matter entirely for you.

(d) The Defence's Case:

39. The accused's case was simple. He denied the allegations against him on oath. He said, he didn't rob PW1 and PW2 at the material time. On oath, he said he was at home on 3 January 2016. He said PW7 and PW8 were mistaken in their identification evidence. He said, he was not driving the vehicle HR 580 on 6 January 2016 after 3 am. He said, he cannot drive and he doesn't have a driving licence. If you accept the accused's evidence, you will have to find him not guilty as charged on both counts. It is a matter entirely for you.

(e) The Need to Considering All the Evidence:

40. The parties submitted an "Agreed Facts". It had 32 paragraphs of Agreed Facts. The prosecution called two witnesses, PW7 and PW8, both police officers. The defence called the accused himself, as their witness. Altogether, there are three witnesses, on whose evidence, the court will have to make a decision. The defence submitted an exhibit. You will have to consider all the evidence together and compare them. If I fail to mention a particular evidence you consider important, please take on board, at your convenience. If you find a witness credible, you may accept the whole or some of his evidence, in your deliberation. If you find a witness not credible, you may reject the whole or some of his evidence. You are the judges of fact.

I. **SUMMARY**

41. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.
42. Your possible opinions are as follows:
- | | | | | | |
|------|-------------|---|--------------------|---|----------------------|
| (i) | Count No. 1 | : | Aggravated Robbery | : | Guilty or Not Guilty |
| (ii) | Count No. 2 | : | Aggravated Robbery | : | Guilty or Not Guilty |
43. You may retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.




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JUDGE

Solicitor for State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for Accused : **A. K. Singh, Barrister and Solicitor, Suva.**