

**IN THE HIGH COURT OF FIJI AT SUVA**  
**[CRIMINAL JURISDICTION]**

**CASE NO: HAC. 158 of 2010 (Re-trial)**

**BETWEEN** :

**STATE**

**AND** :

**FILIFE DELANA**

*Counsel* :

*Ms. Tamanikaiyaroi U. for State*

:

*Accused appears in Person*

*Hearing on* :

*24<sup>th</sup> October – 26<sup>th</sup> October 2018*

*Summing up on* :

*29<sup>th</sup> October 2018*

## **SUMMING UP**

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the Assessors of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room and the exhibits tendered. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments for the prosecution and the defense are not evidence. A suggestion made during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, a part or none of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes we honestly forget things or make mistakes regarding what we remember.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has

not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.

9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question of reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.

13. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must find the accused not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
15. You are not required to decide every point the parties in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge is proved against the accused.
16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
17. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

*Statement of Offence*

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

*Particulars of Offence*

FILIPA DELANA in the company of others on the 22<sup>nd</sup> day of July 2010 at Suva in the Central Division, robbed PRANIT NARAYAN of 1 x Compaq Laptop, 1 x Men's Cologne, 1 x Women's Cologne, 1 x Shaving Gel, 1 x Motorola Mobile Phone, 1 x Toyota Land Cruiser, the property of the said PRANIT NARAYAN.

18. To prove the offence of aggravated robbery the prosecution must prove the following elements beyond reasonable doubt.
  - a) the accused;
  - b) committed robbery; and

- c) at the time the robbery was committed, the accused was in the company of 1 or more others.
19. The first element involves the identity of the offender. The prosecution should prove beyond reasonable doubt that the accused committed the offence and no one else.
20. A person commits robbery if he immediately before committing theft; or at the time of committing theft; or immediately after committing theft, uses force or threatens to use force on another person with intent to commit theft or to escape from the scene.
21. 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.
22. The element 'dishonestly' is about the state of mind of the accused. So is the element, 'intention to permanently deprive'. Inferences may be drawn from the conduct of the accused, with regard to an accused's state of mind.
23. 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. In law, property belongs to a person if that person has possession or control of the property.
24. Robbery becomes aggravated robbery, if the accused was in the company of one or more persons at the time of committing the robbery.

#### **Summary of the evidence**

25. The first witness called on behalf of the prosecution was Mr. Pranit Narayan. His evidence was that;
- (a) On 22<sup>nd</sup> of July 2010, he was residing at 322, Princess Road, Tamavua, together with his father, mother and the house boy named Arnold. On that day, at about 3 O'clock in the morning the house boy, Arnold has awakened him up saying that robbers were trying to break in. He got up and being disturbed gone to the sitting room through the sliding door.
- (b) There he has seen three men trying to break open the front grill. The front grill was fastened with a chain. The robbers were trying to cut it with the bolt cutter. In addition to the bolt cutter, they have had a large screwdriver and a knife. The

witness has punched on the sliding door to deter them, and being unsuccessful has gone back to his room to change his clothes as he was in the night shorts.

- (c) At his room the closest he found was a Sulu and as he turned round wearing it, the three robbers were there in his room. Two of them wore masks whereas the third or the tall man as referred the witness, did not wear a mask. The tall man then hit him on his head with the bolt cutter. Later he said that he did not suffer much injury as it was more of a hard push than a hit, but there was a swelling on his head due to that.
- (d) The witness recalls that the tall man was wearing a dark coloured T-Shirt, Black Jeans and a Jacket. The other two were wearing shorts. Describing the "Tall-Man" the witness said that he is little over 6 feet, whereas the other two were below 6 feet. He had more than 20 minutes to observe him during the robbery at close proximity without any obstructions and under the fluorescent lights. Referring to the tall man, the witness identified him as the Accused.
- (e) The witness testified that he has seen the Accused before this incident of Robbery in July 2010. That was when the witness happened to be in the cell block for an offence of Drinking & Driving, in March 2010, he has seen the Accused being in there with him, and the witness is said to have remembered the accused because of his stature. Further, the witness says that he could remember the accused having lunch together with him in the cell block, and having observed him in close proximity without any obstructions for about 20 to 30 minutes while having lunch.
- (f) The witness however states, that though he could Identify the Accused as the one of the robbers who robbed them In July 2010, he is not 100% sure of it. The witness explains his uncertainty is due to the fact that this robbery having taken place about 8 years back.
- (g) Describing the incident, the witness states that all three robbers having come to his room, one went to his parents' room while two remained with him and later they took him also to his parents' room. At his parents room they (the witness and his parents) were asked to give all their jewelry and money and the tall-man pressed the bolt cutter to his father's face (between the lip and the nose) and asked for the hidden things. Having robbed many things inclusive of a Compaq Lap-top, Motorola Mobile Phone, Aftershave, a wristwatch and his wallet containing about \$70 from his room, They robbed his parents Jewelry including rings and necklaces, from the parents room.
- (h) After possessing the items, the tall-man, (the Accused) has asked for the Car Keys of the witnesses Car and the robbers have fled away in the said vehicle. The

vehicle was later recovered abandoned and keys were recovered from the Accused.

- (i) In cross examination by the Accused, the witness admitted that he identified the Accused from the photographs shown to him by the Police and there was no Identification parade held. When queried why fact that the witness having seen the Accused before, was not been recorded by police in his statement, the witness explained it as the police recorded things relevant to the incident only, though informed of his recognition, the police may not have recorded it. Further, it was suggested by the Accused that he met the witness in the cell block, only after this incident. The witness denied it affirming that he has been on the cell block only once and that was in March 2010, few months before the robbery. Further, the Accused has queried the witness regarding the inconsistency between his evidence and the statement to the police, of the time period the robbers were in his house. In the stamen witness says that the robbers were there for about 30 to 40 minutes where as in evidence the witness testified that the robbers were there inside the house for about 20 to 30 minutes. The explanation given by the witness was that in the statement to the police, he may have counted the time the robbers took to break into the house by breaking open the grill. Furthermore, the witness affirms that when he was shown some of the recovered items at Samabula Police Station he identified them as some of their lost items. Among the said items were his Motorola Mobile Phone, his Compaq Lap-top, his perfumes and his mothers' ring which he could positively identify.
- (j) In re-examination, the witness affirms that only time he has been in the cell-block was in March 2010, and that is when he first saw the Accused.

26. Next witness was DC Samuela Vinakawaya. He said;

- (a) That he is a Detective Constable attached to Fiji Police Force, having a service history of 17 years. In July 2010, he was attached to Nasinu police station and on the information received, he has arrested the Accused at about 12.00 hrs, at Anadela Hotel. Before the arrest he has obtained a search warrant and having entered the hotel, he has arrested the Accused. At the time of the arrest the witness has found, a Mobile Phone, Perfumes and a Car Key in the possession of the Accused.
- (b) In response to Cross Examination, the witness states the Accused was arrested at 12.00 hrs on 22<sup>nd</sup> July 2010, and the key recovered from the Accused is included there in the search list. The witness when queried by the Accused of his arrest

the witness states that the Accused was sitting on his bed at that time. However, the Accused successfully points out a contradiction by referring to the testimony of the witness in the first trial, where the witness has testified the Accused was laying on the bed at the time of the arrest.

27. The third witness was DC Leone Vurukani. He states that;
  - (a) He has been serving Fiji Police Force, for a period of 12 years and in July 2010 he was attached to Samabula police Station. He has been the investigating officer in this case and has recorded the statements of the witnesses and conducted the investigations. The alleged stolen items included a vehicle and its' keys, a laptop, a mobile phone, perfumes and a shower gel. They managed to recover vehicle keys, a mobile phone, perfumes and a shower gel, from the Accused and later the said items were shown to the witnesses and identified as a part of their lost items.
  - (b) The witness further states that the recovered vehicle and its' keys were handed over to the complainant. He confirms that the Accused was arrested by Detective Constable Samuela, and recoveries received from the arresting officer were listed as exhibits and kept at the Samabula Police Station. The witness affirms that an Identification Parade was not held as the complainant informed the suspect is known to him. The witness confirms the 1<sup>st</sup> witnesses' position that some photographs were shown to the complainant and from them, he identified the Accused.
  - (c) The cross examination by the Accused was limited. The witness admitted to be the interviewing officer in this case. In addition, he explained that the car keys were not listed as an exhibit as they were handed over to the complainant.
28. With leading evidence from the three witnesses mentioned above, the prosecution has closed their case.
29. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times.
30. The accused chose to give sworn evidence.
31. The accused Evidence



- (a) According to the accused's evidence, he could clearly remember the day he was arrested, the 22nd of February 2010. On the previous night, he was in the town with his girlfriend. Thereafter he has gone to the Anadale hotel from where he was arrested. He testifies that he was unaware of this robbery and no keys were recovered from him. He was shown the keys at Vanalevu Police Station at the time of the interview. Accused further testifies that the police did neither show him to the complainant nor held an identification parade; therefore, the prosecution could not confirm his Identity.
  - (b) In cross examination, the Accused having admitted the arrest and recovery of perfumes and the mobile phone in his possession, denies the recovery of the car keys from his possession. The Accused though submits an Ali-bi or brings out the defense of being elsewhere at the time of the incident, has failed to file notice of Ali-bi. Further, he concedes that he has not listed the so called girl friend of his who is supposed to have been there with him during the relevant time.
32. That is a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit. As I have already explained, which evidence you would accept and do not accept is a matter for you to decide.
33. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence have been proven beyond reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.
34. When you consider the evidence on the identification of the accused by the 1st witness as the person who hit him on the head with the bolt cutter and one of them who robbed his house and also as the person who took his car keys and robbed the vehicle, please bear in mind that an honest and a convincing witness can still be mistaken.
35. In this case the witness testified that he has seen the Accused before at the Cell Block. Therefore, at the time of the robbery, it was recognition of the previously seen person. Recognition is somewhat stronger than identifying for the first time. Still, mistaken

recognition can occur even of close relatives and friends. Therefore, you should closely examine the following circumstances among others when you evaluate the evidence given by the aforementioned witnesses on identification of the accused;

- (i) Duration of observation;
- (ii) The distance within which the observation was made;
- (iii) The lighting condition at the time the observation was made;
- (iv) Whether there were any impediments to the observation or was something obstructing the view;
- (v) Whether the witness knew the accused and for how long;
- (vi) Whether the witness had seen the accused before, how often and special reason to remember; and
- (vii) Duration between original observation and identification.

36. The accused points out that there are inconsistencies in the evidence led by the prosecution. One such was whether the Accused was sitting or lying on the bed at the time of the arrest. You should consider these inconsistencies and any other inconsistency which you may have noted according to the directions I gave you earlier on dealing with inconsistencies.

37. The Accused's evidence is that he was elsewhere at the time of the robbery. In legal terms it is called an *Alibi*. May I now direct you on the defense of *ali-bi*. As for the Law, if an Accused intends to rely on an *Alibi* he is bound to give notice of it to the prosecution before the commencement of the trial. Accused being given the opportunity and being well aware, did not file such notice of *Alibi* as required. Therefore, to me it is apparent that it is just an afterthought. Anyway, I will leave it up to you to give due consideration in assessing the credibility of the Accused's evidence.

Though an accused raises the defense of alibi, please remember that there is no burden for the accused to prove that he was elsewhere during the time the offence was alleged to have been committed. The prosecution should still prove that it was the accused that committed the offence and therefore the accused's position is not true.

38. However, you should also bear in mind that you should not assume that the accused is guilty of the offence merely because you decide not to accept his alibi. You should remember that sometimes an accused may invent an alibi just because it is easier to do so rather than telling the truth. The main question remains the same. That is, whether you are sure that it was the accused who committed the offence.

39. I must again remind you that even though an accused person gives evidence, he does not bear any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
40. Generally, when an accused give an explanation, one of the three situations given below would then arise;
- (i) You may believe his explanation and, if you believe him, that means that prosecution has failed to convince you, and then your opinion must be that the accused is 'not guilty'.
  - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind regarding the prosecution case, and therefore, again your opinion must be 'not guilty'.
  - (iii) The third possibility is that you reject his evidence. That is you disbelieve the accused, yet that itself does not make the accused guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.
41. Any re-directions?
42. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused.. When you have reached your separate opinion, you come back to court and you will be asked to state your opinion.
43. Your opinion should be whether the accused is guilty or not guilty.

  
**Chamath S. Morais**  
**JUDGE**



*Solicitors for the State* : *Office of the Director of Public Prosecutions, Suva.*  
*Solicitors for the Accused* : *Accused appeared in person.*