

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 403 OF 2016S

STATE

vs

1. ASESELA NIUBASAGA
2. SAMISONI WAQAVATU

Counsels : Mr. S. Shah for State
Mr. J. Daurewa for Accused No. 1
Mr. N. Tuifagalele for Accused No. 2

Hearings : 2, 3, 4, 5, 8, 9 and 11 October, 2018

Summing Up : 12 October, 2018

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 was 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 in this case. However, you are not bound by what they said. It is you who are the representative 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 accuseds. There is no obligation on the accuseds to prove their 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 accuseds' guilt, before you can express an opinion that they are guilty. If you have any reasonable doubt so that you are not sure about their guilt, then you must express an opinion, that they are 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 accuseds 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 ISSUE

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

- (i) Did Accused No. 1 and 2, with others, on 28 October 2016, at Samabula in the Central Division, commit aggravated robbery against the complainant (PW1), when they broke into his house and forcefully stole his properties, as itemized in the information?

E. THE OFFENCE AND IT'S ELEMENTS

9. Accused No. 1 and 2 are charged with "aggravated robbery", contrary to section 311 (1)(a) of the Crimes Act 2009. It was alleged that, the two, with others, broke into the complainant's house on 28 October 2016, forcefully tied him and his wife up, and stole his properties, as itemized in the information. For the accuseds to be found guilty of the offence, 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 particulars of offence in the information that the prosecution began with the phrase, "...ASESELA NIUBASAGA AND SAMISONI WAQAVATU, WITH OTHERS..." The prosecution was alleging that the accuseds committed the above offence as a group. In other words, to make them jointly liable for the offence, the prosecution appears to be relying on the concept of "joint enterprise".
13. "Joint enterprise" is "when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence" (Section 46, Crimes Act 2009). In considering each accused, you will have to ask yourselves the following questions. Did each of them form a common intention with each other, to break into the complainant's (PW1) house on 28 October 2016? If so, did each of them acted together in breaking into the complainant's (PW1) house on 28 October 2016? When they broke into the complainant's house and later committed aggravated robbery on the complainant, was this episode a probable consequence of them breaking into the complainant's house on 28 October 2016? If your answer to a particular accused was yes, and you are sure that the elements of the offence as described in paragraphs 9 to 11 are satisfied, the particular accused was guilty as charged. If it was otherwise, he was not guilty as charged.
14. Furthermore, in this case, there are two accuseds on trial. Each of them is entitled to be tried solely on the evidence that is admissible against him. This means that you must consider the position of each accused separately, and come to a separate considered decision on each of them. Just because they are jointly charged, does not mean that they must all be guilty or not guilty. Most evidence in this case are admissible against all accuseds. However, regarding their police caution interview statements, which may contain their alleged confessions, the statements therein are only admissible against the maker of the statements, and on no other. In other words, in each of the accused's police caution interview statements, you must totally disregard what the accused said about his co-accuseds on the commission of the offence,

because these are inadmissible evidence. You can only take into account what he said about himself, regarding his role in the commission of the crime, because this is admissible evidence against him.

F. THE PROSECUTION'S CASE

15. The prosecution's case were as follows. On 28 October 2016, the day of the alleged "aggravated robbery", the complainant (PW1) was 68 years old and a businessman. Asesela Niubasaga (DW1), the first accused, was 31 years old. He reached Form 4 level education at Saraswati College, and was living with his defacto wife at Kalabu village. He was a subsistence farmer by profession. Samisoni Waqavatu (DW2), the second accused, was 26 years old and single. He reached Form 4 level education at Kalabu Secondary School. He was living with his mother and other relatives at Kalabu village. He was a subsistence farmer by profession.
16. According to the prosecution, Asesela allegedly met Samisoni on 27 October 2016. Asesela allegedly invited Samisoni and another to a robbery to be done early morning on 28 October 2016, at Tamavua. On 27 October 2016, late at night, Asesela allegedly met Samisoni and another at Kalabu. They allegedly took a taxi to Princes Road, Tamavua. According to the prosecution, they met 4 other youths at Tamavua. The group then identified the complainant's two storey concrete house to break into. According to the prosecution, the group allegedly planned to break into the house early morning on 28 October 2016.
17. Early morning on 28 October 2016, Asesela and his friends put on their masks, and allegedly broke into the complainant's house at Princes Road, Tamavua. They were allegedly armed with pinch bars, bolt cutters and cane knives. They got hold of the complainant (PW1) and his wife, and allegedly threatened them not to resist. They tied them up. Later they ransacked the house and allegedly stole the items mentioned in the information. They later fled the crime scene in PW1's car. The matter was later reported to police. An investigation was carried out. The two accuseds were arrested by police. They were cautioned interviewed. They allegedly confessed to the above crime to the police. They were later charged with "aggravated robbery".
18. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find both accuseds guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASES

19. On 5 October 2018, the first day of the trial proper, the information was put to both accuseds, in the presence of their counsels. They pleaded not guilty to the charge. In other words, they denied the allegations against them. When a prima facie case was found against each of them, at the end of the prosecution's case, wherein they were called upon to make their defence, both of them choose to give sworn evidence in their defence. Accused no. 1 called Doctor Archana Prasad (DW3) as his supporting witness. Accused no. 2 called no witness. What the accuseds did was totally within their rights.
20. The accuseds' cases were very simple. On oath, they both denied the allegations against them. They each said, they did not rob the complainant as alleged in the information. In their closing submission, they appeared to say that no eye witness saw them at the crime scene. They appear also to say that the complainant (PW1) did not identify them, at the crime scene, at the material time. They said, the only evidence against them, appear to be their alleged confession to the police, when they were caution interviewed by them.
21. However, they ask you, as assessors and judges of fact, to ignore and disregard their alleged confessions to the police. They say, this was because the police force the confessions out of them. They said, the police repeatedly assaulted them and threatened them, and as a result, they allegedly confessed to the police. They said, their alleged confessions were given involuntarily by them and without their own free will. They appear to say that the police also fabricated the answers allegedly given by them in the interview notes. As a result of the above, they say the alleged confessions were not true.
22. Because of the above, the two accuseds are asking you as assessors and judges of fact, to find them not guilty as charged. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

23. In analysing 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 and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analysing the evidence, we

will first discuss the State's case against both accuseds, then the accuseds' cases, and lastly, the need to consider all the evidence.

(b) The State's Case Against both Accuseds:

24. In this case, none of the accuseds disputed the evidence of the complainant, Mr. Nitya Nand Shankar (PW1). It was accepted that, approximately five armed masked men broke into his two storey concrete dwelling house in the early morning of 28 October 2016. It was also accepted that the men broke into their bedroom and confronted him and his wife. They appear to threaten the couple with pinch bars, screw drivers, knives and other weapons. They were tied up and told not to raise the alarm. They were ordered not to resist or they will be hurt. The men demanded money, jewellery and other properties. They ransacked the house and stole the items mentioned in the information. They then fled the crime scene in PW1's car. The complainant, in his evidence said, he could not identify any of the robbers' face, because they were all masked. The above evidence was not disputed by the accuseds, during the trial. As a result, you may safely accept that, the complainant and his wife were violently robbed of the properties mentioned in the information on 28 October 2016 at Tamavu in the Central Division. The burning question becomes: who did the robbery?
25. The prosecution was unable to provide an eye witness or witnesses to say that it was the accuseds who allegedly robbed PW1 at the material time. PW1, who was at the crime scene at the material time, could not identify any of the robbers. This is not unusual in this type of cases. PW1 said all the robbers were masked, and thus he could not identify any of them. This was obviously a difficulty for the prosecution.
26. Nevertheless, to connect the two accuseds to the alleged crime, the prosecution relied solely on the two accuseds' alleged confession to the police, when they were allegedly caution interviewed on 3 and 4 November 2016 at Samabula and Raiwaqa Police Stations. The State's case against both accuseds stands or falls, on whether or not you accept or reject the two accuseds' alleged confessions. We will therefore begin our discussion by identifying where in the interview notes the two accuseds allegedly admitted the offence. Then I will direct you on how to approach the above alleged confession. Then we will discuss the police and the two accuseds' version of events in how the alleged confessions were obtained. Finally, we will discuss what the two doctors said in their evidence.

27. As for Asesela Niubasaga (Accused no. 1 and DW1), his police caution interview statements were tendered in evidence as Prosecution exhibit no. 2. A copy of the same is with you and please read it carefully. From questions and answers 38 to 67, Asesela tells us what allegedly happened prior to the robbery. From questions and answers 68 to 81, Asesela tells us what occurred during the robbery. From questions and answers 82 to 150, Asesela tells us what occurred after the alleged robbery and what he did with his share of the loot.
28. As for Samisoni Waqavatu (Accused no. 2 and DW2), his police caution interview statements were tendered in evidence as Prosecution Exhibit No. 1. A copy of the same is with you and please read it carefully. In question and answer 31, Samisoni allegedly admitted the offence to police. In questions and answers 18(2) and 33, Samisoni allegedly admitted to police that his admission above were given voluntarily and out of his own free will and they were the truth. From questions and answers 50 and 74, Samisoni tells us what allegedly happened prior to the robbery. From questions and answers 75 to 80, Samisoni tells us what occurred during the robbery. From questions and answers 81 to 83 and 101 to 106, Samisoni tells us what occurred after the alleged robbery.
29. If you accept the two accuseds' above confessions, you will have to find them guilty as charged. If you reject the two accuseds' above confession, you will have to find them not guilty as charged. It is a matter entirely for you. However, in approaching the two accuseds' alleged confession, I must direct you as follows as matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution interview statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If it's otherwise, you may give it less weight and value. It is a matter entirely for you.

30. In this case, the manner in which the above alleged confessions were taken by police, was hotly disputed by the parties. The prosecution called the two police officers who took Asesela and Samison's caution interview statements. Sukulu Colati (PW6) was the police officer who interviewed Asesela and recorded his interviewed statements via a laptop. This was tendered as Prosecution Exhibit No. 2. Maciu Vakaruru (PW5) was the police officer who interviewed Samisoni and recorded his interview statements via a laptop. This was tendered as Prosecution exhibit No. 1. Both PW5 and PW6 said, both accuseds were given their rights to counsels and other legal rights. They said, both were given the standard caution, rest and meal breaks. Both said, the accuseds freely signed their interview statements to confirm they gave the same voluntarily and out of their own free will. PW5 and PW6 said, they never assaulted, threatened or made promises to the accuseds, while they were in their custody. PW5 and PW6 said they never saw any police officer assault, threaten or made promises to the two accuseds, while they were in police custody.
31. However, the two accuseds said exactly the opposite. You have heard them give evidence in court and I am sure their evidence is still fresh in your mind and I don't want to bore you with the details. Suffice to say that they said they were arrested by police on 3 November 2016 and were in police custody from then until taken to court on 7 November 2016. Both appear to say they were interviewed on 3 and 4 November 2016. Both appear to agree they were taken by police to Raiwaqa Health Centre on 6 November 2016 and were seen by Doctor Asheel Singh (PW7). Asesela agreed he was seen by Doctor Edwin Kumar on 8 November 2016 at Samabula Health Centre. Both accused said that the police repeatedly assaulted them while in their custody. As for Asesela, he said he was repeatedly punched in the ribs at Rifle Range Vatuwaqa by the police on 3 November 2016. On 4 November 2016, Asesela said, he was repeatedly punched by police on the right temple at Samabula Police Station. He said, he was also repeatedly kicked in the ribs. He said, police slammed his head to the back of a police vehicle in Colo-i-Suva.
32. As for Samisoni, he said, he was also repeatedly assaulted by police at the Rifle Range in Vatuwaqa, and at Raiwqa Police Station. He said, he was repeatedly punched in the ribs and forehead and his little finger was broken by police. Both accuseds were taken by police to Raiwaqa Heath Centre on 6 November 2016 to be medically examined. It must be noted that this was 2 days after their caution interview statements were taken on 3 and 4 November 2016. Doctor Ashneel Singh (PW7) medically examined both accuseds. Doctor Singh said none of

the accused made any complaints to him. Nevertheless, he examined them. According to Doctor Singh, he found no injuries on them. Doctor Singh tendered the accuseds' medical reports as Prosecution Exhibit no. 3 and 4 in the trial. Please, read the reports carefully. On 8 November 2016, Asesela was further medically examined by Doctor Edwin Kumar at Samabula Health Centre. He produced a medical report. However, on the day of trial, Doctor Kumar was sick. Doctor Archana Prasad (DW3) stood in for him. This was permitted by section 133 (5) of the Criminal Procedure Act 2009. Doctor Prasad said, Asesela had no major injuries on him on 8 November 2016. Doctor Prasad said, he only had abrasions. On Asesela's allegation of repeated assaults at Rifle Range and Samabula Police Station, Doctor Prasad said she would expect more severe injuries than abrasions. Doctor Prasad tendered Doctor Kumar's medical report of Asesela as Defence Exhibit no. 1.

33. How you view the prosecution's version of events as against the accuseds, on the basis of the above evidence, is entirely a matter for you. If you accept the prosecution's version of events, you must find the accuseds guilty as charged. If otherwise, you must find them not guilty as charged. It is a matter entirely for you.

(c) **The Accuseds' Cases:**

34. I have summarized the accuseds cases to you from paragraphs 19 to 22 hereof. I repeat the same here. If you accept the accuseds' version of events, you must find the accuseds not guilty as charged. If you reject the accuseds' version of events, you must still consider the prosecution's case as a whole. If you are not sure of the accuseds' guilt, you must find them not guilty as charged. If otherwise, you must find them guilty as charged. It is a matter entirely for you.

(d) **The Need To Consider All the Evidence**

35. Seven witnesses gave evidence for the prosecution, that is, five civilians and two police officers. Three witnesses gave evidence for the defence, that is, the two accused and a doctor. Four Exhibits were given by the prosecution, and one by the defence. You must consider all the evidence together. Compare and analyze them together. If I haven't mentioned a piece of evidence you consider important, please take it on board in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his/her evidence in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his/her evidence in your deliberation. You are the judges of facts.

I. **SUMMARY**

36. Remember, the burden to prove the accuseds' guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accuseds, at any stage of the trial. The accuseds are not required to prove their innocence, or prove anything at all. In fact, they are 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 accuseds' guilt, you must find them 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 accuseds' guilt, you must find them not guilty as charged.
37. Your possible opinions are as follows:
- (i) Aggravated Robbery : Accused No. 1 - Guilty or Not Guilty
Accused No. 2 - Guilty or Not Guilty
38. You may now 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 No. 1 : Legal Aid Commission, Suva
Solicitor for Accused No. 2 : N. Tuifagalele, Barrister and Solicitor, Suva