

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

**CASE NO: HAC. 332 of 2018**

**BETWEEN** : **STATE**  
**AND** : **ILAI TUINASAVUSAVU**

*Counsel* : *Ms. Lodhia S. and Mr. Zunaid Z. for State*  
: *Mr. Qetaki L. and Ms. Chand M. for the accused*

*Hearing on* : *13<sup>th</sup> March – 14<sup>th</sup> March 2019*  
*Summing up on* : *18<sup>th</sup> March 2019*

## **SUMMING UP**

Ladies 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. As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;
  - i) If a person has committed an offence, he should be meted out with an adequate punishment.  
In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. I must remind you that it is the duty of the prosecution to prove all the elements of the alleged offence beyond reasonable doubt. The accused is not required to prove anything as his innocence is presumed by the law.
  - ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to convict one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. 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.
4. 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.
5. 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.
6. 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.
7. 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.

8. 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.
9. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his 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.
10. 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.
11. 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.
12. 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.

13. 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 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.
14. 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.
15. 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.
16. 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.
17. 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 mandatory.
18. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

*Statement of Offence*

ATTEMPTED AGGRAVATED ROBBERY: contrary to section 44(1) and 311(1) (a) of the Crimes Act 2009.

*Particulars of Offence*

Jovilisi Gonekalou & Ilai Tuinasavusavu with others on the 19<sup>th</sup> day of August 2018 at Nasinu in the Central Division, in company of each other attempted to rob one Gulsar Ali.

19. Section 44 (1) of the Criminal Procedure Act states that;  
44. — (1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.  
Therefore, as for the charge, the prosecution need not prove that the offence has in fact been committed, but the accused attempted to commit such.
20. 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.
21. 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.
22. 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.
23. 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.
24. 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.
25. '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.

26. 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

27. The first witness called on behalf of the prosecution was Mr. Gulsar Ali. His evidence was that;
- (a) He is a 62 year old plumber living at Naulu, nakasi.
  - (b) On the 19<sup>th</sup> of August 2018 at about 7.30pm he has gone with his 9 year old daughter to his sisters place and on his way back at about 8.00pm has gone to Hanson's super market.
  - (c) Having bought bread there, he has walked to the nearby bus stop together with his daughter to catch a bus. He has noticed 4 I-Taukei youths following him.
  - (d) When at the bus stop, one of them came up to him and has said "Hey Tamana, Kai-se" (meaning, Hey Old man, How are you). Then another one has come from his behind and grabbed him and tried to take his wallet. After trying for a while, since he could not get the wallet, he has called another. That one also has come and holding the witness with one hand has tried to pinch his wallet. The witness has struggled with them and the witness has shouted for help. The vehicles travelling on the road nearby has stopped and started honking their horns and shouting. Then the youths have released him and ran away.
  - (e) The witness has gone to the Nasinu police Station to report the matter. The Officers there having heard the incident has gone in search of the youths together with the witness and his daughter.
  - (f) While going in search of the assailants, having seen and identified by the witness the police has tried to arrest them. They have managed to arrest two of them only as the other two has run away.
  - (g) The witness identified the accused as the youth who came to assist the first youth who was holding him at the time of the incident. He further affirms that he has seen the accused face for more than 1 minute without any obstruction, while the accused attempted to rob his wallet.
  - (h) In cross examination, the witness concedes that the light at the scene of the crime is quite dull but states that there were lights falling from the moving vehicles. The witness, denying a suggestion that the light from the moving vehicles was just a flash, states that it was good enough to identify anyone.

- (i) When queried of the clothes the accused wore, the witness states that he did not concentrate on them as his concentration was on saving himself and his wallet.
- (j) In re-examination, the witness affirms that he identified them not only because there were 4 of them together, but also since they were following him from the hot bread kitchen and he has seen them well at the time of the incident.

28. Next witness was Seci Vesikula. He said;

- (a) He is 17 years old, doesn't go to school now and lives in Makoi with his siblings.
- (b) Last year he was schooling and was in form 4. During the school holidays in August 2018, too he was in Makoi.
- (c) On the 19<sup>th</sup> of August 2018, at around 6.00pm he has gone to his aunt's place in Livaliva to ask for some CD's. There at his aunt's place, he has met Ilai, the accused, whom he knows since his brother is married to Ilai's sister. He has known Ilai for about 2 months and used to visit Ilai's home about thrice a week. Ilai stays at his aunt's place. Having met Ilai, the witness has come out with him to a shop. There they have met Jovilisi and Maku the other two.
- (d) There they have bought a cigarette roll and smoked. Having smoked the cigarette roll, Ilai has noticed an Indian man walking on the road. Then Ilai has made a plan to rob the Indian man. Ilai has told the witness to go and distract the Indian man by saying "Hey, Tamana Kaise". (Hey Old man, How are you)
- (e) He has said so as told by Ilai, to the old man. Then he has seen Jovilisi coming from behind the old man and getting hold of him. Then Ilai went there and searched the old man's pockets. Ilai touched the old man's pockets in search of money. While this was happening the Indian man was moving and shouting for help. The passing vehicles stopped and started honking their horns. Therefore, they (4 of them) left the Indian man and walked towards the white steps.
- (f) While they (the witness, Ilai the accused, Jovilisi and Maku) were walking near the William Cross School, a police vehicle has come with the Indian old man and his child and arrested him and Ilai while Jovilisi and Maku managed to run away.
- (g) The witness identifies the accused as Ilai, who was well known to him and whom he referred to throughout his evidence.
- (h) In cross examination, the witness admits that this was the first time he was arrested and taken to a police station and he was worried and scared. When suggested that police promised to let him go if he give evidence against the accused, the witness denied.
- (h) Lady and Gentleman assessors, when analyzing this evidence, you should remember that this witness was also an accomplice of this crime. In general the

evidence of an accomplice is to be treated with care as may be a possibility for him to lie for his escape. Here the witness's evidence do incriminate him though the authorities has decided to not to make him an accused. Further, it is always safer to look for corroboration of this type of witness's evidence by other independent evidence.

29. The final witness, PW3 for the prosecution was Detective Constable 3064, Samuela Dakuitoga. His evidence is;
- (a) He is an officer with 17 years of service and by 19<sup>th</sup> of August, 2018, was attached to the Nasinu police station.
  - (b) On that day while on duty received information of an attempted aggravated robbery at about 8.00 pm.
  - (c) The information was provided by Mr. Gulser Ali and his Daughter and accordingly together with the complainants, he has left the station in a police vehicle & gone in search of the suspects.
  - (d) Having searched surrounding areas when they were on Makoi Road, have seen the 4 suspects in front of the William cross school and the complainant having identified them, went & tried to arrest them. However two of the suspects ran away and the witness has managed to arrest Ilai, the accused and Seci the PW2.
  - (e) At the time of the arrest the Gulser Ali, the PW1 has identified Seci the PW2 as the person who distracted him and Ilai the accused, as the one who searched his pockets while another was holding him.
  - (f) The witness further states that the accused gave his name as Ilai Tedese and later when his fingerprints were obtained came to know his real name as Ilai Tuinasavusavu.
  - (g) In cross examination, the witness admits that the accused denied any involvement with the incident when arrested. Further, the witness admits that the accused has shown them the house of Jovilisi, who was arrested from there and later charged.
30. With leading evidence from the three witnesses mentioned above, the prosecution has closed their case.
31. At the end of the prosecution case you heard me explain his rights and giving 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.



32. The accused chose to give sworn evidence.
33. The accused Evidence is that;
- (a) On the day of the incident, while returning from work he has met Seci on the foot path going towards Livaliva.
  - (b) When they were going together, they have met two other boys namely, Jovilisi and Maku sitting at the bus stop.
  - (c) They have seen an Indian man and a child standing at the bus stop. Then Jovilisi and Maku told them to rob the Indian man.
  - (d) According to him, the witness has asked others to not to rob the Indian man. Then others have forced him to come with them and rob the Indian man.
  - (d) The witness states that he did not rob the Indian man. He further states that he did not plan the robbery. When others approached the Indian man he has walked away and did not know anything about the incident.
  - (e) When he was going home, the others came behind him laughing and joined him. Then police came and arrested him and seci. He states that he did not run away when the police came, as he did not know anything about the incident.
  - (f) The witness, when queried 'Why Seci gave evidence against him' states that 'May be he is jealous of me or angry with me'
  - (g) In cross examination, the Accused says that he was unaware that his sister is married to Seci's brother. He further states that Seci is a stranger coming to his house, but usually meets Seci at the his house.
  - (h) He admits that they smoked cigarette together. He states that there were other people in the bus stop when the incident happened. The accused finally affirms that he did not give a wrong name to the police, but the officer has misheard it.
34. 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.
35. 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.

36. When you consider the evidence on the identification of the accused by the 1st witness as the person who came when another was holding and the person who tried to take his wallet, please bear in mind that an honest and a convincing witness can still be mistaken.
37. The Pw1 states that the accused together with others followed him. Thereafter he clearly saw the accused's face for more than a minute at the time of the incident. In support of that the PW2 testified that he has seen the Accused getting involved with the alleged incident. The accused is well known to him and they have been together at that time. Therefore, it was recognition of a well-known 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.
38. The defense points out that there are inconsistencies in the evidence led by the prosecution as to whether the accused was arrested initially or not. You should consider this inconsistency and any other inconsistency which you may have noted according to the directions I gave you earlier in dealing with inconsistencies.
39. 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 evidence. You should remember that sometimes an accused may come out with a lie 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.

40. 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.
41. 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.
42. Any re-directions?
43. 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.
44. 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* : *Legal Aid Commission, Suva.*