

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 : *13th March – 14th March 2019*
Summing up on : *18th March 2019*
Judgment : *20th March 2019*

JUDGEMENT

- [1] The accused, Mr. Ilai Tuinasavusavu is charged, contrary to Sections 44 (1) and 311(1) (a) of the Crimes Decree No. 44 of 2009 for Attempting to commit Aggravated Robbery on Mr. Gulsar Ali.
- [2] He pleaded not guilty to the charge and the ensuing trial lasted for 2 days. The complainant, Seci Vesikula and DC 3064, Samuela Dakuitoga, gave evidence for the prosecution while the accused gave evidence in denial of the charge.

- [3] At the conclusion of the evidence and after the directions given in the summing up, the assessors unanimously found the accused guilty to the count of Attempted Aggravated Robbery.
- [4] I direct myself in accordance with the law and the evidence inclusive of which I discussed in my summing up to the assessors.

The Evidence

- [5] 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 19th 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.

[6] 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 19th 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.

[7] 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 19th 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.

- [8] With leading evidence from the three witnesses mentioned above, the prosecution has closed their case.
- [9] At the end of the prosecution case the court having decided that prosecution has adduced sufficient evidence covering all the elements of the offence, called for a defense. The court has explained his rights and given the due options to the accused. The accused being well aware of his rights chose to give sworn evidence.
- [10] 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.

- [11] That was a summary of the evidence given in this case. I have outlined above, some of the important and relevant evidence given at this trial. However, I am much familiar with all the evidence lead in this case as I have listened, and taken down the entire evidence and have observed the demeanor of the witnesses as well.

Analysis

- [12] The identification of the accused by the PW1 needs consideration. Though it cannot be described as a fleeting glance the consideration and application of Turnbull principles would be helpful. The Pw1 has observed the accused for more than a minute in very close proximity. Though the lighting was dull, there had been enough flashes of light from the moving vehicles. The PW1 has seen the accused few moments before the alleged incident when they followed him. Further, the witness has identified the accused when he came with the police between 10 to 20 minutes after the incident. Most of all the accused was well identified by the PW2, who was in fact an accomplice. The evidence of PW1 in respect of the identification as well as the incident is soundly corroborated by the PW2.
- [13] When it comes to the evidence of PW2, it should be remembered that he is an accomplice. As a general rule, an accomplice's evidence should be treated with care as accomplices tend to incriminate others in order to exculpate themselves. However, in this case the PW2 evidence implicates him, though the authorities have apparently decided to not to prosecute him. Most of all the evidence of the PW2 is comprehensively substantiated by the other witnesses. Therefore I am of the view that the evidence of the PW2 is safely acceptable and believable. Even there happens to be any doubt as to the identification of the accused by the PW1 that doubt is entirely removed by the PW2.
- [14] With leading of the evidence of the PW1 to PW3, the prosecution has closed their case. The prosecution has managed to prove all essential

ingredients of the offence. Now I will look in to the evidence of the accused in order to see whether he manages to create a reasonable doubt in the prosecution case.

- [15] The accused states that he met Seci on the narrow footpath on his way home from work and Seci followed him. Thereafter when he was going with Seci, they have met Jovilisi and Maku at the bus stop. If that is a true statement, the foot path and his home should be on different directions from the bus stop. But at the time of the incident he has taken the foot path to go home from the bus stop. This is impossibility and creates doubt on the veracity of the accused's evidence at the very beginning itself. In addition, when PW2 affirmed that he met the accused at his house, it was never challenged by the defense. Further, the accused testifies that when Jovilisi and Maku planned to rob the Indian man, he asked them to not to do it. He goes on to say that they forced him to rob. But all of a sudden he has managed to get away, head towards his home and was unaware of what happened at the scene. Though he has gone towards his home, he has met others back and when they were together, police has come and arrested them near the William Cross School. The accused further affirms that he was unaware that his sister is married to Seci's brother, and Seci is a stranger to him. When considered this evidence in total, I am of the view that it fails to create any doubt in the prosecution case.
- [16] The court having explained all the relevant legal principles and the applicable law to the assessors, they unanimously held the accused to be guilty of the alleged offence. Each one of the assessors has obviously rejected the denial of the accused on the count. It was a question of believing either the prosecution or the defense.
- [17] From my point of view, the assessor's opinion was not perverse. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the opinion of the assessors.
- [18] I, having seen and heard the testimonies of the witnesses, am satisfied that evidence of the prosecution presented through the witnesses 1 to 3, is sufficient to establish the elements of Attempted Aggravated Robbery beyond reasonable doubt. The prosecution also established the identity of

the accused beyond reasonable doubt. In these circumstances, I am satisfied without a reasonable doubt that the accused has committed the offence of attempted aggravated robbery.

[19] Therefore, I convict the accused, Ilai Tuinasavusavu to the count of Attempted Aggravated Robbery.

[20] This is the Judgment of the Court.



At Suva
This 20th Day of March 2019