

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 114 OF 2018

STATE

-v-

- 1. MATAIYASI NAVUGONA**
- 2. KEVERIELI DUIGIGIDIGO WAQA (GABE-RIELI WAQA)**

Counsel: **Ms. W. Elo for Prosecution**
Mr. L. Qetaki for Defence

Dates of Hearing: **21, 22 March, 2019**
Date of Summing Up: **25 March, 2019**

SUMMING UP

Lady and Gentlemen Assessors,

- 1 We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused persons.
- 2 I will direct you on matters of law which you must accept and act upon.
- 3 On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.

4. In other words you are the judges of fact. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the counsel. They were their arguments, which you may properly take into account when evaluating the evidence. It is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law that accused person is innocent until he is proven guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find an accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty. However, the doubt must be reasonable and not be based on mere speculation.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this court room. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial.
10. Proof can be established only through evidence. Evidence can be direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. You are also free to draw reasonable inferences in the circumstances of this case if such inferences are based on facts proved by evidence.

11. Documentary evidence is evidence presented in the form of a document. In this case, the photographs used in the photograph identification parade are an example if you believe that those photographs were used in a proper manner to identify the accused.
12. This summing-up is not evidence. Statements, arguments, questions and comments by the counsel are not evidence either. A thing suggested by a counsel during a witness' cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as being true. You may take into account arguments and submissions of the counsel when you evaluate the evidence.
13. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
14. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in applying them.
15. In the course of cross-examination, the Defence counsel referred to previous statements of witnesses recorded by police. A previous statement made by a witness is not evidence in itself unless it is adopted and accepted by the witness under oath as being true. You can of course use those statements to test the consistency and credibility of the witness if you are satisfied that such a statement was made.
16. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. You have seen how the witness' demeanour in the witness box when answering questions. But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
17. In testing the consistency of a witness you should see whether he or she is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and whether what the witness has told court contradicts with his/her earlier version. You must however, be satisfied that such

contradiction is material to the core issues of this trial and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. There may be reasonable explanations for the inconsistencies. You must consider overall evidence of the witness, the demeanour, the way he/she faced the questions etc. in deciding on a witness's credibility.

18. Let us now look at the information, a copy of which has been given to you.

Statement of Offence

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

Particulars of Offence

MATAIYASI NAVUGONA and **KEVERIELI DUIGIGIDIGO WAQA** on the 11th day of March, 2018 at Kinoya in the Central Division, in the company of each other robbed, Reapi Kawanikailekutu of \$249 in case cash, the property of Reapi Kawanikailekutu.

19. 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. the robbery was committed in the company of one or more other persons; or at the time of robbery, has an offensive weapon with him.
20. The first element involves the identity of the offender. That is the main issue of this whole trial. The prosecution must prove beyond reasonable doubt that the accused Mataiyasi Navugona and Keverieli Waqa and no one else committed this offence.
21. The offence of Robbery is defined in the Crimes Act. 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.

22. A person commits theft if that person;
 - a. dishonestly;
 - b. appropriates the property belonging to another;
 - c. with the intention of permanently depriving the other of that property.

23. 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.

24. 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. At law, property belongs to a person if that person has possession or control of the property.

25. Aggravated Robbery is the aggravated form of robbery. Robbery when committed in the company with one or more other persons or if at the time of robbery the accused had an offensive weapon with him, that amounts to Aggravated Robbery.

26. An offence may be committed by one person acting alone or by more than one person acting together with the same criminal purpose. In this case, the Prosecution says that the accused committed the offence in the company of each other. I must explain to you the liability of a number of people who commit a crime together. If several people decide to commit an offence together, and all of them participate and assist each other in doing it, each of them is guilty of the crime that is committed. This is so, even though individually, some of them may not actually do the acts that constitute the offence. The offenders' agreement to act together need not have been expressed in words. It may be the result of planning or it may be a tacit understanding reached between them on the spur of the moment. Their agreement can be inferred from the circumstances.

27. Those who commit a crime together may play different parts to achieve their purpose. The prosecution must prove that the accused took some part in committing the crime. If you are sure that the offence of Aggravated Robbery was committed by more than one person and that

the accused acted together with the others to commit that offence and took some part in that offence you should find the accused guilty of the offence of Aggravated Robbery.

28. In this case the Prosecution case depends wholly on the correctness of identification of the accused as the offender. The Prosecution relies on the eye witness account of the complainant and photograph identification to prove the identity of the accused. The Defence challenges this identification. It says that the eye witness Revani is mistaken. In these circumstances I must warn you of the special need for caution before convicting the accused on the correctness of this identification.
29. The reason for this is the danger that a wrong identification will cause a miscarriage of justice and there have been cases where this has happened. It is not a question of a witness being untruthful but mistakenly believing the person seen at the crime scene at the crucial time was the accused. With this genuine belief a mistaken witness can nevertheless be a convincing one. I am not saying that is necessarily the case here. I am explaining the reason for the special care with which you must approach this issue.
30. You must decide whether the evidence of identification is reliable and should be accepted or whether it is unsatisfactory and should be rejected or leaves you in doubt. To do this you must examine all the circumstances and determine the strength or quality of the identification. It is for you to assess the value of the evidence that has been given.
31. To do this you must closely examine the circumstances in which the identifications came to be made. Generally, this will include such matters as:
 - How long did the witness have the person under observation? Was it a significant period or just a fleeting glimpse?
 - At what distance?
 - In what light?
 - Was the view impeded or obstructed in any way?
 - Was the accused a person known to the witness?
 - Had the witness ever seen the accused before and, if so, how often?
 - How long elapsed between the original observation and any subsequent identification of the accused as that person?

- How was the subsequent identification made?

32. Such matters as these go to the quality of the identification evidence.
33. The Prosecution adduced evidence in respect of photograph identification parade conducted by PC Inoke on the 23rd April 2018, more than one month after the alleged incident. It is not improper for the police in doubt as to the person who committed a particular crime to show a number of photographs of different individuals to persons who may thereafter become witnesses at the trial of one of those individuals, in order that they may be assisted in their efforts to find out who the culprit was. The object of showing a group of photographs to a witness is to test his or her ability to pick out the photograph if it is there, of the person whom the witness has said that he has seen previously in the crime scene. Every precaution should be taken by police in this procedure to exclude any suspicion of unfairness or erroneous identification.
34. The Defence argues that, in conducting the photograph identification process the police have not followed the proper procedure and conducting such a procedure when the suspect is already in custody is contrary to Fiji Police Force Standing Orders. I must tell you that the Fiji Police Force Standing Orders are not Rules of law and are only meant to ensure the fairness of the procedure.
35. PC Inoke who conducted the photograph identification process admits that he failed to follow the proper procedure in that he was not the most senior ranker in the Police Station at that time; it was not conducted in the police station but a complainant's work place and the photographs were displayed on a private car etc.
36. According to Fiji Police Force Standing Orders, photographs should not be shown to a witness if the circumstances allow of persona identification, e.g. when there is already a suspect who is readily available to be asked to stand on an identification parade. PC Inoke explained why he had to deviate from the proper procedure as set down by Police Force Standing Orders. He said that the photograph identification was used only for them to be satisfied as to Reapi's claim that she had already known the suspects. It is for you to decide what weight to be attached to the photograph identification evidence and if it has helped at all to bolster the identification evidence adduced by Reapi.

37. The 2nd accused took up the defence of *alibi* to impeach the credibility of identification evidence of the Prosecution. The case of the 2nd accused is that he was elsewhere when the alleged robbery took place. Where the Defence says that the accused was somewhere else at the time of the alleged incident, the burden of proof is on the Prosecution to disprove the *alibi* and not the Defence to prove it.
38. Should you conclude the *alibi* is false you should not for that reason alone convict the accused. Even if you reject the *alibi* evidence given on behalf of the Defence you ought not to conclude from such rejection that the accused must be guilty.
39. I must also caution you about evidence adduced against the 1st accused Mataiyasi who was not present in court during the trial. He was also not represented by a Counsel. You must not draw the inference that the 1st accused was not present in court to face his trial because he was guilty. Despite his absence, 1st accused must be given all the rights to a fair trial that are guaranteed to an accused person. He did not have the opportunity to cross-examine the witness called by the Prosecution. Therefore you have to be mindful of the weakness of the evidence presented against him. That does not mean that evidence against him should be rejected. I only caution you and remind that the evidence against the 1st accused was not tested by cross examination.
40. That completes my directions to you on the legal issues.
41. I must also remind you of the evidence given and the cases of both the Prosecution and Defence. In doing this I do not propose going through all the evidence of every witness. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision on this case.

Case for Prosecution

PW.1 Reapi Kawanikailekutu (The Complainant)

42. Reapi said that in 2018 she was running a car wash at Kinoya named Kinoya Car Wash. On the 11th of March, 2018, she was at the said work place with her husband, the girl who did the night shift and her one year old daughter. In the morning, she came out of car wash shop room with her one year old daughter to have fresh air. She saw two boys loitering around the car wash. She then went inside the room to open the grill. Her nephew Lepani Waqa's wife was counting money in the same room after the night shift. She said that she took a seat so that she can have a better view of the boys loitering outside. Then she stood up to close the grill door, two boys pulled open the grill door and walked inside the room. They went to the counter and took all the cash collection, three mobile phones and went away. She was frightened. She was with her one year old daughter. Lepani's wife was pregnant. She could not do anything. Her husband and other boys were washing the car. When the robber left, she started screaming out to the husband.
43. Reapi said that the two boys who walked in were drunk. She said she knew the boys prior to the incident because they used to loiter round the car was 3-4 times a week with a group of boys. One boy is nicknamed Gabby by the boys in the area. The other one is Mataiyasi. She said that she came to know of Mataiyasi's name only after the incident but she knew his appearance before. She said the Gabby was the first one to enter the room and Mataiyasi was right behind him. Gabby took the money at the counter and Mataiyasi took the phones. She said that the two boys were under her observation for ten minutes when they were loitering outside and when they entered the room in a close proximity of 2-3 feet.
44. She said that Gabby managed to escape; Lepani got hold of Mataiyasi, but he to managed to escape later. Lepani gave a chase but they boarded a Toyota Fielder which was waiting for them and they got in the car and escaped. Her husband and nephew boarded a car and followed them. The car was later located abandoned but no one was found inside.
45. About a month after this incident, police officers came to the car wash and showed her 10 photographs. They asked her to identify the two boys who had robbed the car wash, if they were there. She identified the boys and picked two photographs. She showed the photograph of Mataiyasi which was marked for identification as MFI 1. The photograph of Gabby was marked as MFI 2. She said that she had just given birth when the policemen came to the car wash to show her the photographs.

46. Under cross examination, Reapi denied that she was mistaken when she identified the accused as robbers. She said that she knew Gabby very well as a person who used to hang around in the area. Gabby was once engaged in a fight with an Indian girl at the car wash. She admitted that in her statement given to police on the 11th march 2018, she had not given full details of the incident and of those present at the scene at the time of robbery. She admitted that she had mention only Gabby's name in her first statement and she came to know of Matiaysi's name only when her husband mentioned his name. Under re-examination, Reapi said that she was asked by police to give only a summary of what had happened.

PW.2 PC Imnoke Tuiloaloa

47. The Constable Inoke said that on the 23rd of April 2018 he was instructed by the investigating officer DC Tuimereke to conduct the photograph identification process. He was given 10 photographs of likely suspects to be shown to the victim Reapi for her to identify the suspects. On the 23rd April, 2018 he went to Kinoya Car Wash because the witness Reapi was unable to come to court after giving birth. He went in his private car with DC Tuimereke and displayed the photographs on the car for the victim to identify the suspects. He said that Reapi picked two photographs and clearly identified the two boys who had robbed the Kinoya Car Wash. He tendered in evidence the photographs which Reapi had identified as PE.1 and PE.2. He said that the purpose of the photograph identification parade was to get the identification confirmed from the victim who had already known the suspects beforehand.
48. Under cross examination, PC Inoke admitted that he failed to follow the proper procedure when he conducted the photograph identification process.

PW. 3 DC Tuimereke

49. The investigating officer Tuimereke admitted that the suspects were already in custody when the photograph identification was done on the 23rd April, 2018. He admitted that he read the witness statement of two eye witnesses namely that of Reapi and Lepani and there were discrepancies in the description given by the two eye witnesses as to the clothing of the two suspects. He said that Lepani was not called for an identification parade because he was washing a car at the time of the robbery and he had seen the robbers only when they were running.

50. That was the case for the Prosecution.
51. At the close of the Prosecution's case you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case they would be cross-examined.
52. The 1st accused elected to exercise his rights to remain silent. That is his right under the Constitution. You must not hold against the accused for exercising his constitutional right. You must not think that he remained silent because he is guilty. The Defence called two witnesses to support 1st accused's defence of *alibi* although the accused had nothing to prove in this case. You should consider the evidence presented by two *alibi* witnesses using the same tests you had used to test the credibility of Prosecution's witnesses and give it such weight as you deem appropriate.

Case for Defence

DW.1 Susana Waqa

53. Susana is the mother of the accused. She said that she was residing at her house at No. 51, Visoko, Nadera. On the 11th March, 2018, she was home and her son Gaberieli Waqa or Gabby was doing a lovo with his siblings at the backyard of her house. She said that Gabby did not go anywhere until she went to church at 10.05 am.
54. Under cross-examination, Susana admitted that Gabby used to hang around with his friends in Kinoya area. She said that she will do anything to protect her son who is very close to her. She said that her statement was taken by police on the previous day of her evidence.

DW.2 Shuiveli Waqa

55. Shuiveli said that Gabby is her younger brother. She said she was residing in Nedra with her siblings, parents and in laws. She said she recall 11th March, 2018 because it was her

birthday. She was home doing a lovo with her siblings at the backyard. Gabby was with her and he never left home in the morning.

56. Under cross examination, Shuiveli said that she will do anything to protect her brother. She said that Gabby used to hang around with his friends in Kinoya area. She also said that her statement was taken by police on the previous day of her evidence.

Analysis


57. There is no dispute in this case that Kinoya Car Wash run by the complainant was robbed by two people on the 11th of March 2018. The only dispute is with regard to the identity of the accused. That is entirely a matter for you to decide.
58. There are two accused persons in this case jointly charged with the same offence. You have to consider evidence in respect of each accused separately.
59. The 1st accused is not in court to present his case and to dispute the identification evidence presented against him by the Prosecution. That does not relieve the Prosecution of its burden to prove beyond reasonable doubt that the 1st accused Mataiyasi was one of the offender who took part of the alleged robbery.
60. You must consider the identification evidence in terms of the directions I have given to you. The circumstances of the evidence in this case are that the observation of the offenders was done during day time. According to the eye witness account, Reapi had observed the offenders in close proximity as they entered the room. The offenders were under her observation before the incident for 10 minutes when they were loitering around the car wash. Reapi said that she had seen these two men several times before the incident.
61. The Prosecution also led evidence of photograph identification done nearly one month after the alleged incident. The Prosecution relies on photograph identification to bolster the identification evidence of the complainant who had said that she knew the suspects already. The Defence alleges that the photograph identification parade was improperly conducted. The police officer who conducted the photograph identification parade admits that it was not conducted properly. However he says that it was conducted only to get a confirmation from

an eye witness who already knew the suspects. It is up to you to decide what weight you should give to the identification evidence of Reapi. If after a consideration of all the evidence the quality of the identification remains good the danger of mistaken identification is lessened. Taking into consideration the directions I have given to you, you decide if the complainant is an honest witness and whether she positively identified the accused.

62. Reapi said that she had seen the 1st accused loitering around the car wash quite often with his friends before the alleged incident and she recognized him as he walked in the car wash office with his accomplice. She had however not mentioned in her 1st statement to police that she knew the 1st accused prior to the incident. She said she came to know of 1st accused's name from her husband who had pursued the accused soon after the robbery. Reapi's husband did not come to give evidence to support the version of Reapi. However, she said that she had recognized the 1st accused's photograph as being one of the robbers when it was shown to her with some photographs of likely suspects by police nearly one month after the alleged robbery. You decide if Reapi is an honest and reliable witness and if she had correctly identified the 1st accused.
63. The 2nd accused completely denies that he took part in this robbery. The Defence case on behalf the 2nd accused is that this identification is incorrect and cannot be relied upon. He took up the defence of *alibi* to discredit the version of the Prosecution. The Defence says that the 2nd accused was elsewhere at the time of the alleged robbery. The Defence called accused's mother and his sister to support its version. They said the 2nd accused was doing a lovo at his house at the time of the alleged robbery. They further said that they will do anything to protect to 2nd accused. The State Counsel argues that the Defence witnesses are close relative of the accused and they have some interests in the Defence's case and therefore you should not rely on the evidence presented to support the *alibi*.
64. It is up to you to decide whether you could accept the version of the Defence and that version is sufficient to establish a reasonable doubt in the prosecution case. If you accept the version of the Defence, you must not find the accused guilty. Even if you reject the version of the Defence still the Prosecution should prove its case beyond reasonable doubt.

65. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused are not required to prove their innocence, or prove anything at all.
66. That concludes my summing up of the law and the evidence in this particular trial. We have now reached the stage where you must deliberate together and form your individual opinions on whether the charge has been proved against the accused. On your return you will be asked to separately state in Court whether the accused is guilty or not guilty of Aggravated Robbery.
67. Would you please now retire to consider your opinions? When you have made your decisions would you please advise the Court clerk and the Court will reconvene to receive your opinions?
68. Any redirections?




Aruna Aluthge
Judge

AT Suva

On 25th March, 2019

**Counsel: Office of the Director of Public Prosecution for Prosecution
Office of the Legal Aid Commission for Accused**