

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 401 OF 2018

STATE

-v-

AKARIVA ASORO BATIKAVAKAVA

**Counsel: Ms. M. Konrote for Prosecution
Ms. S. Hezelman & Ms. Chand for Accused**

Dates of Hearing: 14,15, 16 May 2019

Date of Summing Up: 17 May 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 person.

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. 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 those arguments and submissions when you evaluate the evidence.
11. 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.
12. Documentary evidence is evidence presented in the form of a document. In this case, the medical report is an example if you believe that such a record was made. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time upon examination of the Complainant.
13. 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' demeanor 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.

14. 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.
15. 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.
16. 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. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.
17. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. Agreed facts in this case are that:
 - I. i. Akariva Asoro Batikavakava (hereinafter rereferred to as the accused) is 18 years of age.
 - II. ii. Salesh Lal (hereinafter referred to as the complainant) is 40 years of age, painter.

- III. iii. On the 15th October, 2018 in the morning the accused was walking along Ratu Dovi Road from Laucala Beach towards the Shah Shopping Centre at Vesivesi.
 - IV. iv. The accused was wearing a blue bula shirt.
 - V. v. The accused was arrested by PC5496 Lepani near the location of the incident.
 - VI. vi. The accused caution interview commenced on the 15th of October, 2018 at Valelevu Police Station and was conducted by DC 4548 Jiutasa Veremaula
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

AKARIVA ASORO BATIKAVAKAVA and another on the 15th of October, 2018 at Nasinu in the Central Division, in the company each other, robbed SALESH LAL of a Samsung mobile phone, the property of the said SALESH LAL.

19. To prove the offence of Aggravated Robbery the prosecution must prove the following elements beyond reasonable doubt;
- a the accused, Akariva Asoro Batikavakava
 - 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

Akariva Asoro Batikavakava and no one else committed the offence in the company of another person.

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. 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.
23. 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 another person. I must explain to you the liability of a number of people committing 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.
24. 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.

25. There is a final legal matter I must direct you which is very important. In this case the Prosecution case depends wholly on the correctness of identification of the accused as the offender. The Defence challenges this identification and says that the witnesses are mistaken. In these circumstances I must warn you of the special need for caution before convicting the accused on the correctness of this identification.
26. 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.
27. 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.
28. 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?

29. Such matters as these go to the quality of the identification evidence.

30. That completes my directions to you on the legal issues.

31. I must also summarise 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 Salesh Lal (The Complainant)

32. Salesh said that, on the 15th of October 2018, he was on his way to his workplace at Lucala Bay. At around 7-7.15 am., he was on Ratu Dovi Road going towards International School. As soon as he crossed the road, two men approached him from the opposite direction. One of them grabbed him from behind and the other gave him a punch. He fell to the ground. The person who was holding him took out the phone from his trouser pocket. The one who punched him was wearing a blue *bula* shirt and the one who held him from the back was wearing a white round neck t-shirt. The person who was in a blue *bula* shirt was a skinny and tall Fijian man, brown in complexion.

33. As soon as he fell to the ground, the person who grabbed him ran away towards the International School Ground with his phone whilst the blue *bula* shirt person was running in front. He started shouting for help. A police officer going on a

motorbike heard him scream. The police officer stopped the motorbike and caught the person who was wearing a blue *bula* shirt.

34. Salesh said that the incident took place for 15 to 20 minutes. It was a rainy day but the light was bright. The man who punched him was very close to him like half an arm's length. When he was punched, he blacked out. Before he was punched, the man in *bula* shirt came near to his face. He got a chance to look at his face almost for five minutes. There was nothing between him and the person who punched him. Salesh said that he had never seen this person before this incident.
35. He further said that the distance between him and the policeman when the blue *bula* shirt man was caught was 3 to 4 meters. The police officer asked him, what happened? He told the police officer about the incident. Police officer grabbed the person who was in a blue *bula* shirt. They waited for 15 to 20 minutes for the transport to come for them to be taken to the police station. He said that the man who was in a blue *bula* shirt which the police officer caught is the same person who had punched him and assisted in robbing him.
36. Salesh in court recognised the accused as the person who punched him on that day. When the transport arrived, he and the person who was caught were escorted to the Nadera Police Post and then to the Valelevu Police Station where he lodged a report. Then he was taken to a doctor at the Valelevu Health Centre on the same day. Salesh recognised his medical report. He said that when he was hit on his eye, he blacked out for 10 to 15 minutes and received injuries in his arms and knees when he fell to the ground. He said that he was waiting for the transport to come for about an hour.
37. Under Cross-examination, Salesh agreed that the attack happened so fast and the time that had taken for the incident would have been about 20 seconds. He agreed that when he blacked out, he could not see. Salesh admitted that when the accused was caught, he (accused) denied that he had robbed him. He

admitted that when he blacked out, he could not see how the person in the blue *bula* shirt got caught. He admitted that his answers as to the time taken for the transport to get there is inconsistent. Salesh admitted that he was uncertain as to what actually happened on the 15th of October 2018 because of the incident. He admitted that he was mistaken as to how many individuals attacked him because the incident happened so quickly. He admitted that he told the police officer that it was the accused that attacked him because the police officer was holding him by his collar.

38. Under re-examination, Salesh said that because of the incident that happened, he was confused as to the time that took for the incident. He confirmed that it took 5-10 seconds for the whole incident. He said that he saw the police officer when he opened the eyes after regaining consciousness. He confirmed that there were only two persons participated in the robbery and the one who grabbed the phone ran away and the person who was with the police officer was the other person.

PW. 2- PC 5496 Lepani.

39. PC Lepani said that on the 15th of October 2018, he was assigned to do traffic duties. At around 7 am., he was heading to Centre Point on his motorcycle. As soon as he turned left on the opposite side of the footpath, he saw an Indian man on the ground with two iTaukei youths searching for his pocket. The Indian man who was on the ground was calling out for help. He moved to the opposite side of the road. When these two boys saw him, they stood up and they ran.
40. PC Lepani said that one of them was wearing a white t-shirt and the other a blue *bula* shirt. The one in white t-shirt managed to cross the road and he ran towards the International School Ground. The man in blue *bula* shirt ran towards Centre Point on the footpath. Whilst he was running, he managed to grab his collar. He parked the bike still holding onto his collar. The Indian man who was lying on the

ground ran towards them and complained that the two boys grabbed his phone from his pocket and they punched him on his face.

41. PC Lepani said that he didn't see the phone being taken from the complainant. After the complainant described what happened to him, he asked the iTaukei youth, what did you do and where is the phone? The iTaukei boy told him that he didn't take the phone; the other iTaukei boy took the phone. He said that the distance between him and the Indian man was about 8-10 metres and the Indian man joined him about one or one and half minutes later. He said that he saw scratch marks on Indian man's face and bruises on his hand. The complainant and accused were escorted to Nadera Police Station in a van and the police officers from Valelevu Police Station came and took them. In court, PC Lepani identified the accused as the man he had caught on that day.
42. Under cross examination, PC Lepani denied the proposition that the accused was not on the run when he was caught. He admitted that no mobile phone was found in accused's possession. He said he did not see the boys grabbing a phone or assaulting the Indian man. He only saw the Indian man was being searched by two iTaukei boys and the Indian man calling for help. PC Lepani admitted that in his statement dated 15 October, 2018, he did not record what the accused had told him whilst accused was in his custody. Under re-examination, PC Lepani said that he did not record everything that happened in his statement because it was a busy day for him.

PW. 3 - Dr. Komal Chand

43. Dr. Chand said that she on the 15th October, 2018 at 8 a.m. she examined the complainant Salesh Lal and recorded her findings in the medical report. She tendered the medical report in her evidence marked as PE.1. She said that she observed bruises on complainant's face and hand. She opined that the injuries could have been caused by a blunt force trauma.

44. That is the case for the Prosecution.
45. 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.
46. The accused elected to give evidence under oath although he is under no obligation to prove his innocence. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains on the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

Case for Defence

Akariva Asoro Batikavakava (The Accused)

47. Akariva said that in October 2018, he was still schooling at John West Lee College. On 15th of October, 2018, early in the morning, he was with a friend at New Street Laucala Beach. At around 7 am., he was coming home along Ratucovi Road. While he was walking, he saw another iTaukei friend by the name of Biggy walking on the opposite side. He crossed over and greeted him. After they greeted each other, they continued their walk in different directions.
48. Soon after Biggy left, he heard someone shouting. When he looked back, he saw Biggy running with a phone in his hand. At the same time, he saw a police officer in a motorcycle coming towards them from the opposite side of the road. The policeman parked his bike and crossed over to his side. Biggy ran across the road to the other side. While he was standing there, the police officer asked him if he knew where Biggy was running to. The policeman parked the bike and got hold of his collar of his shirt. He told the police officer that he didn't do anything. When the

Indian boy came to them, the police officer asked him what happened. He said that they waited there for transport to come for 10 minutes and came to Nadera Police Post with the complainant in a vehicle driven by an Indian man.

49. Under cross examination, Akariva admitted that he was wearing a blue bula shirt on that day. He denied that he was accompanied by his friend Biggy. He denied that the road was empty at that time. He denied that they decided to rob the complainant because there was no one around at that time. He denied that while his friend Biggy was holding the complainant from behind he had punched the complainant on his face for him to be fallen to the ground. He denied that the policeman held him from his collar because he was running at that time. He agreed that the complainant identified him as the person who had assaulted him and robbed him that morning. He denied that the policeman had seen him searching through complainant's pocket while the complainant was lying down on the ground. He admitted that he was arrested at the scene of the incident.

Analysis

50. There is no dispute in this case that the complainant Mr. Salesh Lal was robbed on the 15th October, 2018, in Nasinu. The accused admits that he saw his friend Biggy running from the crime scene with a mobile phone in his hand no sooner he heard the complainant screaming for help. The accused completely denies that he took part in this robbery although he was arrested near the crime scene.
51. The only dispute in this case is with regard to the identity of the accused. Defence takes up the position that the complainant was mistaken when he identified the accused as one of the robbers. You must consider the identification evidence of both the complainant and PC Lepani in light of the directions I have given to you.

52. The Prosecution says that it was not a fleeting glimpse although the whole episode was over fairly quickly. The circumstances of the identification evidence in this case are that the observation of the offender was done in day light. The complainant said that he observed the offender at a close proximity before he was punched by the iTaukei boy who was wearing a blue *bula* shirt. He said that nothing was obstructing his view until he blacked out. The complainant said that the road was empty and no one, other than the robbers, was present at the crime scene at the time of the offence.
53. The Prosecution also relies on evidence of PC Lepani who said that he saw the accused searching through the complainant while the complainant was lying on the ground, and at the same time calling for help. The Prosecution also relies on the alleged admission made by the accused soon after his arrest to the effect that it was the other iTaukei boy who took away the phone.
54. The accused does not deny that he was wearing a blue *bula* shirt and that he was arrested in close proximity to the crime scene. He also admits that he was implicated by the complainant as one of the robbers soon after his arrest.
55. The Defence case is that this identification is incorrect and cannot be relied upon. The Defence alleges that the complainant is not consistent in his evidence and also he is not confident as to what had actually happened on the day of the incident. They also argue that the complainant was not in a position to clearly identify the robbers because he had blacked out for some time after being punched. They also say that the accused was implicated by the complainant not because he had identified the accused but only because the accused was arrested by a police officer in close proximity to the crime scene.
56. The Defence also says that PC Lepani had arrested the accused because the accused was located close to the crime scene at the time of the robbery. The alleged admission made to PC Lepani is also challenged by the Defence on the basis that PC Lepani had not recorded such an admission in his statement. You heard the

explanation PC Lepani gave for his failure to record everything. You observed the demeanour of the witnesses. It is up to form your own opinions as to the credibility of the witnesses and what version is to believe.

57. The accused denies that he took part in the robbery. He says that no phone was recovered from his possession soon after the incident and the real culprit had fled the scene.
58. If you believe the version of the prosecution to be true and that the accused punched the accused in his face to assist somebody to rob the complainant, you could find the accused guilty of aggravated robbery although he himself did not steal the phone from the complainant.
59. 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's 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.
60. 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 is not required to prove his innocence, or prove anything at all.
61. 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.

62. 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?
63. Any redirections?



AT Suva

On 17th March, 2019

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