

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 308 of 2018

STATE

vs.

- 1. WALESY CYRIL BROWN**
- 2. SAMISONI KALOU**

Counsel: Mr. E. Samisoni for the State
Ms. A. Prakash with Ms. M. Singh for Accused 1
Mr. K. Prasad for Accused 2

Date of Hearing: 24th June 2019

Date of Summing Up: 26th June 2019

SUMMING UP

1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. However, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.
4. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
5. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.
6. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

7. I now draw your attention to the issue of burden and standard of proof. The accused are presumed to be innocent until they are proven guilty. The presumption of innocence is in force until you form your own opinion that the accused are guilty for the offence.
8. The burden of proof of the charge against the accused is on the prosecution. It is because the accused are presumed to be innocent until they are proven guilty. In other words there is no burden on the accused persons to prove their innocence, as their innocence is presumed by law.
9. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information and elements of the offence

10. The two accused are charged with one count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act. The particulars of the offence are before you, hence, I do not wish to reproduce them in the summing up.
11. The main elements of the offence of the Aggravated Robbery as charged in the information are that:
 - i) The two accused persons with another,
 - ii) In the company of each other,
 - iii) Robbed Sireli Kacilala of one S5 Samsung Mobile Phone and One Huawei Mobile Phone,
 - iv) The two mobile phones were belonged to Valerie Waqa,

12. The first element involves the identity of the offenders. The prosecution should prove beyond reasonable doubt that the two accused persons committed this offence with another and no one else.
13. Then the prosecution has to prove that the two accused with another committed this offence in the company of each other. Hence, the prosecution's case is that the two accused and another committed this offence together. Where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are acting together as part of a joint plan or agreement to commit the offence, they are each guilty.
14. The word plan and agreement do not mean that there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It can be made with a nod and a wink, or a knowing look, or it can be inferred from the behaviour of the parties. The essence of joint responsibility for a criminal offence is that each accused shared a common intention to commit the offence and played his part in it, however, great or small, so as to achieve that aim.
15. Robbery is the aggravated form of theft. A theft becomes robbery, if the two accused immediately before committing theft; or at the time of committing theft; or immediately after committing theft, use force or threaten to use force on another person with intent to commit theft or to escape from the scene. The robbery becomes aggravated robbery, if such a robbery is committed with the company of one or more people or committed with an offensive weapon. In this case, the prosecution alleges this robbery was committed with the company with three people.
16. A person commits theft if that person:
 - i) Dishonestly,
 - ii) Appropriates the property belonging to another,
 - iii) With the intention of permanently depriving the other of that property.

17. The elements of ‘dishonestly’ and “the intention of permanently depriving the other of the property” are the state of mind of the two accused at the time of committing the offence. It is not possible to have direct evidence regarding a person’s state of mind as no witness can look into the accused’s mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of an accused from the facts and circumstances you would consider as proved.
18. ‘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.
19. Accordingly, the prosecution has to prove beyond reasonable doubt that:
 - i) The two accused, in this case Walesi Cyril Brown and Samisoni Kalou with another,
 - ii) In the company of each other,
 - iii) Dishonestly appropriates one S5 Samsung Phone and one Huawei Phone belong to Valerie Waqa,
 - iv) With the intention of permanently deprive it,
 - v) And used force on Sireli Kacilala and Valerie Waqa, before stealing the said items.

Admitted Facts

20. I now take your attention to the agreed facts, which are before you. They are the facts that the prosecution and the defence have agreed without any dispute. Hence, you are allowed to take them into consideration as proven facts beyond reasonable doubt.

Evidence of the Prosecution

21. Let me now remind you briefly the summary of the evidence presented by the prosecution. This is a very short hearing and lasted only for a day. Therefore, I trust that you can properly and correctly recall all of the evidence adduced during the hearing.

22. Mr. Sireli Kacilala had gone to the seawall near the Holiday Inn hotel with his girlfriend Valerie Waqa on the early morning of 22nd of July 2018. They have gone to the seawall after buying hotdogs from the hotdogs' stand. They have sat on the seawall and started to talk. The hand bag of his girlfriend was placed in between them on the seawall. Two mobile phones were inside the bag. One of them was belonged to Sireli. While Sireli was talking to his girlfriend, he had looked at the right side and saw three men was walking towards them. He had thought that they would walk passed them. It is a public place and people were walking and sitting around the area. After looking at his right side for a minute, he had turned to his girlfriend to talk. While he was talking to her, facing the sea, he was pushed to the sea from behind by the three men who walked towards them. Sireli in his evidence said that he saw them pushed him behind and then they pushed his girlfriend as well. He fell down to the sea which was about three meters down from the seawall. He got injured. His girlfriend also had a cut. He managed to get back to the seawall. He found the handbag was not on the seawall. Sireli said that he saw the three men took the handbag. He ran after them and managed to catch them. He had asked them to stop. Two of them stopped and the third one managed to walk away. He found the first accused was carrying the handbag over his neck. He had begged them to return the bag. The first accused had given him the bag to check inside and he found nothing in the bag. At that time, the police came and took the two suspect to the police station. Sireli had told the police everything happened to him at the seawall.
23. You have heard that Sireli described the two people with whom he confronted at the Suvavou house. He pointed out at the first accused as the person who had the hang bag around his neck. He said that he cannot identify the second person if he sees him again.
24. The second witness of the prosecution is SC Paula Navico. He was the arresting officer of the two suspects.

Right to Remain Silence

25. At the conclusion of the prosecution case, both accused were explained about their rights in defence. Both of them opted not to give evidence on oath and exercised their rights to remain silent. The accused does not have to give evidence. You must not assume that they are guilty because they have not given evidence. The fact that they have not given evidence prove nothing. It does nothing to establish their guilt.

Analysis and Directions

26. The prosecution alleges that the two accused together with another came from behind when Sireli was sitting on the seawall with his girlfriend Valerie Waqa and pushed both of them to the sea. They have then stolen S5 Samsung Phone and the Huawei Phone belonged to Valerie Waqa. In order to determine whether the two accused had actually committed this offence as alleged, you have to evaluate the evidence given by the witnesses of the prosecution. Therefore, I now take your attention to the directions of evaluation of evidence.

Reliability of Evidence

27. You must be satisfied that you can rely on the evidence as true, reliable, and credible evidence. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.

Credibility of Evidence

28. The assessment of credibility of evidence is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his motivations, his relationship to and the reaction to the particular situation.

29. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to determine whether a witness is telling the truth and is correctly recalling the facts about which he has testified.
30. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking about in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his own evidence but also with other evidence presented in the case.
31. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he may be accurate in saying one thing and not accurate in another thing.

Caution Interview of the First Accused

32. According to the admitted facts of the first accused, the prosecution and the defence have not disputed the contents of the record of the caution interview given to the Police by the first accused. You have heard the learned counsel for the prosecution in his closing submissions addressed you about the certain contents in the said caution interview of the first accused.
33. The first accused has said in his caution interview that he was at the seawall near the Holiday Inn on the early hours of the 22nd of July 2018 with his workmates. One of the persons who was with him had pushed the partners to the sea. The first accused said that he did not push the partners to the sea. He had then picked a white bag from the sea. Moreover, the first

accused has not said that he saw the same person who pushed the partners to the sea, were taking the phone. You may see that the first accused has further stated that he cannot recall where it went to, when he was questioned about the mobile phone which was inside the bag. (*vide Q&A 16 - 23*).

34. The learned counsel for the prosecution in his closing address suggested you that the first accused had admitted certain elements of the offence in the caution interview.
35. As I said before, the first accused had stated in the caution interview that he was at the seawall during the early hours of the 22nd of July 2018 with his workmates. One of the person who was with him had pushed the partners to the sea. The first accused had then picked the white bag from the sea. Hence, the caution interview contains certain admissions and also the explanations and exculpatory statements of the first accused. Such a statement made by the accused to the police is considered as a mixed statement.
36. You have to take into consideration whole of the statement in order to determine whether the accused has made admissions to this offence in the caution interview. If you are not satisfied or not sure of that the accused has actually made admission in his caution interviews, you must ignore the caution interview.
37. If you are satisfied, that the accused has made the admission in his caution interview, then it is for you to decide whether it is truthful, and what weight you give them as evidence. It is for you to decide whether you consider the whole of admission or part of it or none of it as truthful, reliable and credible. You must consider all other evidence adduced during the course of the hearing in deciding the truthfulness, credibility and reliability of the admissions made in the caution interview.

Inconsistencies and contradictions

38. You have heard that the learned counsel for the first accused cross examined Sireli about the inconsistent nature of the evidence he gave in the court with the statement he made to

the police during the investigation. He explained in his evidence that three men came from behind and pushed him and his girlfriend to the sea. In the statement made to the police, Sireli has stated that two men came and pushed him to the sea. Sireli said that he mentioned about two men in the statement because only two of the three men pushed him and his girlfriend to the sea. Moreover, he has stated in the statement that the man who had the hand bag was wearing a green colour t-shirt and blue colour trousers. In his evidence Sireli said the man who had the handbag was wearing a black and orange colour t-shirt.

39. You are allowed to take into consideration about such inconsistencies and contradictions when you consider the credibility and reliability of the evidence given by the witnesses. However, you have to be mindful that the previously made statements are not evidence of the truth of its contents. The evidence is what a witness testified in the court.
40. It is 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.
41. In respect of the inconsistency between the evidence presented in the court and the previously made statement, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.
42. Madam assessors, it is important to keep in your mind the allegation against the two accused is that they have robbed one S5 Samsung Mobile phone and one Huawei Mobile phone belonged to Valerie Waqa. It is the onus of the prosecution to prove beyond reasonable doubt that the two accused together with another robbed those properties belonged to Valerie Waqa. I specially remind you this because you have heard during the course of the hearing about a handbag.

43. It is your duty to determine whether prosecution presented any evidence about these S5 Samsung Mobile phone and Huawei Mobile phone. If you are satisfied that there are evidence of such two mobile phones, then you have to proceed to determine whether the two accused together with another actually stole the said two mobile phones belonged to Valerie Waqa on the early hours of 22nd of July 2018 at the seawall. In doing that you could take into account the evidence of Sireli where he said that the handbag was on the seawall when he was pushed into the sea. According to the caution interview of the first accused, he had picked the white bag from the sea. (*vide Q & A 21*)
44. Then you have to determine whether the two accused together with another have used force on Sireli Kacilala and Valerie Waqa before stealing the said two mobile phones. Then you have to proceed to determine whether the first and second accused acted in joint enterprise. Let me now explained you what is Joint Enterprise.
45. The law says that where two or more persons form a common intention, to do something unlawful together, and while doing something to further that purpose, an offence is committed of such a nature that its commission was a probable consequence of that purpose, each of those who had formed the common intention and had taken part in furtherance of that intention, is deemed to have committed the offence.
46. If you are satisfied that the prosecution has presented evidence in relations to those elements of the offence, you must then proceed to determine whether these evidence are credible, reliable, probable and truthful. You can then proceed to determine whether you could accept these evidence as proven facts beyond reasonable doubt.

Final Directions

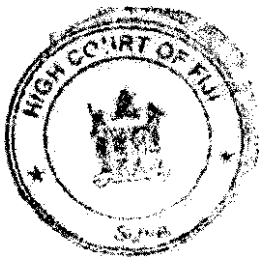
47. Having taken into consideration all the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the two accused and another, in company with each other have committed the offence of Aggravated Robbery as charged, you can find them guilty of the offence of Aggravated Robbery.

48. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the two accused and another in company with each other have committed the offence of Aggravated Robbery as charged, you can find them not guilty of the offence of Aggravated Robbery.

Conclusion

49. Madam assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.

50. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



A handwritten signature in black ink, appearing to read "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe
Judge

At Suva
26th June 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid Commission for the 1st Accused.
Office of the Legal Aid Commission for the 2nd Accused.