

**IN THE HIGH COURT OF FIJI AT SUVA**

**CASE NO: HAC. 238 of 2018**

**[CRIMINAL JURISDICTION]**

**STATE**

**V**

- 1. EPI TEKEI KATONIVERE**
- 2. ILAITIA TAMANITOAKULA**

**Counsel** : Ms. W. Elo for State  
Ms. N. Mishra & Ms. S. Naidu for 1<sup>st</sup> Accused  
Ms. M. Singh & Ms. S. Hazelman for 2<sup>nd</sup> Accused

**Hearing on** : 10 - 12 March 2020

**Summing up on** : 12 March 2020

**Judgment on** : 16 March 2020

**JUDGMENT**

1. The accused in this case were charged with the following offences;

**FIRST COUNT**

*Statement of Offence*

**Aggravated Robbery:** contrary to Section 311 (1) (a) of the Crimes Act, 2009.

*Particulars of Offence*

**EPI TEKEI KATONIVERE and ILAITIA TAMANITOAKULA** on the 9<sup>th</sup> day of June, 2018 at Nasinu in the Central Division, robbed **PRANIT SINGH**

of 1 x Samsung J2 mobile phone valued at \$250, 1 x wallet valued at \$25.00 containing \$35.00 cash, 1 x Fiji Rugby flip flops valued at \$90.00, all to the total value of \$400.00 and during the theft did use force on **PRANIT SINGH**.

## **SECOND COUNT**

### *Statement of Offence*

**Common Assault:** contrary to Section 274 of the Crimes Act, 2009.

### *Particulars of Offence*

**EPI TEKEI KATONIVERE** on the 9<sup>th</sup> day of June, 2018 at Nasinu in the Central Division, unlawfully assaulted **SANJESH NARAYAN**.

2. In the case of **State v Ravutanasau** [2019] FJHC 1109; HAC377.2017 (12 November 2019) Nawana J said;

*“... I conclude that the prosecuting state counsel is not empowered to conduct the case totally on a different basis by making an opening statement, which is manifestly different to the information presented to court and served on an accused person by the DPP without an amendment to the information, if such amendment is warranted.”*

3. As noted in the first count, the prosecution alleges that both accused robbed Pranit Singh (PW1). In the second count the allegation is only against the first accused, that he assaulted Sanjesh Narayan (PW2).
4. As evident from the summary of evidence in my summing up, the only evidence against the first accused was that he was wearing a t-shirt which was green and white in colour at the time of his arrest effected on the same night the offences were alleged to have been committed (agreed fact) and that an iTaukei boy wearing a green t-shirt came towards PW1 and PW2 with two others and one wearing a green t-shirt punched PW2 on the forehead. PW1 does not mention anything about a person wearing a green (or green and white) t-shirt. According to PW1, only one person wearing a dark blue t-shirt with a white design on it assaulted him and stole the items mentioned in the first count which were in his possession.

5. By charging the first accused separately as the sole offender for assaulting PW2, the prosecution has made it clear that the alleged assault was not done pursuant an agreement with anyone else and also that that assault has nothing to do with the alleged conduct of the first accused in relation to the first count. For the reason that no other evidence against this person wearing a green t-shirt at the time of offence came out from the prosecution witnesses, especially in relation to the first count, there was no case for the first accused to answer in relation to the first count. The prosecutor did concede to this fact at one point.
  
6. There were relevant and admissible evidence against the second accused in relation to the first count. Then again, though PW1 and PW2 said that three iTaukei boys came towards them, the first count above identifies only the above named two accused as the offenders. In other words, according to the first count, only two offenders had robbed PW1 and they are the two accused persons in this case. This is the case presented by the prosecution through the Information. Since there was no evidence against the first accused in relation to the first count where the offence is aggravated robbery, the charge of aggravated robbery as framed on the first count could not be maintained by the prosecution against the second accused beyond the no case to answer stage.
  
7. Therefore, at the conclusion of the prosecution case, after hearing the parties, the assessors were informed that the case will proceed in relation to the first count only against the second accused but on the lesser offence of robbery; and that the case will proceed against the first accused only in relation to the second count.
  
8. After their deliberations, the assessors returned with the unanimous opinion that the second accused is guilty of the lesser offence of robbery in relation to the first count and that the first accused is guilty of the second count.

9. I direct myself in accordance with the summing up delivered to the assessors on 13/03/20 and the evidence adduced during the trial.
10. Prosecution led the evidence of five witnesses. The first accused chose to remain silent. The second accused gave evidence on oath.
11. Both accused did not challenge the fact that PW1 was robbed and that PW2 was assaulted. Each accused disputed the evidence on identification.
12. In relation to the first count, according to PW1, only one person assaulted him and then stole his items. The only description given by PW1 in his evidence regarding his assailant was that the said person was wearing a dark blue t-shirt with a circular white design. However, PW1 admitted that he told the police when he made his police statement on the day of the incident, that the person who attacked him was wearing a blue vest. It should be noted that according to PW2, one of the three iTaukei boys who came towards them were wearing a blue t-shirt, one was wearing a dark blue t-shirt with 'something white like a round on it' and the third person was wearing a green t-shirt. PW2 also admitted telling the police when he gave his statement on the day of the incident that "*one wearing the blue vest grabbed Pranit and took him to Nadera ground*".
13. Though the inconsistency the counsel for the second accused sought to highlight was the use of the word 'vest' by PW1 in his police statement as opposed to the word 't-shirt' in his evidence which in fact cannot be considered as significant, I find this inconsistency in relation to the description of the garment the assailant was wearing on his upper body at the time as highlighted above, is significant. It is pertinent to note that, if the vest or the t-shirt the assailant of PW1 wearing was blue, that points out to a different person altogether given PW2's evidence that one person was

wearing a blue t-shirt and another person was wearing a dark blue t-shirt with a white design. Moreover, it should be noted that PW2 also admitted during cross-examination that he informed the police that it was the person wearing the blue vest who took PW1 to the ground. In my view, there was no acceptable explanation for this inconsistency I have highlighted and it calls into question the credibility of PW1's evidence regarding the person who robbed him.

14. There was another significant inconsistency regarding which PW1 did not offer any acceptable explanation. That is in relation to how he ended up at the Nadera Ground after PW2 was assaulted. It was noted that though PW1 said in his evidence that he ran towards his house when PW2 was assaulted and he was attacked when he stopped to see what was happening to PW2, he admitted telling the police that the iTaukei boy wearing the blue vest got hold of him by his neck and dragged him to the Nadera ground. PW2 also admitted saying something in the same line to the police, though his evidence in court was slightly different where he said that 'they' took PW1 to the ground. During cross-examination, when PW2 was asked to describe what the person that took PW1 was wearing, PW2 said that it was the one who was wearing the blue t-shirt and the one wearing the dark blue t-shirt with the white design.
15. As I have already mentioned, in relation to the second count, the only description PW2 gave regarding his attacker is that the said person was wearing a green t-shirt. There is an inconsistency between the colour of the t-shirt PW2 said his assailant was wearing (green) and the colour of the t-shirt the first accused had agreed that he was wearing (green and white) at the time of his arrest which was also confirmed by PW3 and PW4. Though the t-shirt worn at the time of arrest was shown to PW1, the evidence of the police officers did not reveal that this t-shirt was seized. I would therefore assume that it was not seized and accordingly PW2 had not identified

whether the t-shirt which the first accused was wearing at the time of his arrest was the same t-shirt worn by his assailant.

16. One important piece of evidence that was not adduced when PW1 and PW2 gave evidence was the time the alleged offences were committed. Their evidence simply was that the incidents happened 'at night' on 09/06/18. The evidence also revealed that both accused were arrested by the police the same night.
17. PW1's evidence was that he was approached by the police 10 to 15 minutes after he was robbed. PW2 on whose request the police team arrived at the scene did not say how long it took for the police to arrive. Both PW1 and PW2 said that police officers gave chase to the assailants. The question is, if the police arrived 10 to 15 minutes after the robbery, could it be reasonably expected for the assailants to be still in the vicinity till the police arrived? It is pertinent to note that according to PW1, the police first thought that some iTaikei boys who were standing near the roadside were the offenders but it turned out that they weren't. PW4 and PW5 did not mention this in their evidence. Neither did PW2.
18. Now I would turn to the evidence regarding the first accused's arrest. I have no difficulty in accepting that the first accused was running away from the police. However, given that the proximity between the time the relevant offence was committed and the time of arrest was not clearly established, an irresistible inference that the first accused ran from police and tried to hide because he committed the offence as alleged in the second count, cannot be drawn. He may have run from the police for many other reasons.
19. The second accused was also arrested the same night. But again, the evidence does not reveal how long the interval between the alleged offence and the time of arrest

was. The evidence of this time difference is also material in applying the doctrine of recent possession which the prosecution is relying on, to prove the case against the second accused.

20. The description PW1 gave of the t-shirt his assailant was wearing at the time was not comprehensive enough and therefore his identification of PE2 when it was shown to him in open court *per se*, does not establish beyond reasonable doubt that the second accused committed the offence of robbery against PW1.
21. According to PW4 and PW5, the shoes that were stolen from PW1 were recovered from the second accused after he was brought to the police station. Both PW4 and PW5 said that they saw these shoes for the first time after the second accused was brought to the police station. According to PW4, he saw the accused wearing one shoe at the police station and the other one was broken. PW5 said that he saw the second accused wearing the pair at the police station. Moreover, according to both PW4 and PW5, the said shoes were seized on 09/06/18 together with PE2, the t-shirt the second accused was wearing. But the search list PE4 is dated 10/06/18 and it does not include the t-shirt PE2. The second accused, though he admits that PE2 was recovered from him, he says that the shoes tendered as PE1 were not in his possession at any time. PW4 and PW5 did not offer any explanation as to why the search list does not include the t-shirt recovered from the second accused.
22. Given the above circumstances involving the recovery of PE1, the shoes, I am not satisfied beyond reasonable doubt that the said shoes were found in possession of the second accused recently after the relevant offence was committed.
23. It is pertinent to note that according to PW1, while he was being choked, he hit his assailant on the face with something hard like a rock. However, there was no

evidence that the second accused had any form of injury on his face at the time he was arrested.

24. All in all, I am not satisfied that the prosecution has proved beyond reasonable doubt the element involving identity, in relation to the first count on the offence of robbery against the second accused; and also in relation to the second count against the first accused.
25. In the circumstances, I am unable to agree with the unanimous opinion of the assessors.
26. I find the second accused not guilty of the lesser offence of robbery in relation to the first count and I find the first accused not guilty of the second count as charged.
27. Both accused are hereby acquitted accordingly.



A handwritten signature in blue ink, appearing to read "Vinsent S. Perera".

Vinsent S. Perera

JUDGE

**Solicitors;**

**Office of the Director of Public Prosecutions for the State  
Legal Aid Commission for both Accused**