

relatives or read in the newspapers, and ignore any advise or suggestions made to you. You must also put aside any feeling of sympathy or ill will either for the complainant or the Accused. You must base your opinions on your own objective analysis of the evidence.

- [4] In assessing the credibility of any witness you would take note of what the witness said and what we call the demeanour of the witness. To accept a witness as credible you have to ask yourselves two questions: Was the witness honest and was the witness reliable. You will ask was what the witness said credible in itself or did it fly in the face of commonsense. Did the evidence fit in with the rest of the evidence? Did the witness' body language indicate evasiveness? Did the witness' memory appear to be affected by the lapse of time?
- [5] I add further that you are not bound to accept all of a witness' evidence nor are you bound to reject all of a witness' evidence although you may. You may however find that some parts of a witness' evidence are worthy of acceptance while other parts are not. You are therefore at liberty to accept some parts of a witness' evidence and reject other parts.
- [6] Before I leave this aspect of the summing up I must point out that you, as assessors are chosen at random from the community. You are all possessed of commonsense and knowledge of human affairs. It means that when you enter the assessor's box you do not leave that behind. You are expected to and are required to use your commonsense and experiences of human affairs to assist you in your deliberations.
- [7] At the conclusion of this summing up I shall adjourn the Court so that you may retire and deliberate. You are free to discuss the case amongst yourselves but with no one else. However, you must form your own individual opinions. When you are ready the Court will re-assemble. You will then be asked to state your individual opinions in Court. You will not be asked for the reasons for your opinions. Your opinions need not be unanimous, but it is desirable that they are. Your opinions are not binding on me, but let me assure you that they will carry a great deal of weight and will greatly assist me at arriving at my judgment.

[8] The Accused in trial has been charged with aggravated robbery. To this charge the Accused has pleaded not guilty. The law says that a person is innocent until proven guilty. It is for the prosecution to prove the guilt of the Accused. It is not for the Accused to prove his innocence. Indeed it is not for him to prove anything. Additionally I direct you that the guilt of the Accused has to be proved beyond a reasonable doubt, that is, you must be so satisfied as to be sure of the Accused's guilt before you can advise me that the Accused is guilty. If you have a reasonable doubt as to the guilt of the Accused you must advise me that he is not guilty.

[9] The Accused has elected to give evidence. He was not obliged to give evidence. He does not have to prove his innocence. He does not have to prove anything. However, he has chosen to give evidence. You must take what he has said into account when considering the issues of fact which to determine. It is for you to decide whether you believe the evidence of the Accused or whether it may be true. If the account given by the Accused is or may be true, then the Accused must be found not guilty. But even if you entirely reject the account given by the Accused, that would not relieve the prosecution of its burden of making you sure by evidence of the Accused's guilt in respect of the charge which you have to consider.

[10] The Accused's defence is one of alibi. He says that he was not at the scene of the crime when it was committed. As the prosecution has to prove his guilt so that you are sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. Even if you conclude that the alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence.

[11] The Accused is charged with aggravated robbery. So here, you have to be satisfied beyond a reasonable doubt of the following:

- (i) That the Accused
- (ii) In company of others
- (iii) Robbed a person.

- [12] Robbery is stealing by using force and stealing means the unlawful taking away of someone's property with no intention of returning it. You may approach your task of determining whether each of the elements have been proven by the prosecution as follows.
- [13] Firstly, consider whether the Accused was one of the perpetrators involved. At this point I would like to say that the law is if two or more people jointly commit a crime, each one is responsible and liable for the actions of another. For example if two people go together to steal money from a shop, but only one goes inside and carries out the stealing, and the other stands at the door distracting the customers from intervening, they both would be guilty of stealing, if anything was stolen.
- [14] If you feel sure that the Accused was involved in company of others then go on consider whether he used force to steal from the complainant, that is, whether he took the complainant's property with no intention of returning it. If you accept the evidence of the complainant that the Accused snatched his mobile phone and hand bag containing \$30.00 cash and ran off with the items as true then you may think that the complainant's property was taken using force and with no intention to return it. That is a matter for you to consider. Remember if you feel unsure of any of these elements then you must express an opinion of not guilty. You may express an opinion of guilty if you feel sure that the prosecution has proved that the Accused in the company of others stole the complainant's property using force.
- [15] Now, let me summarize the evidence for you.
- [16] The only witness for the prosecution is the complainant, Josaia Vusuya. His evidence is that in the early hours of 3 February 2018, after clubbing in Suva he took a ride to his home in Narere in a minivan with a friend he met in a club. He got off the minivan and while he was walking along Omkar Road with his friend, a vehicle stopped. He recognized Ashwin (referring to the Accused) – his childhood friend from the neighbourhood for more than 20 years and whose vehicle he had regularly used as his mode of transport. The complainant asked for a ride but the Accused responded saying he had people sitting at the back seat. The complainant said the Accused switched on the

light inside the vehicle and that is how he recognized him and saw three Itaukei boys sitting at the back seat of the vehicle. After that conversation the complainant turned around to walk away when the Accused reversed his vehicle and got off with the three boys and approached him for a roll while the other boys started bothering the complainant's friend and took his belongings. The complainant took out a roll and gave it to the Accused. At that point the Accused pulled the complainant's bag and mobile phone from his hand, got on his vehicle with the boys and fled the scene.

[17] At this stage I must give you a direction on identification. This a trial where the case against the Accused depends wholly on the correctness of identification of him which the defence alleges to be mistaken. To avoid the risk of any injustice in this case, such as has happened in some cases in the past I must therefore warn you of the special need for caution before finding the Accused guilty in reliance on the evidence of identification. A witness who is convinced in his own mind may, as a result, be a convincing witness, but may nevertheless be mistaken. Mistake can also be made in the recognition of someone known to a witness, even of a close friend or relative. I give you this warning not because I have formed any view of the evidence, but the law requires that in every case where identification evidence is involved, that the warning be given.

[18] You should therefore examine carefully the circumstances in which the identification by the complainant was made. How long did he have the person he says was the Accused under observation? At what distance? In what light? Did anything interfere with the observation? Had the complainant ever seen the person he observed before? If so how often?

[19] It is not in dispute that the observation was made in the early hours on a street without any street lights. The complainant said he recognized the Accused when he switched the inside light of his vehicle to have a conversation with him and that there was nothing obstructing his view. He recognized the Accused by his name Ashwin also known to him as Batak or Nathan. They are from the same neighbourhood which the Accused did not dispute in his evidence. You may take all these matters into account in determining whether the complainant is mistaken or accurate in identifying the Accused.

- [20] You will recall that the complainant was cross examined on the omissions in his police statement. For example, the complainant admitted that there is no mention of the Accused getting off his vehicle and asked for a roll and having a conversation with him for 15-20 minutes. The complainant gave an explanation for the omissions saying the experience at the police station was overwhelming for him given how police treat people like him, referring to his physical appearance.
- [21] As a matter of law, I must direct you that what a witness says on oath are evidence. What a witness says in his police statement is not evidence. However, police statement is often used to challenge a witness's credibility and reliability because a previous inconsistent statement may indicate that a witness has told a different story previously and are therefore not reliable. It is for you to judge the extent and importance of any inconsistency or omission. If you conclude the complainant has been inconsistent on an important matter or any omission was material and the explanation offered for the inconsistency or omission is unreasonable, you should treat both accounts with considerable care. If, however, you are sure that the evidence of the complainant is true in whole or in part, then it is evidence you are entitled to consider when deciding your opinions.
- [22] The Accused gave evidence that at the time of the alleged incident he was asleep at his home as he was not feeling well that night. He did not dispute that the complainant knows him as they are from the same neighbourhood. His mother and brother gave evidence in support of his alibi but they admitted that they were sleeping in different rooms and they cannot be certain if the Accused was inside his room the entire time in the early hours of 3 February 2018.
- [23] You are to judge from what you saw and heard in court. You are to ask yourself questions such as whether the evidence rings true, whether the witness was evasive or hesitant. You are to have regard to his or her demeanour and whether the evidence discloses any motive for lying.
- [24] Which version of the facts you accept is a matter for you. Even if you reject the defence version that does not mean that the Accused is guilty. You may find the Accused guilty

only if you find the complainant is a truthful witness and his identification of the Accused reliable and you feel sure that the Accused in company of others stole the complainant's property using force. If you feel unsure of any of these matters, you must express an opinion of not guilty.

[25] That is all I wish to say to you. You may now retire to consider your opinions. When you are ready with your opinions the court will reassemble to receive them in open court.



A handwritten signature in blue ink, consisting of a stylized initial 'D' followed by a long horizontal line.

.....
Hon. Mr Justice Daniel Goundar

Solicitors: Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused