

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

**CASE NO: HAC. 221 of 2019**

**[CRIMINAL JURISDICTION]**

**STATE**

**V**

**ILISAVANI TAMANISAVE**

**Counsel** : Mr. E. Samisoni for the State  
Ms. H. Hazelman and Mr. K. Skiba for the Accused

**Hearing on** : 10 – 11 February 2020

**Summing up on** : 12 February 2020

**SUMMING UP**

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless you agree with that opinion. You are the judges of facts.
2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room and the exhibits tendered. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or the complainant. No such emotion should influence your decision.
5. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
6. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.

7. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. In this regard, you may perhaps think it 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.
8. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
9. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
10. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

11. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
12. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
13. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge has been proved.
14. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
15. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

*Statement of Offence*

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

*Particulars of Offence*

**ILISAVANI TAMANISAVE with others** on the 4<sup>th</sup> day of June, 2019 at Nasinu in the Central Division, in the company of each other, stole a bag containing a Samsung mobile phone charger and a pair of sunglasses from **RONEEL PRAKASH** and immediately before stealing from **RONEEL PRAKASH**, used force on him.

16. In order to prove that the accused is guilty of the above offence, the prosecution should prove all the elements of the offence beyond reasonable doubt.
17. To prove the offence of aggravated robbery in this case, the prosecution should 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.
18. The first element involves the identity of the offender. The prosecution should prove beyond reasonable doubt that the accused committed the offence and no one else.
19. 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.
20. 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.
21. 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.
22. 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. In law, property belongs to a person if that person has possession or control of the property.
23. Robbery becomes aggravated robbery, if the robbery is committed in the company of one or more other persons.

24. The prosecution led the evidence of three witnesses. At the end of the prosecution case you heard me explain several options to the accused. The accused had those options because he does not have to prove anything. The burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence on oath.
25. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
26. The first prosecution witness was Roneel J. Prakash (PW1). He said in his evidence that;
- a) On 04/06/19 he returned from work and was walking towards his house around 6.00pm. As he was about to reach the pathway to his house, an iTaukei man came to him and asked for a dollar. When he said he does not have, the man tried to search his pockets and tried to take his mobile phone. He shouted out and the person let go of his mobile phone and started to walk beside him. While this was happening he noticed that two other iTaukei man were coming towards him and after the above incident the two of them were walking behind him.
  - b) As he was about to reach his house, the three men got together where two of them grabbed him from behind and put him down and the third person came in front of him trying to take the bag he was carrying. He said that his mobile phone charger, sunglasses, work ID and a bunch of keys were there inside the bag. He held onto the bag until the third person punched him on his chest a few times. The person who punched him then got hold of the bag and thereafter the three of them started to run.
  - c) He said that when the three men attacked him the lighting at the place was a bit dim as it was around 6.30pm but still there was daylight. He said that he was attacked at a distance of about 5 - 6 meters from his house. After his bag was taken, he called out for his brother and ran towards his house. When the brother came out he told the brother that the three men who are running away robbed him. His brother then ran after them. He gave his wallet and the phone to his sister and thereafter started to run after the three men.
  - d) Thereafter he saw that one of his tenants had also joined his brother and that they were hitting towards the bush at the end of the road near the roundabout, with a long stick. Then one [out of the three] of them jumped out of the bush and started to run. This person was holding the bag. He said

that it was the same person who punched him earlier and took his bag. They could not find the other two iTaukei men. He said that there was a short cut to go to Tovata and the two of them may have taken that short cut.

- e) The person who came out of the bush first started running towards him and after a while he stopped and started to walk as if nothing happened. That person then walked up to him and tried to convince him that he (the person) was just trying to give the bag back to him. He then together with his brother got hold of the person who then tried to run away. They took the person to Vula Road junction and later handed him over to the police.
- f) He said that he grabbed the bag from the person while they were waiting for the police. Later, the police gave him the items which were inside the bag and took the bag as evidence. He identified the bag in court and it was tendered as PE1. He also said that the strap of the bag broke off when the person was trying to take the bag from him.
- g) He said that when the person jumped out of the bush, the distance between the person and him was around 10-15meters. There was light coming from the street lights towards the bush and it was bright enough to recognize the face of the person who came out. He identified the accused as the person who came out of the bush and later caught with his bag.
- h) During cross-examination he said he did not yell when he was being attacked because one of them were covering his mouth. He agreed that he had mentioned in his police statement that when he *“reached his brother he saw one male iTaukei jump out from the bush”*. He agreed that the said version is different from what he said in evidence as he said that the person who jumped out of the bush first ran and then walked towards him as if nothing happened. He also agreed telling the police that *“my brother and ‘Sami’ quickly ran after him and grabbed him at Kalokalo Crescent”*.
- i) When it was suggested to him that the accused was punched by some iTaukei youth near the playground at Lomalagi, he said that the accused was punched when the accused was brought to Vula Road and Kalokalo Crescent junction but not near the ground. He said that when those boys started to punch, the accused said that he was trying to return the bag.

27. The second prosecution witness was Ravneel J. Prakash (PW2). He said that;

- a) PW1 is his older brother. On 04/06/19 around 6.30pm while he was at home, he heard his brother calling him. He ran out of the house and he saw three men grab his brother and then run away. When he came out, his brother was lying on the ground and then stood up. He did not speak to his brother when he came out of the house. He started chasing the three men.
- b) The three of them hid behind the bush and he took a stick and waved into the bush. He said that when he said “bush” it was a cassava patch and grass which was about 1meter high. The stick was about the length of his arm. He said that as soon as he waved the stick, the accused jumped out of the bush and started to run. He said that the accused was wearing the bag

which was grabbed from his brother and was running towards Kalokalo junction and from there he started to slow down and then walk.

- c) As the accused stopped at the junction his brother and another neighbor caught the accused at the junction. He said that he grabbed the accused. He said that the light near the bush was sufficient to recognize the accused. He said that there was light from street lights and the lights in the houses nearby. He identified the accused as the person he and his brother caught.
- d) During cross-examination he said that when he came out of the house his brother spoke to him but he did not speak to his brother. He agreed that he told the police that he saw his brother running home. When he was asked whether that version he had given the police or that the brother was lying down as he said in court is correct, he said that both versions are correct. He agreed with the suggestion that, when he reached the playground at Lomalagi, he saw the accused being assaulted by some youth. He said that the accused robbed his brother and he is 'very sure of it'.

28. The third witness for the prosecution was Police Constable Eparama Diva (PW3). He said that he arrested the accused with WPC Kolata on 04/06/19 after they went to the scene upon receiving a phone call. The accused was arrested on the complaint that the accused stole a bag. Upon arrest the accused told him that the accused was only assisting the two complainants to arrest an unknown person who grabbed the bag. He said that the accused complained that he was assaulted by a group of iTaukei persons.

29. The accused (DW1) said in his evidence that;

- a) On 04/06/19 around 6.30pm he came down Vula Street to go home as he was returning from his cousin brother's house at Tuirara. He said that he went past the complainant and he saw three iTaukei persons. He walked past those three men and after he walked about 10 meters from them, he could hear a sound. He turned around and went back running to help the complainant.
- b) While he was running, he saw the complainant lying down and the three men running away. He shouted at them and ran after them. He managed to get hold of one of them who was carrying the bag. When he was trying to pull the bag, the other two came to him and punched him. He managed to pull the bag and they assaulted him and ran away. At this time there was no one else around.
- c) Then he ran to the complainant to give the bag. While he was running to the complainant, seven iTaukei boys who were playing in the ground thought that he was one of the three who stole the bag and they punched him. When he was being assaulted by the seven boys, he did not see the



complainant there. He tried to free himself and told them that he did not rob the complainant. When the police arrived, he told the police that he did not steal. He said that at the police station he asked the complainant whether he stole from the complainant and the complainant replied saying "no".

30. The second witness for the defence was Emosi Karawaki (DW2). He said that;
- a) On 04/06/19 at 6.30pm while he was heading towards Vula Street he saw three men running and 'Saban' following them. He said that the person he was referring to as 'Saban' is the accused and he knew the accused as they go to church together. He said that after he saw the accused chasing the three boys and after they passed him he just kept walking.
  - b) During cross examination he said the reason the accused ran after the three men was because the accused was helping an Indian man. He said that the accused shouted out to him to stop the three men, but he could not do that because they were all adults. When he was asked whether he helped the accused to capture the three of them by running with the accused, he said 'yes'. When he was asked whether he saw the accused being punched he said 'no'. He agreed that the accused is a close friend of his and that he is giving evidence to protect the accused. During re-examination he said that he ran after the three men with the accused.
31. In this case, you may note that the accused does not dispute that there was an aggravated robbery. That is, the fact that more than one person (three men) used force on the complainant and stole the bag the complainant had in his possession. What is disputed by the accused is the fact that he was involved in committing the offence. Accordingly, it is the first element of the offence that involves the identity of the offender which is in dispute, in this case.
32. In this case, the evidence was that the accused was caught soon after the incident with the bag alleged to have been stolen from the complainant (PW1). Around 20 minutes later, the accused was handed over to the police. PW1 and PW2 identified the accused as the person they caught on 04/06/19 with the bag. The accused also does not dispute that he had the bag in his possession soon after the alleged incident and the fact that he was apprehended that evening with the complainant's bag in his possession. But he denied the fact that he was caught by PW1 and PW2. PW1 further said that the accused was the same person that punched him on his chest and took the bag from him.

33. When you assess the evidence of the complainant to the effect that the accused was the same person who took away his bag after punching him, please bear in mind that an honest and a convincing witness can still be mistaken. Mistaken recognition can occur even of close relatives and friends. Therefore, you should closely examine the following circumstances among others when you evaluate the evidence given by the complainant on identification of the accused;
- a) Duration of the observation;
  - b) The distance within which the observation was made;
  - c) The lighting condition at the time the observation was made;
  - d) Whether there were any impediments to the observation or was something obstructing the view;
  - e) Whether the witness knew the accused and for how long;
  - f) Whether the witness had seen the accused before, how often, any special reason to remember;
  - g) Duration between original observation and identification; and
  - h) Whether there is any material discrepancy between description to Police and the accused's appearance.
34. To prove the case against the accused the prosecution is relying on the doctrine of recent possession. With regard to recent possession, the law is that if, recently after the commission of the alleged offence, a person is found in possession of the stolen goods, that person is called upon to give an explanation for the possession, an explanation which is not unreasonable or improbable. The reason is that, from the fact that a person is found in possession of stolen items soon after the offence of theft is committed, an inference can be drawn that the said person must have stolen the property. The strength of the inference, which arises from such possession, is in proportion to the shortness of the interval which has elapsed from the time of the offence. If the interval is short, the presumption is so strong, that it almost amounts to proof; because the reasonable inference is that the person must have stolen the property and committed the offence. If an explanation is given which may be true, it is for you to decide on the whole of the evidence whether the accused is guilty or not. That is to say, if you think that the explanation may reasonably be true, the accused is entitled to an acquittal, because the prosecution has not discharged the burden of proof imposed upon it

of satisfying you beyond reasonable doubt. That burden never changes and it always rests on the prosecution. If you find that this explanation may reasonably be true, you should find the accused not guilty.

35. The accused said that he saw PW1 being robbed by three men; he confronted them; he took the bag they stole from PW1; when he was on his way to return the bag to PW1, seven boys who were playing nearby thought that he was one of the three who robbed PW1; and that they assaulted him. The accused said that no one was around when he ran after the three assailants. The second witness who was called by the defence said that he saw the accused running after three men, and he also joined the accused to chase the three on the request of the accused. He did not see the accused being assaulted.
36. Accordingly, you should decide whether this explanation given by the accused is reasonable and probable given all the evidence presented before you. If you believe the accused or if you find that his explanation may reasonably be true, you should find the accused not guilty.
37. The defence says that there are serious inconsistencies in the evidence presented by the prosecution and therefore the prosecution has not proven the case against the accused beyond reasonable doubt. The prosecution also says that there were inconsistencies between the evidence of the accused and the second defence witness. I have already explained to you on how to deal with inconsistencies and you should follow those directions when you deal with any inconsistency you may come across.
38. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
39. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case

against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate. Given the facts of this case, the accused is simply required to provide an explanation which is reasonable and probable with regard to having possession of the stolen item after the alleged incident.

40. There is one other matter. You may have noted that the accused is not present today and he was also not present when the closing addresses were made yesterday. Please do not speculate the reason for his absence. You should not draw any adverse inference against the accused in view of him not being present in court.
41. Any re-directions?
42. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
43. Your opinion should be whether the accused is guilty or not guilty.



  
Vincent S. Perera  
JUDGE

**Solicitors;**

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