

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 280 of 2019

STATE

V

SAVENACA VALU

Counsel : Ms. Swastika Sharma for the State  
Ms. Lice Manulevu with Ms. Kalesi Marama for the Accused

Dates of Trial : 19-20 October 2020

Summing Up : 22 October 2020

### SUMMING UP

Madam Assessors and Gentleman Assessor,

- [1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the accused and the State have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.
- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.

- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charge against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charge against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, the Huawei brand mobile phone and the caution interview statement made by the accused, which were tendered as prosecution exhibits and the admissions made by the parties by way of Admitted Facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. 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's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

- [11] As I already indicated to you, a matter which will be of primary concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may sometimes find Court environment stressful and distracting.
- [14] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept and in the circumstances of the case? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to perceive (or know) in any other way the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [15] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This could be in relation to the testimony of the witness given in Court or in comparison to any previous statement made by that witness.
- [16] A statement made to the Police by a witness can only be used during cross-examination to highlight inconsistencies or omissions. That is, to show that the relevant witness on a previous occasion had said something different to what he or she said in Court (which would be an inconsistency) or to show that what the witness said in Court was not stated previously in the statement made to the Police (which would be an omission). You have to bear in mind that a statement made by a witness out of Court is not evidence. However, if a witness admits that a certain portion in the statement made to the Police is true, then that portion of the statement becomes part of the evidence.
- [17] This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that

inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. 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. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.

- [18] However, if there is no acceptable explanation for the inconsistency or omission 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 and omissions 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. Therefore, if there is an inconsistency or omission 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 his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency or omission and consider him or her to be reliable as a witness.
- [19] Madam Assessors and Gentleman Assessor, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [20] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [21] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not of the charge. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [22] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [23] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did

something, may have told you about that from the witness box. Those facts are called primary facts or is direct evidence.

- [24] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. This is also referred to as circumstantial evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [25] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [26] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [27] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. It is not required for the accused to prove his innocence.
- [28] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [29] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [30] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.

- [31] You must not let any external factor influence your judgment. You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant in this case or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must also not speculate about what evidence there might have been. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [32] Let us now look at the charge contained in the Information.
- [33] There is one charge preferred by the Director of Public Prosecutions (DPP), against the accused:

[COUNT]

*Statement of Offence*

**AGGRAVATED ROBBERY:** Contrary to Section 311 (1) (a) of the Crimes Act 2009.

*Particulars of Offence*

**SAVENACA VALU** and others, on the 29<sup>th</sup> day of July 2019, at Suva, in the Central Division, in the company of each other, robbed **VILIAME SIVO RAKURO** of 1 x Huawei brand mobile phone, the property of **VILIAME SIVO RAKURO**.

- [34] As you would observe the charge is one of Aggravated Robbery. Let me now explain to you the elements of the offence of Aggravated Robbery.
- [35] Section 311 (1) of the Crimes Act reads as follows:
- "A person commits an indictable offence if he or she-*
- (a) Commits a robbery in company with one or more other persons; or*
- (b) Commits a robbery, and at the time of the robbery, has an offensive weapon with him or her."*
- [36] Section 311 (2) of the Crimes Act provides that an offence against sub-section (1) is to be known as the offence of Aggravated Robbery.
- [37] As you would observe, in this case the prosecution has charged that the accused committed Robbery in the company of other persons.
- [38] The offence of Robbery is defined in Section 310 (1) of the Crimes Act as follows:
- "310. — (1) A person commits an indictable offence (which is triable summarily) if he or she commits theft and —*

*(a) immediately before committing theft, he or she—*

*(i) uses force on another person; or*

*(ii) threatens to use force then and there on another person —*

*with intent to commit theft or to escape from the scene; or*

*(b) at the time of committing theft, or immediately after committing theft, he or she—*

*(i) uses force on another person; or*

*(ii) threatens to use force then and there on another person—*

*with intent to commit theft or to escape from the scene.”*

**[39]** Therefore, in order for the prosecution to prove the charge of Aggravated Robbery, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 29 July 2019);
- (iii) At Suva, in the Central Division;
- (iv) With others;
- (v) Robbed Viliame Sivo Rakuro of his property (The Huawei brand mobile phone).

**[40]** Let me now elaborate on these elements in respect of the count.

**[41]** The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

**[42]** The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

**[43]** The fourth element is that the accused committed this offence in the company of other persons. You must bear in mind that an offence may be committed by one person acting alone or by more than one person acting together with the same criminal purpose. 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. Those who commit crime together may play different parts to achieve their purpose.

The prosecution must prove that the accused took some part in committing this offence.

- [44] The fifth and final element the prosecution must prove is that the accused, robbed Viliame Sivo Rakuro of his property (The Huawei brand mobile phone). 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. Robbery when committed in the company of one or more other persons, amounts to Aggravated Robbery.
- [45] Therefore, it is necessary that I explain to you the elements of the offence of Theft. A person commits Theft if he or she dishonestly, appropriates property belonging to another, with the intention of permanently depriving the other of that property.
- [46] I will now have to explain to you as to what is meant by dishonesty; as to what is meant by appropriating property belonging to another; and also as to what is meant by intending to permanently deprive another of his property. In this instance the property concerned is the property of Viliame Sivo Rakuro.
- [47] Let me first explain to you the meaning of dishonesty. You have to consider whether the accused acted dishonestly [and thereby appropriated the Huawei brand mobile phone, which is the property of Viliame Sivo Rakuro]. "Dishonesty" is a state of mind of the accused. In order to determine whether the accused had a dishonest mind, you have to adopt a two-tiered approach as defined in Section 290 of the Crimes Act.

*(a) dishonest according to the standards of ordinary people; and*

*(b) known by the defendant (accused) to be dishonest according to the standards of ordinary people.*

First, according to the ordinary standards of reasonable and honest people, you have to decide whether what was done by the accused was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. [Dishonest according to the standards of ordinary people-which is an objective test].

If it was dishonest by those standards, then you must consider whether the accused himself has realized that what he was doing was dishonest by those standards. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the accused himself knew that he was acting dishonestly. It is dishonest for the accused to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting in the manner he did. [Known by the accused to be dishonest according to the standards of ordinary people-which is a subjective test].



Therefore, the prosecution should prove beyond reasonable doubt that the accused acted dishonestly [and thereby appropriated the Huawei brand mobile phone, which is the property of Viliame Sivo Rakuro].

[48] The prosecution will also have to prove beyond reasonable doubt that the accused, together with the other persons, appropriated the property of Viliame Sivo Rakuro. ‘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.

[49] At this stage I wish to make reference to Section 293 (1) and (2) of the Crimes Act.

*“(1) for the purposes of this Division, any assumption of the rights of an owner to ownership, possession or control of property, without the consent of the person to whom it belongs, amounts to an appropriation of the property.*

*(2) Sub-section (1) applies to a case where a person obtains possession of property (innocently or not) without committing theft, and there is a later assumption of rights without consent by keeping or dealing with it as owner.”*

[50] The prosecution must further prove beyond reasonable doubt that the accused, together with the other persons, intended to permanently deprive Viliame Sivo Rakuro of his property (the Huawei brand mobile phone). The law provides that a person is said to have intention with respect to conduct if he or she means to engage in that conduct. Therefore, to prove this element, the prosecution should prove beyond reasonable doubt that the accused intended to permanently deprive Viliame Sivo Rakuro of his property.

[51] You should also remember, that no witness can look into an accused’s mind and describe what his state of mind was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused’s state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.

[52] Furthermore, Section 300 of the Crimes Act provides:

*“(1) For the purposes of this Division, if —*

*(a) a person appropriates property belonging to another without meaning the other permanently to lose the thing itself; and*

*(b) the person’s intention is to treat the thing as the person’s own to dispose of regardless of the other’s rights; the person has the intention of permanently depriving the other of it.”*

- [53] As you would have realized during the course of this trial, the complainant Viliame Sivo Rakuro does not himself identify as to who had robbed him on the 29 July 2019. To impute liability on the accused the prosecution is relying on what is known as the Doctrine of Recent Possession. In other words, in this case the prosecution is relying on the Doctrine of Recent Possession to establish the link between the accused and the Huawei brand mobile phone stolen from the complainant.
- [54] It is said: *"The doctrine of 'recent possession' furnishes a legal and factual basis to found a criminal prosecution. The underlying principle in the doctrine is that a person, who is in possession of stolen goods soon after a theft or an associated offence, implicates him in the act of receiving [stolen goods] or in the act of theft itself or in associated offences.*
- [55] *The prosecution, for it to be benefitted from the application of the doctrine, must prove that:*
- (i) The accused possessed the goods;*
  - (ii) The goods possessed by the accused were the subject matter of the offence, as complained to by the complainant; and,*
  - (iii) There is no explanation from the accused in regard to his possession of the suspected goods."*
- [56] Therefore, according to the Doctrine of Recent Possession, when a person is found in possession of recently stolen property, which is the subject matter of the offence, and cannot provide a reasonable explanation for that fact, the Court may infer that he or she either stole the property or received the property knowing that it was stolen. This principle can be extended to apply to cases of robbery and armed robbery as well.
- [57] If you are satisfied beyond any reasonable doubt that the accused, on 29 July 2019, at Suva, together or in the company with other persons, robbed Viliame Sivo Rakuro of his property (the Huawei brand mobile phone), then you must find him guilty of the count of Aggravated Robbery.
- [58] If you find that the prosecution has failed to establish any of these elements in relation to the charge, then you must find the accused not guilty of the count of Aggravated Robbery.
- [59] However, if you find that the prosecution although failing to prove the elements of the offence of Aggravated Robbery beyond any reasonable doubt, has proved that the accused dishonestly received stolen property knowing or believing the said property to be stolen; as an alternative, you are then allowed to look at the lesser offence of Receiving, in terms of Section 306 of the Crimes Act, though the accused is not formally charged in the Information for that offence.

- [60] In terms of Section 306 of the Crimes Act *“A person commits a summary offence if he or she dishonestly receives stolen property, knowing or believing the property to be stolen.”*
- [61] In order for the prosecution to prove the offence of Receiving, they must establish beyond any reasonable doubt that;
- (i) The accused;
  - (ii) On the specified day (in this case the 29 July 2019);
  - (iii) At Suva, in the Central Division;
  - (iv) Dishonestly;
  - (v) Received stolen property;
  - (vi) Knowing or believing the property to be stolen.
- [62] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [63] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.
- [64] The fourth element is the element of dishonesty. I have already explained to you as to what dishonesty or acting dishonestly means.
- [65] With regard to the fifth element, the prosecution should prove beyond any reasonable doubt that the accused dishonestly received stolen property. Therefore, it is necessary to find out as to what is *“stolen property”*.

[66] Section 306 (3) provides:

*“for the purposes of this section, property is stolen property if, and only if —*

*(a) it is **original stolen property** (as defined by sub-section(5)); or*

*(b) it is **previously received property** (as defined by sub-section (6)); or*

*(c) it is **tainted property** (as defined by sub-section (8)).*

*This sub-section has effect subject to sub-sections (4) and (7).”*

*[Emphasis is mine].*

[67] For a proper understanding of sub-section 306 (3), the remaining sub-sections of Section 306 are reproduced below:

*(4) for the purposes of this section, stolen property does not include land obtained in the course of an offence against sections 317.*

*(5) for the purposes of this section, **original stolen property** is —*

*(a) property, or a part of property, that —*

*(i) was appropriated in the course of theft (whether or not the property, or the part of the property, is in the state it was in when it was so appropriated); and*

*(ii) is in the possession or custody of the person who so appropriated the property; or*

*(b) property, or a part of property, that —*

*(i) was obtained in the course of an offence against section 317 (whether or not the property, or the part of the property, is in the state it was in when it was so obtained); and*

*(ii) is in the possession or custody of the person who so obtained the property or the person for whom the property was so obtained.*

*(6) for the purposes of this section, **previously received property** is property that —*

*(a) was received in the course of an offence against sub-section (1); and*

*(b) is in the possession or custody of the person who received the property in the course of that offence.*

*(7) for the purposes of this section, property ceases to be original stolen property or previously received property —*

*(a) after the property is restored —*

*(i) to the person from whom it was appropriated or obtained; or*

*(ii) to other lawful possession or custody; or*

*(b) after —*

*(i) the person from whom the property was appropriated or obtained ceases to have any right to restitution in respect of the property; or*

(ii) a person claiming through the person from whom the property was appropriated or obtained ceases to have any right to restitution in respect of the property.

(8) for the purposes of this section, **tainted property** is property that —

(a) is (in whole or in part) the proceeds of sale of, or property exchanged for

(i) original stolen property; or

(ii) previously received property; and

(b) if sub-paragraph (a)(i) applies — is in the possession or custody of —

(i) if the original stolen property was appropriated in the course of theft — the person who so appropriated the original stolen property; or

(ii) if the original stolen property was obtained in the course of an offence against section 317 - the person who so obtained the property or the person for whom the property was so obtained; and

(c) if sub-paragraph (a)(ii) applies -is in the possession or custody of the person who received the previously received property in the course of an offence against sub-section (1).

(9) for the purposes of this section, if, as a result of the application of sub-section 317(9) or (10), an amount credited to an account held by a person is property obtained in the course of an offence against section 317 —

(a) while the whole or any part of the amount remains credited to the account, the property is taken to be in the possession of the person; and

(b) if the person fails to take such steps as are reasonable in the circumstances to secure that the credit is cancelled — the person is taken to have received the property; and

(c) sub-section (7) of this section does not apply to the property.

*[Emphasis is mine].*

[68] The final element for the prosecution to prove beyond reasonable doubt is that the accused dishonestly, received stolen property knowing or believing the property to be stolen. The law provides that a person has knowledge of a circumstance or a result, if he or she is aware that it exists or will exist in the ordinary course of events.

[69] You should also remember what I said earlier, that no witness can look into an accused's mind and describe what his state of mind was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of

mind. Knowledge/Belief or intention of an accused can only be inferred based on relevant proven facts and circumstances.

- [70] However, I wish to emphasize that you need to go in this direction ONLY if you find that the prosecution has failed to establish the charge of Aggravated Robbery beyond reasonable doubt. If you are satisfied that the prosecution has established all the elements constituting the offence of Aggravated Robbery beyond reasonable doubt, then you must find the accused guilty as charged.
- [71] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [72] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Admitted Facts*" without placing necessary evidence to prove them:
1. The complainant (PW1) in this matter is Viliame Sivo Rakuro, 22 years old at the time of the offence, resides at Lot 28 Nawanawa, Nadera.
  2. At the time of the offence, Savenaca Valu was 19 years old, student at FNU, resided at 31 Kameli Place, Nabua.
  3. Police Officer Mario Navla and Special Constable (SC) Pita went into Birdland night club on 29<sup>th</sup> July 2019. Whilst at the club, they met Savenaca Valu who approached them and asked "If they could buy him a carton of beer in exchange of a Huawei mobile phone".
  4. The officers then arrested Savenaca Valu and escorted him to Totogo Police Station because the mobile phone did not belong to him.
  5. On 30<sup>th</sup> July 2019, the accused was interviewed under caution by WDC 3045 Salote.
- [73] Since the prosecution and the defence have consented to treat the above facts as "*Admitted Facts*" without placing necessary evidence to prove them you must, therefore, treat the above facts as proved beyond reasonable doubt.

#### Case for the Prosecution

- [74] The prosecution, in support of their case, called the complainant Viliame Sivo Rakuro, former Police Officer, Special Constable Pita Waqabaca and Woman Detective Constable (WDC 3045) Salote Talaca. The prosecution also tendered the following exhibits:

Prosecution Exhibit **PE1**- The Huawei brand mobile phone of the complainant.

Prosecution Exhibit **PE2**- The caution interview statement made by the accused.

**[75] Evidence of Viliame Sivo Rakuro**

- (i) *He is the complainant in this matter and he is 23 years of age. The witness testified that he resides at Lot 28, Nawanawa, Nadera. He is residing there with his wife and kids.*
- (ii) *The witness said that he is working for C. J. Patel as an 'Isle Picker'. He said: "We pick orders from the supermarket". He has been working at C. J. Patel for 1 ½ years.*
- (iii) *The witness recalled the events which took place on 28 July 2019. He testified that in the evening of 28 July 2019, he was at the Sand Dunes Nightclub in Suva. He was with two other players from his Nasinu Soccer Team (Arami and Sekove) and they were drinking beer. He said that he was at the Sand Dunes Nightclub around 10.00 p.m. and was there for about 2 hours.*
- (iv) *The witness said that around 12.00 a.m. he walked from the Sand Dunes Nightclub to the Temptation 1 Nightclub, together with his two team mates. At the Temptation 1 Nightclub, he had met some other team mates and they were drinking beer. They were drinking in front of the bar. When asked as to what the lighting was like where he was drinking, the witness answered on a scale from 1 – 10, it was 5.*
- (v) *When asked as to how much beer he drank at the Sand Dunes and the Temptation 1 Nightclub, the witness said he cannot recall.*
- (vi) *The witness said that at the time the Temptation 1 Nightclub was really crowded.*
- (vii) *The witness was then asked the following questions in evidence in chief:*
- Q. *When you were drinking tell us what happened?*  
A. *We were drinking inside the bar and all of a sudden I was being pulled by a guy. He pulled me to the corner of the nightclub (right side of the bar) and there were six of them. They started touching my pocket.*
- Q. *How did he pull you?*  
A. *He forcefully pulled me.*
- Q. *What do you mean by forcefully?*  
A. *He grabbed my t-shirt and pulled me.*
- Q. *What were you wearing that night?*  
A. *I can't remember.*

- Q. *You just said he grabbed your t-shirt and pulled you and that there were 6 of them. What do you mean by there were 6 of them?*
- A. *The guy who pulled me, and there were 5 others with him.*
- Q. *What were the other 5 doing when the other guy pulled you?*
- A. *They were waiting at the corner.*
- Q. *Which corner is this?*
- A. *Opposite the bar.*
- Q. *Is this the same corner (right corner of the bar) where the other 5 were?*
- A. *Yes.*
- Q. *Tell us what exactly were the 6 of them doing in the corner?*
- A. *They were waiting to rob me.*
- Q. *Who started touching your pocket?*
- A. *The 6 of them who were waiting at the corner.*
- Q. *How many were waiting for you at the corner?*
- A. *5.*
- Q. *How many of them touched your pocket?*
- A. *I only know there was one hand go inside my pocket.*
- Q. *Which pocket are you referring to?*
- A. *Right side of my pocket.*
- Q. *Which clothes had the pocket that you are referring to?*
- A. *My pants.*
- Q. *Can you tell us what the person was doing when one hand was inside your pocket?*
- A. *He was holding me.*
- Q. *Can you describe how he was holding you?*
- A. *He held me with both hands (Witness demonstrated as to how he was held).*
- Q. *How tightly was he holding on to you?*
- A. *Really tight.*



Q. *What were you doing at the time?*

A. *I was just standing and I couldn't move – because one of the guys was holding me really tight.*

Q. *What happened after that?*

A. *The person whose right hand went inside my right pant pocket, grabbed my mobile phone. And then they started to touch my other pockets. My mobile phone was in my right side pocket.*

Q. *How many of them touched your other pockets?*

A. *I can't remember. It was more than one person.*

Q. *What were you doing at this time?*

A. *I was just standing, I couldn't move.*

Q. *Why couldn't you move?*

A. *One of them was still holding me – this was the same person who had pulled me.*

Q. *And then what happened after that?*

A. *They pushed me back to the bar.*

Q. *Could you tell us the distance from where you were drinking to where they pulled you to?*

A. *Witness shows the distance from the Witness box to the right corner of the Courthouse.*

.....

Q. *And all this time where were your friends?*

A. *They were still in front of the bar.*

Q. *How long was it from the time they pulled you to the corner and pushed you to the bar?*

A. *It took less than a minute.*

Q. *What was the time your phone was robbed from you?*

A. *About 1.00 a.m. – 2.00 a.m.*

Q. *After they had pushed you to the bar then what happened?*

A. *I had few more drinks with my friends.*

Q. And then?  
A. Then I went home.

Q. What time did you get back home?  
A. Around 3.00 in the morning.

- (viii) The witness then said that the phone that was taken from his pocket was a Huawei brand phone, black in colour. The value of the phone was \$349.00. He estimated that he had been using the phone for about 1 year and 6 months.
- (ix) The witness testified that in the morning of 30 July 2019 the Totogo Police had called his wife's number and wanted him to come to the Police Station. Upon going to the Police Station he had seen his phone which had been recovered by the Police.
- (x) The witness identified the phone that was shown to him in Court. The phone was tendered as Prosecution Exhibit PE1.
- (xi) During the cross examination of the witness Viliame Sivo Rakuro by the defence several suggestions were put to him.
- (xii) The witness agreed that he drank a lot of beer at both the Sand Dunes Nightclub and the Temptation 1 Nightclub. The witness also agreed that after he was allegedly robbed at the Temptation 1 Nightclub, he did not report this to the bouncers or the security guards at the nightclub. The witness also agreed that he did not report the alleged robbery to the police on 29 July 2019.
- (xiii) It was suggested to the witness that since he had a lot of alcohol to drink on 28 July 2019 going on to 29 July 2019, that he could not clearly recall what actually happened at Temptation 1 Nightclub. The witness denied this suggestion.
- (xiv) It was further suggested to the complainant that because he had a lot of beer to drink, he cannot clearly recall the time he was allegedly robbed inside the Temptation 1 Nightclub. The witness agreed with this suggestion.

#### [76] Evidence of Pita Waqabaca

- (i) The witness testified that he is 33 years of age and that he is now working as Chief Security Officer at New World. He has been working in this capacity for the past 4 weeks.

- (ii) *Prior to this he had been working as a Police Officer at the Police Special Response Unit (PSRU) based at Makoi. He had worked at the PSRU for 2 years. He was a Special Constable by rank.*
- (iii) *The witness testified that on 29 July 2019, he was on patrol in the Suva City area along with Sergeant Aparama and PC Mario. He started his duties at 2200 hours. Sergeant Aparama had told him and PC Mario to patrol around Suva including the nightclubs. That night he and PC Mario were in civilian clothes.*
- (iv) *The witness said that he and PC Mario had gone to the Birdland Nightclub from 1.00 a.m. to 2.30 a.m. He said that was the time that was given for them to be in the Birdland Nightclub.*
- (v) *It is an admitted fact Police Officer Mario Navia and Special Constable (SC) Pita went into Birdland night club on 29 July 2019. Whilst at the club, they met Savenaca Valu who approached them and asked "if they could buy him a carton of beer in exchange of a Huawei mobile phone".*
- (vi) *The witness testified that the accused had approached him around 2.00 in the morning. "I was standing at the Birdland Nightclub when he saw me. I was in a good suit like someone came from overseas. And he came and said if I can buy him a carton of beer in exchange for the Huawei phone. He said this to me in the iTaukei language."*
- (vii) *The witness said that he had taken the phone and asked the accused if he could unlock the phone. The accused had said that he found the phone in front of the Onyx Nightclub. "And he had said he does not know the phone pattern, and he said he found it outside Onyx Nightclub."*
- (viii) *The witness said that he had then talked to PC Mario and told him that the accused does not know the pattern of the phone and so the phone does not belong to him.*
- (ix) *The witness said that thereafter they had decided to arrest the accused. The accused had been arrested at 2.00 in the morning. Later the witness said that the arrest had been made only after Sergeant Kiniviliame Namaumou and the team came.*
- (x) *The accused had then been taken to the Totogo Police Station.*
- (xi) *It is an admitted fact that the officers then arrested Savenaca Valu and escorted him to the Totogo Police Station because the phone did not belong to him.*

(xii) The witness was shown Prosecution Exhibit PE1 and he identified it as the Huawei phone that had been handed over to him by the accused on 29 July 2019.

(xiii) The witness also identified the accused in the dock.

(xiv) During the cross-examination the defence highlighted the following inconsistency in the testimony given in Court by the witness vis a vis his statement made to the Police on 29 July 2019:

i. In his testimony in Court, the witness said that it was Sergeant Kiniviliame and the team who had effected the arrest of the accused.

However, in his statement made to the Police, it is recorded as follows: "... and we informed this boy that we are police officer and at the same time I touched him and informed him that he is under arrest and will be escorted to Central Police Station."

The witness agreed that what is recorded in his police statement is different to his testimony in Court.

(xv) The Defence also highlighted the following omissions in the testimony given in Court by the witness vis a vis his statement made to the Police.

i. In his testimony in Court, the witness testified that he had called Sergeant Kiniviliame to come with the uniform team inside the Birdland Nightclub. However, he has not made any reference to this in his statement made to the Police.

ii. In his testimony in Court the witness said it was Sergeant Kiniviliame and the uniform team who had arrested the accused. However, he has not made any reference to this in his statement made to the Police.

#### **[77] Evidence of WDC 3045 Salote Talaca**

(i) The witness is a Police Officer based at the CID Branch of the Totogo Police Station. She has served in the Fiji Police Force for 18 years. She had been serving at the CID Branch at the Totogo Police Station for the past 4 years.

(ii) The witness testified that she is the Investigating Officer in this matter.

(iii) She testified that the accused had been brought to the Totogo Police Station early in the morning on 29 July 2019, together with the recovered mobile phone. The accused had been drunk and he had been locked up in the cell.

*When asked as to how drunk the accused was, the witness said: "He was really drunk".*

- (iv) The witness said that the recovered phone had been handed over to her custody. She had switched on the phone. Then she saw a different wallpaper. So she knew the phone did not belong to the accused. She had removed the sim card from the recovered phone and put it in her own phone. She had then tried to call some numbers in the contact list of the said sim. She ended up talking to the wife of the owner of the phone and requested that they come to the Police Station.*
- (v) It is an admitted fact that on 30 July 2019, the accused was interviewed under caution by WDC 3045 Salate.*
- (vi) The witness confirmed that she had recorded the Caution Interview Statement of the accused. The interview had commenced at 11.32 in the morning on 30 July 2019 and had concluded at 12.40 in the afternoon. The Caution Interview Statement of the accused was tendered to Court as Prosecution Exhibit PE2. The witness read out the entire Caution Interview Statement in Court.*
- (vii) The witness said that the distance between the Temptation 1 Nightclub and the Birdland Nightclub was about 40 meters, and that it will take about 2 minutes to walk from Temptation 1 to Birdland when it is less crowded. If the roads are crowded it would take 3 to 4 minutes.*
- (viii) The witness agreed that the alleged robbery of the complainant had taken place at Temptation 1 Nightclub. However, she agreed that all reference in the Caution Interview of the accused is to Temptation 2 Nightclub.*
- (ix) The witness also agreed that no CCTV footage had been obtained from the Temptation 1 Nightclub to assist in the investigations.*

[78] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[79] In this case, the accused opted to remain silent. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent.

## Analysis

- [80] The above is a brief summary of the evidence led at this trial. The prosecution relied on the evidence of the complainant, Viliame Sivo Rakuro, former Police Officer, Special Constable Pita Waqabaca and Woman Detective Constable (WDC 3045) Salote Talaca. The prosecution also tendered the following exhibits:
- Prosecution Exhibit **PE1**- The Huawei brand mobile phone of the complainant.
- Prosecution Exhibit **PE2**- The caution interview statement made by the accused.
- The accused exercised his right to remain silent.
- [81] As I have informed you earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [82] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [83] During the cross examination of prosecution witness Pita Waqabaca, the defence highlighted certain inconsistencies and omissions in the testimony given in Court by the witness *vis a vis* his statement made to the Police. I have already explained to you how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation given by the witness for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [84] However, if there is no acceptable explanation given by the witness for the inconsistency or omission 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 and omissions 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. Therefore, if there is an inconsistency or omission 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 his evidence is inaccurate. In the alternative, you may accept the reason he provided for the inconsistency or omission and consider him or her to be reliable as a witness.
- [85] In this case the prosecution is relying on the admissions made by the accused in his Caution Interview Statement. The caution interview statement made by the accused has been tendered to Court as Prosecution Exhibit **PE2**. Any admission made by an accused in his caution statement is admissible and sufficient evidence to prove his guilt to a charge.

- [86] However, please bear in mind, there are some applicable principles of law in relation to this evidence. The prosecution must prove that the Caution Interview Statement was made by the accused voluntarily and fairly. The prosecution must establish these facts beyond a reasonable doubt.
- [87] In this case the defence is not challenging the voluntariness or fairness of the statement made.
- [88] The question of whether the admissions in the Caution Interview Statement were made by the accused and whether they are true and the question of what weight to attach to the admissions made in the said statement is a matter of fact entirely for you to decide.
- [89] In this case, the accused takes the position that he had found the Huawei mobile phone of the complainant in front of the Onyx Nightclub. It is for you to determine whether this is a reasonable explanation offered by the accused for being in possession of the phone at the time he had approached PC Mario and SC Pita at the Birdland Nightclub, on 29 July 2019, and asked them *"If they could buy him a carton of beer in exchange of a Huawei mobile phone"*.
- [90] The prosecution denies this position. The prosecution version is that the accused, together with others, had robbed the complainant of his mobile phone at the Temptation 1 Nightclub.
- [91] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence of Aggravated Robbery beyond any reasonable doubt.
- [92] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of Aggravated Robbery;*
  - ii. *If you find the prosecution evidence is both truthful and reliable, then only you must consider whether the elements of the charge of Aggravated Robbery have been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

iii. *As an alternative to the charge of Aggravated Robbery, you may consider whether the accused is guilty or not guilty of the lesser charge of Receiving.*

[93] Any re-directions the parties may request?

[94] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the charge separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[95] Your possible opinions should be as follows:

**Count**

Aggravated Robbery- Guilty or Not Guilty.

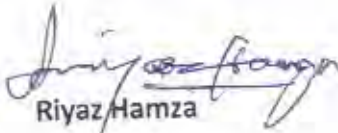
If not guilty,

In the alternative,

Receiving- Guilty or Not Guilty.

[96] I thank you for your patient hearing.



  
Riyaz Hamza  
JUDGE  
HIGH COURT OF FIJI

AT SUVA

Dated this 22<sup>nd</sup> Day of October 2020

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