

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

**Criminal Case No. HAC 380 of 2019**

**BETWEEN** : **THE STATE**

**AND** : **TAITO SOSOWALE**

**Counsel** : Ms. Naidu, M with Mr. Samisoni, E for the State  
: Ms Singh, M with Ms. Manulevu, L. for the Accused

**Date of Trial** : 22 June 2022

**Judgment** : 5 July 2022

**JUDGMENT**

1. The Accused is charged with a count of Aggravated Robbery contrary to section 311 (1) (a) of the *Crimes Act* 2009. The Prosecution alleges that on 18 November 2019, the Accused in the company of others, robbed Subash Dutt of a Samsung J2 mobile phone, \$50.00 cash and a stainless steel container.

**Burden and standard of proof**

2. The Prosecution bears the burden of proving the Accused person's guilt. It discharges that burden by proving each element of the offence beyond reasonable doubt.

**The offence**

3. A person commits aggravated robbery if
  - (a) he or she 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.

4. Robbery is where a person 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.

Elements of aggravated robbery

5. To prove the offence that the Accused is charged with, the Prosecution must prove beyond reasonable doubt that:
- 1. The Accused
  - 2. In company with one or more other persons
  - 3. Committed theft and
  - 4. At the time or immediately before or after committing theft,
  - 5. Used force on the Complainant

Agreed Facts

6. The following facts are agreed between the Prosecution and the Defence and are taken as proved:
- 1. The complainant is Subhash Dutt, 53 years old, residing at Lot 9 Mama Place, Caubati.
  - 2. Taito Sosowale, 20 years old and is charged ... for one count of Aggravated Robbery.
  - 3. Taito Sosowale resides at Jittu Settlement, Gaji Road.
  - 4. On 18 November 2019, Taito Sosowale met one Kavaya Namalo.
  - 5. Taito Sosowale asked one Kavaya Namalo if he wanted to buy a mobile phone.

6. On 21 November 2019, Taito Sosowale was arrested and escorted to Samabula Police Station.
7. On 21 November 2019, Taito Sosowale was interviewed at Samabula Police Station.

#### The Prosecution case

7. The Complainant is a taxi driver of 19 years' experience. He gave evidence that on 18 November 2019, he started driving his taxi at 7:30am. At 12 o'clock midday, three boys hired his cab asking to be taken to Kula Street in Samabula. One of them sat in the front passenger's seat while the other two sat in the rear passengers' seat. When he stopped at the bus stop at Kula Street, the boy in the front seat put his hand into his pocket. He thought it was to give him money for their fare. At the same time, the two boys seated at the back got out and tried to open his door. He realised they were trying to rob him so he held the door back to keep it from opening. While that was happening, the boy sitting beside him took his silver money box with \$30 in it, and \$20 which had been in the box beside the gear. One of the two boys outside grabbed his phone and the two ran away. The phone was a black Samsung J2 Core mobile phone.
8. After the incident, he reported the matter at the Samabula Police Station. The Police told him to take them to the site and he did. They returned to the Police Station where he was then released. He was told to bring evidence of the phone and he took the phone box which had the IMEI number for the phone on it to the Police Station. The phone box was evidence that he had bought the phone.
9. Subsequently, he was told by the Police they had recovered the phone. They showed him the phone and he confirmed it as his.
10. He identified the mobile phone and the phone box in Court and tendered these as part of his evidence. He read out the IMEI number on the phone box as being: 359065-09-060682-3. He also removed the battery of the mobile phone to reveal the IMEI number on the phone. Though there was some uncertainty at first on what the 10<sup>th</sup> digit was, I

confirmed that it was a 6, and therefore a match with the IMEI number on the phone box given by the Complainant to the Police.

11. In cross-examination, the Complainant agreed that he had given a second statement to the Police, recorded on 23 November 2019, at 1pm. He said the phone was shown to him at this time.
12. Cpl 4149 Kalivati testified to having received instructions on 22 November 2019 to go to Lagilagi Housing to seize a stolen mobile phone. He made enquiries at Lagilagi Housing on information given by Taito during his interview. He seized the stolen phone from one Litiana Bale after matching the IMEI number with the number given by the Complainant and also by the physical description given to him. He returned to the Police Station and handed the mobile phone to the interviewing officer, DC Josaia Soro. He prepared a search list dated 22 November 2019 at the Station and tendered this in Court.
13. In cross examination, Cpl Kali agreed that the numbers on the search list did not match the number on the phone and the phone box saying he did not write down the correct number.
14. Police Constable 4570 Josaia Soro interviewed the Accused under caution from 21 November 2019 at 2:50pm to 23 November 2019 at 8:35am. There were not enough Police Officers at the Station at the time so he conducted the interview without a witnessing officer. He tendered the record of interview saying that after he typed out each page, he printed it out for the Accused to read and sign if the Accused felt the record was correct. This was not the case for pages 5 – 6 as he had had to suspend the interview to take the Accused for reconstruction of the crime scene at Kula Street. During the reconstruction, he did not have his notebook and had taken “small notes” on scrap paper which he has since misplaced. When he got back to the Station, he typed the record of the reconstruction. The Accused did not wish to read his cautioned interview statement at the end but had read each page as he printed it out and the Accused signed it.
15. PC Soro says he gave the Accused his right to remain silent and right to counsel. Breaks were given during the interview for the Accused to rest. The interview was suspended from 4:50pm on 21 November 2019 until 8am on 23 November 2019. The long break was

attributed to the long time it took to recover the stolen mobile. In the course of the interview, the Accused had given a number of names and they had to find these people to recover the phone. The phone was shown to the Accused during the interview and the accused said it was the same one stolen from the taxi driver at Kula Street. The answers in the record were given by the Accused and no one else. The Accused was cooperative and gave his answers of his own free will.

16. PC Soro said that he showed the Accused the mobile phone recovered by the Police. The constable also said he got the IMEI number 359065090606823/01 in Question 75 of the interview by dialling \*#06#, a function on the mobile phone itself to get its IMEI number.
17. In cross examination, PC Soro agreed that he had given cautionary words to the Accused but that they had the same implication as the right to silence. He agreed the right to remain silent was not properly put and not explained to the Accused. He denied fabricating the Accused's answers in the cautioned interview statement saying they were the answers given by the Accused.
18. PC 5469 Samuela was the investigating officer. He received the Complainant's report, recorded the Complainant's statement and visited the scene of crime. He noted down the IMEI number for the mobile from the phone box given to him by the Complainant. He received the phone from PC Kali who had seized it in the course of investigations. The phone was shown to the Complainant who confirmed it as his. The IMEI number on the phone matches the number on the phone box.
19. The Accused chose not to give evidence, opting instead to remain silent. This option is available to him consistent not only with his right to remain silent but also with the fact that being deemed innocent until proven guilty, he has no obligation to prove his innocence. No adverse inference can be drawn from his decision to remain silent. It is for the Prosecution always to prove his guilt.

#### Analysis

20. Though the Accused did not give evidence, I must still consider whether the Prosecution evidence on its own proves the Accused person's guilt beyond reasonable doubt.

21. On the Prosecution evidence, I accept that the Complainant Subhash Dutt was robbed by the three passengers he had taken to Kula Street, Samabula on 18 November 2019. The Complainant's uncontradicted evidence is that the front passenger at the material time had stolen the silver container with \$30 in it and \$20 from the box beside the gear while the two passengers in the back had tried to force open his door. When he resisted by holding the door back, they stole his mobile phone and took off. The only issue is whether the Accused was one of the three persons who had robbed the Complainant.
22. The Prosecution relies on the direct evidence of the Complainant who proved the fact of being robbed. He said the boy who had sat beside him stole the silver box with \$30 inside and \$20 in the <sup>box</sup> beside the gear stick. When caution interviewed by the Police, the Accused had admitted to being the front passenger in the Complainant's cab.
23. The defence highlights the absence of dock identification of the Accused by the interviewing officer.
24. In FICAC v Kumar Criminal Case No: HAC 001 of 2009, 11 February 2010, in an application for no case to answer, the defence submitted the prosecution had not led evidence of dock identification of the accused persons. The Court referred to R v. Nicholson (1984) 12 C.C.C. (3d) 228 where on appeal, Kerans JA stated:

The argument for the appellant before us proceeded on the assumption that a dock identification by an arresting officer is an integral part of the criminal process. This is a myth. That the Crown often relies upon such evidence should not permit us to think that a dock identification is a ritual as essential to a criminal trial as, say, the reading of the charge. The onus upon the Crown is to prove that the crime alleged has been committed and that the accused is the person who did it. This last, like any fact in issue, can be proved in many different ways.

And later:

It follows that no dock identification of an individual in the court-room as being the accused need be made in such a case. Identification of the accused as the offender is established if it is established that the

offender was given the appearance notice confirmed by the information founding the case.

25. The charge before the Court is one of aggravated robbery, the particulars being that Taito Sosowale with others had robbed the Complainant. To this charge, the Accused appeared. He pleaded not guilty when the charge was read to him. Admitted Facts filed by both parties identifies the Accused as Taito Sosowale; that he had met one Kayava on 18 November 2019 and has asked the said person if he wanted to buy a mobile phone; and that he had been arrested and taken to the Samabula Police Station on 21 November 2019. Throughout the trial, Defence counsel referred to the Accused as Taito. It was never the position of the Defence that the person on trial was not Taito Sosowale or that he was not the person arrested, interviewed and charged by the Police.

Full

26. On the evidence before the Court, I consider that the Prosecution has led sufficient evidence of identification. The absence of dock identification does not create a doubt in my mind that the person before the Court is Taito Sosowale.

27. The Prosecution relies also on the recovered mobile phone and the phone box given to the Police by the Complainant to help identify his phone. The IMEI number on both the phone and box are identical. The interviewing officer said the IMEI number he had written in Question 75 of the interview was the IMEI number he got after dialing \*#06#, a function on the phone itself to get its IMEI number. This is the same number Cpl Kali had written in the search list exhibited. Except for the last 3 characters on the number given by Cpl Kali, the first 10 digits are the same as those on the phone battery and phone box. I accept that the phone tendered in Court was the one stolen from the Complainant on 18 November 2019.

28. The Prosecution further relies on confessions in the cautioned interview statement. The record of interview tendered by the Prosecution contains admissions by the Accused to going with two others in a cab which they had caught from RB Patel CentrePoint to Kula Street where they stopped the cab at the house before the bus stop. He said he had sat in the front passenger's seat. He said he distracted the driver while the other two got out

and held the driver from outside and took the phone which was on the door while he took the money tin beside the gear box. They then all ran down the crossing to Koroi Place. He opened the money tin and shared the money with the others. One of the accomplices had the mobile phone. He and one of the accomplices went to sell the phone. They met a Kayava who told them he knew someone who could buy it. This Kayava took the mobile phone and sold it for \$60 which he shared with Kayava and one of the accomplices. When shown the mobile phone recovered, he said it was the same phone they had stolen from the taxi driver at Kula Street. He said he was sorry for what he had done.

29. The defence says that the confessions in the cautioned interview statement were fabricated by the Police. The interviewing officer's evidence is that the answers in the cautioned interview statement were those given to him by the Accused person. There is no evidence to counter this.
30. He was cross-examined on not explaining to the Accused his right to remain silent at any time in the interview. He stated the cautionary words given to the Accused had the same implication as the right to counsel. He admitted the right to remain silent was not adequately explained to the Accused.
31. The rights of arrested and detained persons are contained in section 13 of the Constitution. Section 13 (1) (a) provides that arrested and detained persons have the right to be informed promptly in a language that he or she understands, of the reason for the detention and the nature of the charge that may be brought against them; the right to remain silent, and; of the consequences of not remaining silent.
32. Section 13 (1) (b) of the Constitution provides that arrested and detained persons have the right to remain silent, while section 13 (1) (d) sets out the right not to be compelled to make any confession or admission that could be used against them.
33. The cautionary words explained by PC Soro to the Accused prior to the commencement of the interview and again each time it continued following a suspension were in these terms:



I wish to caution you in that you are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.

34. Of a caution given in this or similar way, the Court in State v Ravutanasau Crim. Case No: HAC 377 of 2017 (per Rajasinghe J) stated:

The courts in Fiji have accepted this line of warning to the suspect as an adequate explanation since it discloses sufficiently the scope of the right to remain silent and the consequences of not remaining silent. Hence, any waiver of the right to silence by the suspect, after he is being sufficiently cautioned along the aforementioned line, is considered as properly, knowingly and voluntarily made decisions by the suspect.

35. The caution given by PC Soro to the Accused in this case was essentially in the spirit of the right to remain silent. The consequences of not remaining silent was also given in the caution. I consider the caution given was sufficient explanation of the right to remain silent and of the consequences of <sup>not</sup> doing so, and therefore sufficient compliance with section 13 (1) (a) (b) of the Constitution.

36. This is not the only contention against the cautioned interview statement, counsel also submitting that the Accused had been remanded for more than the stipulated 48 hours. Section 13 (1) (f) of the Constitution provides the right of arrested and detained persons

to be brought before a court as soon as reasonably possible, but in any case not later than 48 hours after the time of arrest, or if that is not reasonably possible, as soon as possible thereafter.

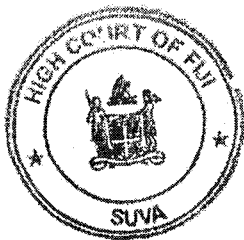
37. Defence counsel says PC Soro admitted that the Accused had been kept at the police station for more than 48 hours. The record of the trial does not show such an admission by the said witness whose evidence was that he was not aware if the Accused had been kept at the Station for more than 48 hours. Apart from this question put to PC Soro, there is no evidence that the Accused had been detained for more than 48 hours.


38. I do not consider the time the phone was shown to the Complainant and his second statement obtained has a significant bearing on the Prosecution case. The interviewing officer PC Soro says he does not know when the phone was shown to the Complainant as his task was only to interview the Accused. According to Cpl Kali, he recovered the phone on 22 November 2019 and gave it to the interviewing officer. Indeed, in the interview, the phone recovered was shown to the Accused. There was no reference to it having been already shown to and identified by the Complainant. The record of interview refers to the phone by the IMEI number, and not by identification by the Complainant.
39. Counsel for the Accused have also pointed to a breach of Force Standing Orders in the failure of the interviewing officer to produce the Accused before the most senior police officer available and there be asked by him if the Accused had any complaints as to his/her treatment by Police and to be examined for injuries. This is a requirement where a person confesses to a serious crime. The interviewing officer admitted this was not done, saying it was only carried out in respect of serious offences such as murder.
40. In *Temo v State* Criminal Appeal No. AAU 117 of 2016, 26 May 2022 at [25], the Court of Appeal stated:

Standing Orders will have the same effect as 'judges' rules' and it is well recognized that they do not have the force of law and hence their noncompliance by itself would not render a particular act or conduct illegal or incapable of being acted upon. Nevertheless, it is important to bear in mind that their compliance is most desirable since they play a crucial role in determining fairness and breaches of them are generally not condoned.

41. The defence says that this breach, taken together with the duration of the interview over three days, the failure to give and adequately explain the Accused person's rights, the failure to ask whether he wished to be seen by a doctor, and the failure to make a dock identification of the Accused, makes it evident that the record of interview was fabricated.

42. I do not agree. I have dealt with the right to remain silent, and the 48 hour breach above. I believe the interviewing officer's undisputed evidence that the long suspension of interview was for the Police to follow up on the leads given by the Accused during his interview. Nothing in the number of questions asked during each session of interview leads me to suspect anything amiss in the conduct of interview. While taking a suspect for medical examination could certainly assist in showing voluntariness and help rule out assault during the period of arrest and detention, the failure to do so of its own does not necessarily point to fabrication as alleged.
43. The same for the non-compliance with Force Standing Orders to produce the Accused before the most senior officer where an accused makes a confession.
44. The interviewing officer's evidence in respect of the manner in which he made notes of the reconstruction visit did cause me some disquiet, however, even if I were to disregard this portion of the record of interview, there remains sufficient evidence, relevant and admissible, pointing to the Accused person's guilt.
45. On the whole of the Prosecution evidence, I am of the view that the Prosecution has proved beyond reasonable doubt that the Accused, with others on 18 November 2019, had stolen cash and a mobile phone from the Complainant and had used force in doing so.
46. I feel sure of his guilt and convict him accordingly.



  
Stainiu F. Bull  
Acting Judge

**Solicitors:**

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