

**IN THE MAGISTRATES' COURT OF FIJI  
AT SUVA  
EXTENDED CRIMINAL JURISDICTION**

*High Court Criminal Case No. HAC 290 of 2013  
Magistrates' Court Criminal Case No. CF 1360 of 2013*

**STATE**

**v.**

**JEKOPE USA**

*For the State:* **Inspector of Police Jiten Singh**  
*For the Defendant:* **Ms. Ali, of counsel, of the Legal Aid Commission**

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**JUDGMENT**

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1. You stood trial for the following offences:

*Count 1*

*Statement of Offence*

**Aggravated Robbery** contrary to section 311 (1)(a) of the **Crimes Act 2009**

*Particulars of Offence*

**Jekope Usa and others**, on the 21<sup>st</sup> day of July 2013 at Raisara, Raiwai in the Central Division robbed **Pravesh Kumar** of \$70.00 cash and 1 x LG Mobile Phone valued at \$140.00 all to the total value of \$210.00 the property of **Pravesh Kumar**.

*Count 2*

*Statement of Offence*

**Aggravated Robbery** contrary to section 311 (1)(a) of the **Crimes Act 2009**

*Particulars of Offence*

**Jekope Usa and others**, on the 21<sup>st</sup> day of July 2013 at Suva in the Central Division robbed **Istifaq Ali** of \$120 cash and 1 x Mobile Phone valued at \$100.00 all to the total value of \$220.00 the property of **Istifaq Ali**.

*Count 3*

*Statement of Offence*

**Theft of a Motor Vehicle** contrary to section 291 (1) of the **Crimes Act 2009**

*Particulars of Offence*

**Jekope Usa and others**, on the 21<sup>st</sup> day of July 2013 at Suva in the Central Division stole a taxi registration number **LT 2509** the property of **Istifaq Ali**.”

2. At trial, the State did not lead relevant and admissible evidence in respect of Count 2 and Count 3. As such, you were acquitted at the “no case to answer” stage in respect of Count 2 and Count 3. I now proceed to judgment in respect of Count 1.

*Presumption of Innocence*

3. I remind myself that you are presumed innocent until proven guilty.

*Burden and Standard of Proof*

4. The State bears the burden of proving each element of the crime and they must do so beyond reasonable doubt. I remind myself that you do not have to prove anything before me.

*Elements of the Offence*

5. The elements the State must prove beyond reasonable doubt are as follows:
  - (i) You
  - (ii) In company with another or others
  - (iii) And acting in concert with another or others

- (iv) Dishonestly Appropriated Property belonging to **Praveen Kumar** with intent to permanently deprive him of that property
- (v) And immediately before the Theft
- (vi) Used Force on **Praveen Kumar**
- (vii) With Intent to Steal

### *Evidence*

6. The State called **Prosecution Witness 1: Praveen Kumar**. He testified that on 21 July 2013 he had been driving a taxi when he picked up 3 *i-Taukei* men outside of *O'Reilly's* in town. They directed him toward Nailuva Road. They then directed him toward Raisara Road off Nailuva Road. He stopped at the junction of Nailuva and Raisara. The person seated immediately behind him grabbed him around the neck. Another person got out from the back seat and came to the front and stopped the car engine. The person who had been seated in the front passenger seat started to search for money. This person took \$70.00 in cash and **PW 1's** LG mobile phone from the front panel. That phone was worth \$140.00.
7. **PW 1** said that there had been lights on from the nightclubs when he first picked up the three men. He said that he had had the person in his front passenger seat under observation for about 10 minutes. I remind myself that **PW 1** was driving at night for the majority of this time. He did chat with the person who was seated in the front seat and did look at him from time to time because he had started to become a little suspicious and had worried he might get robbed. There had been street lights on along Nailuva Road but the lights in his taxi were off. After the person in the front seat had taken the money and the mobile phone they all got off the taxi and disappeared.
8. **PW 1** then drove to Raiwaqa Police Station and reported the matter. Two Police Officers got into his taxi and they came back around to Raisara Road. They then followed several interconnected roads in that neighbourhood and a short while later they came across 2 men who were wearing the same clothes as the people who were in his taxi earlier. However, in Court he could no longer remember what clothing had been worn. They stopped for about 2 minutes and the street lights were on. Then they returned to the Raiwaqa Police Station to get back-up. When they returned the men had disappeared.

9. He gave a statement to the Police then went home. In that statement he gave no description to the Police of the persons who had robbed him. They then called him back to the Police Station and showed him photographs. The photographs were not tendered in Court. **PW 1** said that he had been shown ten photographs of *i-Taukei* men. The photographs were passport sized. Some men in the photographs were slim and others fat. Some were fair and some were dark. All had short hair and the photographs were in colour. The photographs were on a table and he was told to look at them and see if he could identify any of the men from the night before. He picked out the person who had been seated in the front of the taxi at the time of the robbery. He said that it took him less than a minute to pick that person out. He described that person as short and stubby. He said that that person had had a bit of a stubble that night. He identified you in Court as being the person who had been in the front seat of his taxi. He made clear that he had not really seen the other two in the backseat.
10. **Prosecution Witness 2: Special Constable 4329 Tevita Ratuiyada** testified next. **PW 1** had come to the station to report a crime along Raisara Road. He got into the taxi with **PW 1** and they canvassed the streets near Raisara. At the junction of Goodsir and Kapadia, they saw two boys. **PW 1** told him that they were 2 of the three boys who had robbed him. They were about 5 meters away from the boys when the driver identified them. The view was clear and the street lights on. They had them under observation for about 3 – 5 minutes. He remembered one of the two boys from his childhood. He made clear that he did not know that person very well and they had not interacted very often. The person had been short, broad, dark and he had had a light stubble that early morning.
11. They returned to the Police Station to get backup. When they returned the boys had disappeared. He then finished his shift and went home. When he returned back on duty he was told that they had arrested one of the three robbers in **PW 1**'s case. He went to the cell block and he saw one of the two men they had spotted along Goodsir and Kapadia inside the cell. He testified that the person he saw in the cell and who had seen along Goodsir and Kapadia was you. Under cross-examination he testified that it was possible that the taxi driver had mistakenly identified you along Goodsir and Kapadia that night.

12. The State then called **Setoki Tavota**, a former Police Officer. He testified that they had invited you to be part of an identification parade and you refused to answer either yes or no when you were so invited. Your Record of Interview with him was tendered as proof of that assertion. More importantly, you agreed via counsel that you had been invited to be part of an identification parade and you had refused to take part in one.

*Analysis*

13. I am satisfied beyond reasonable doubt that three men, in company with each other, and acting in concert, had dishonestly appropriated \$70.00 in cash and an LG mobile phone belonging to **PW 1** with intent to permanently deprive **PW 1** of the said property. I am satisfied beyond reasonable doubt that immediately before the theft, one of the three had used force on **PW 1** with intent to facilitate the theft. That is the only logical conclusion that can be drawn from the facts established at trial.

14. I now pause to carefully consider whether you had been part of this group that night. This is a case that depends *wholly* on the correctness of your identification. You claim that that identification is mistaken. I warn myself of the special need for caution in these circumstances. I remind myself that:

- (i) there is a need for caution to avoid the risk of injustice;
- (ii) a witness who is honest and convinced in his own mind may be wrong;
- (iii) a witness who is convincing may be wrong;
- (iv) more than one witness may be wrong (*not applicable here*);
- (v) a witness who is able to recognise the defendant, even when the witness knows the defendant very well, may be wrong.

15. More, I must and do carefully examine the circumstances in which the identification came to be made:

- (i) How long did the witness have the accused under observation?
- (ii) At what distance?
- (iii) In what light?
- (iv) Was the observation impeded in any way, as for example by passing traffic or a press of people?

- (v) Had the witness ever seen the accused before?
- (vi) How often?
- (vii) If only occasionally, had he any special reason for remembering the accused?
- (viii) How long elapsed between the original observation and the subsequent identification to the Police?
- (ix) Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?
- (x) Are there any specific weaknesses that had appeared in the identification evidence?

16. I have significant reservations about the identification evidence. First, I do not accept that **PW 1** had the person seated in the front seat under observation for any significant period of time. I accept that he became suspicious and so perhaps made an effort to look at the person in front but in a ten minute trip at night, I do not believe for one moment that there was sufficient time or opportunity to get a good look at the person who was seated in front that night. While he was being robbed, he would have focused first and predominantly on the fact that he had been grabbed around the neck by the person behind him. It seemed clear from his testimony that the robbery happened very quickly. He was grabbed, another person came around the front and turned off his engine and the person in the front grabbed his money and his phone before they all disappeared.

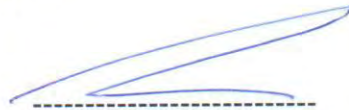
17. The only thing he seemed to remember clearly was that the person in front was short and stubby and had a stubble. It is clear that they came across a short, stubby man with a stubble along Goodsir and Kapadia later that night and that he identified a man with a stubble via photo board identification later that day. I have two concerns. First, **PW 2** testified that **PW 1** had identified two men standing along Goodsir and Kapadia as having been the people who robbed him. **PW 1** had made clear in Court that he did not really see who had been in the back seat. Second, the State did not tender the photographs shown to **PW 1** at the Police Station. For all I know, perhaps the photograph **PW 1** identified was the only picture of a person who had a stubble. I am not even sure if the photograph **PW 1** had identified in the Station had indeed been a photograph of you.

18. With such weak foundation, I reject the identification evidence led by the State against the Defendant. I am not sure if he had indeed been present in that taxi, let alone <sup>P</sup> participated in the robbery against **Pravesh Kumar** that early morning. I am not satisfied beyond reasonable doubt that it had been the Defendant who had been in the taxi that early morning.

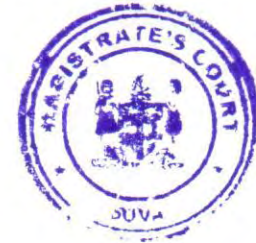
***Result***

19. In the result and for the reasons set out above, I find the Defendant not guilty and I acquit him of **Aggravated Robbery** as charged on Count 1 forthwith.

20. Any party dissatisfied with either the acquittals in respect of Counts 2 and 3 after my ruling on “No Case to Answer” and the acquittal at judgment in respect of Count 1 is at liberty to appeal against these orders of acquittal to the Court of Appeal within 30 days.



Seini K Puamau  
**RESIDENT MAGISTRATE**



Dated at Suva this 20<sup>th</sup> day of January 2020