

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: 077 OF 2012

STATE

-v-

- 1. JOKIBO BUARAVI**
- 2. LAISENIA TAMANI**

Counsels : Mr. Timoci Qalinauci for the State

Both Accused in Person

Date of Trial : 03 June – 06 June 2013

Date of Summing Up : 06 June 2013

SUMMING UP

Madam Assessors:

1. We have now reached the final phase of this case. The law requires me – as the Judge who presided over this trial – to sum up the case to you on law and evidence. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.

3. On matters of facts, however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the Judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for the Prosecution and the accused made submissions to you about the facts of this case. That is their duty as Prosecution Counsel and the accused. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused persons are innocent until they are proved guilty. The burden of proving their guilt rests on the prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed

required to use that common sense and experience in your deliberations and in deciding.

12. In assessing the evidence, you are at liberty to accept the whole of the witnesses evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he/she evasive? How did he/she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.

13. In this case the prosecution and the defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of court time.

14. The two accused are charged with two counts of Aggravated Robbery under Section 311 (1) (a) of the Crimes Decree, 2009.

15. I will now deal with the elements of the offence. Each accused is charged with two counts of aggravated robbery. Robbery in law is the theft of something from someone accompanied by violence or threats of violence, to affect the theft. The state must prove to you beyond reasonable doubt in the case for each charge of each accused:

- (i) That he committed a theft either himself or as a member of a group acting jointly together;
- (ii) That at the time of the theft, violence being used or threatened.

16. The prosecution says that the robbery was aggravated. A robbery may be aggravated in two ways:

- (i) If the robbery is committed by two or more persons acting together,
- (ii) If the robber is armed with any offensive weapon or anything that appears to be an offensive weapon.

I think you will give no trouble in founding that the robbery was aggravated if there is evidence that more than one person took part in the robbery.

17. I must explain the legal basis of these charges. When charges are laid jointly against more than one accused-person in this manner, it brings into focus an important legal principle, which is known as the 'doctrine of joint enterprise'

18. Usually, a person is liable in law for only acts committed by him and for his conduct and such acts or conduct attract criminal liability if they are unlawful acts or unlawful purposes. The doctrine of joint enterprise is an exception to that general rule, of course, for valid and sound reasons. The principle is explained under section 46 of the Crimes Decree 2009, which reads:

Offences committed by joint offenders in prosecution of common purpose

'When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.'

19. Madam assessors, if I am to borrow the example, this is how the principle works. Three people plan to rob a shop and one stands guard outside looking out for any police surveillance. One man goes inside and holds the security guard, while the other threatens the cashier with a gun and takes all the cash. All three men then make their get-away. Now you will see that only the third man did the actual act of offence, while the other two helped to execute the plan of robbery. Under the law, each one of them is held liable for the offence of robbery. Under the law, each one of them is held liable for the offence of robbery with violence irrespective of the individual roles played by each one of them under the doctrine of 'joint enterprise.' For the principle to work under the section, there should be evidence beyond reasonable doubt that:

- (i) There should be two or more persons forming a common intention to prosecute an unlawful purpose;
- (ii) In prosecution of that unlawful purpose, an offence/s should be committed; and
- (iii) The commission of such offence/s should be the probable consequence of the prosecution of that unlawful purpose.

20. In dealing with the principle, you must also consider the following factors as matters of law. They are:

- (i) The case of each accused must be considered separately. That is, you must find evidence as to what each accused did to demonstrate that he too had shared the intention in common to prosecute unlawful purpose;
- (ii) Each accused must have been actuated by that common intention with the doer of the unlawful purpose at the time the offence was committed and should have contributed in some meaningful way towards the prosecution of the unlawful purpose;
- (iii) Each one of them should have known that the commission of the offence is a probable consequence of the prosecution of that unlawful purpose;
- (iv) Common intention must not be confused with same or similar intention entertained independently of each other. Instead, it should clearly be distinguished from similar intention. That is, if you find no evidence to show a particular accused did not share the intention in common with others and that he was actuated by his own intention which was, however, similar to the intention of others, you can find the accused guilty only for what he has committed and not for anything else;
- (v) There must be evidence, either direct or circumstantial, or pre-arrangement or some other evidence of common intention. Sometimes, such common intention could occur on the spur of the moment;
- (vi) The mere fact of the presence of the accused at the time of the offence is not necessary evidence of common intention.

21. I must direct you on the application of this legal principle in this case bearing in mind that the two separate charges have been based on that principle *but on same set of facts. If I am to elaborate, both accused are covered by the joint enterprise according to the information of the DPP in respect of both charges. They are charged with others who have already pleaded guilty.* Therefore both accused are criminally liable for their actions and those who have already pleaded guilty, if and only if they were actuated by a common intention to prosecute an unlawful purpose in the prosecution of which the offence of aggravated robbery was committed.

22. At this stage I must give you a direction on identification.

23. Evidence that the accused has been identified by a witness as doing something must, when disputed by the accused, be approached with special caution.

24. It is because experience has demonstrated, even honest witnesses have given identification which has been proved to be unreliable. I give you this warning not

because I have formed any view of the evidence, but the law requires that in every case where identification evidence is involved, that the warning be given.

25. In assessing the identification evidence, you must take following matters into account:

- (i) Whether the witnesses have known the accused before?
- (ii) For how long did the witnesses have under observation and from which distance?
- (iii) Was it more than a fleeting glance?
- (iv) Did the witnesses have any special reason to remember?
- (v) In what light the observation were made?
- (vi) Whether there was any obstacle to obstruct the view?
- (vii) How long elapsed between the original observation and subsequent identification to the Police.

26. You must always bear in mind the above legal principles in evaluating facts on the basis of evidence in this case against the accused as the acts and the conduct of each accused have to be considered in two different sets of facts according to the particulars of charges laid against them as stated little while ago.

27. I will now deal with the summary of evidence in this case.

28. Prosecution called 1st witness Arti Verma first. According to him on 28.5.2012 at around 9.00 p.m. he went to Balawa shopping centre with two others namely Rakesh and Kishore in a van to buy beer. He got out from the van and went into the shopping centre. He saw some Fijian boys drinking beer.

29. He bought four beer bottles. When he was coming out towards the van, these boys came from behind and grabbed him. Then they started snatching beer from him. One of them had punched him on the face. These were the same boys who were inside the shop. They have taken his wallet with \$59 and Alcatel mobile phone worth \$ 129. They were wearing jeans and T-shirts.

30. He had never seen them before. Two of them were smaller in size to him. There were six boys. He was pushed on the ground and two beer bottles were broken at that time. He had shouted for help. Rakesh Kumar who was inside the van had come for his help. He had tried to clear the boys. He too was hit by the boys. There was a security officer, but he did not come near.

31. Thereafter the boys fled towards the Balawa cemetery. He had gone with his friends to the Lautoka police station and had made a complaint. Three police officers have taken him and Rakesh to the place of incident. Those police officers had a discussion with the security officer. Then they were taken to nearby Field 40 area. At there, he had seen some boys walking on the road. They have recognized those boys as the same boys who robbed them.
32. The police officers have arrested three of them and others had run away. He recognized them as he saw them when he went inside the shopping centre and they were the same boys. It is hard for him to recognize them today due to time lapse.
33. When cross examined by the first accused, he said that he can't directly blame him as he can't identify him now. When asked who really punched you the witness stated that one of the persons in the group had done that. The second accused did not cross examine the witness.
34. Rakesh Kumar was called as the 2nd witness for the prosecution. According to him on 28.5.2013 around 9.00 p.m. he had gone to Balawa shopping centre with Arti Verma to buy beer in the van driven by Kishore. Verma went inside the shopping centre while he waited in the van. He saw Verma coming out and six boys who were inside the shopping centre grabbed him from behind. They were wearing jeans and T-shirts.
35. Three of them were short persons and the other three were of his height. They were medium built persons. The van was parked about 3m away and he saw two beer bottles falling down and other two being grabbed by the boys. One of them punched Verma on the face. Another took Verma's wallet. Third person had taken Verma's mobile phone.
36. Arti Verma was calling for help and he went there as soon as he could. When he tried to help, one of the boys punched him. Another boy wearing Blue T-shirt had taken his mobile phone.
37. After that he had gone to Lautoka police station with Verma and had reported the matter. Police officers have gone to the Balawa shopping centre with them. There police officers had talked to the security guard. Then they went to Field 40 sub division.
38. As soon as they went there, they saw six boys standing on the road. He had identified them as the same boys who robbed him. The person wearing the Blue T-shirt was there. He was arrested. Three boys were arrested and the other three ran away.

39. As it is one year now he could not recognize them properly now.
40. When both accused were explained the evidence and their right to cross examine the witness they did not ask any question from the witness.
41. DC 3830 Apenisa who is attached to crime branch Lautoka police station was the next witness for the prosecution. On 28.5.2012 after receiving the report about the incident he had gone to Balawa shopping centre with the complainants. There he had spoken to the security guard. He was informed that some Fijian boys from Navutu had robbed two Indian men.
42. He went with the complainants to the Field 40 area. There were group of boys walking on the road. The two Indians had identified them as the persons who robbed them. He managed to arrest three of them while another three ran away. Two of the arrested boys are in the accused box today.
43. First accused did not cross examine this witness. Second accused asked when they were caught whether he found anything with them. The answer was no.
44. Next witness for the prosecution was Epeli Naua, security guard attached to the Balawa shopping centre. On 28.5.2012 he had seen group of Fijian boys who were drunk and making noise inside. He had taken them out. These Fijian boys are known to him.
45. Then he saw two Indian men who had come to buy drinks. Those men have taken drinks out. He had heard shouting from outside. When he went outside he saw that two Indian men were injured.
46. When inquired, the two Indian men had told him that the liquor they bought and some personal things were taken by the Fijian boys. They were also punched. He was told that the same boys who came from the shop had done this. The two Indian men have left in their van.
47. After half an hour, police officers have come with the two Indian men and he had told that Fijian boys are from Navutu. Then they left and came back in 15 minutes with three arrested Fijian boys. He had identified them. One of them is his neighbor Maciu.
48. Detective Constable Isoa was the last witness for the prosecution. He had given a similar version to the witness DC Apenisa. He had added that after the arrest of three Fijian

boys, they have gone to the Balawa shopping centre and the security guard had identified one of them as Maciu Bakani. The two accused did not cross examine this witness.

49. After the case for the prosecution was closed defence was called. You heard me explain to each accused their rights in defence First accused elected to give evidence and to call witnesses.

50. Giving evidence first accused only said "I just want to tell Court on the day that this incident happened I was not part of it."

51. When cross examined by the state counsel he admitted that he went to Balawa shopping centre on the date in question with four others. He further admitted that he was arrested with two others the same night. However he denied taking part in the offence.

52. Navitalai Sadilo was called as a witness on behalf of the 1st accused. He stated that only three persons took part in the assault. Those are Maciu Bakani, Joeli Nabogi and himself. When cross examined by the State Counsel he admitted that he and four other Fijian boys assaulted and robbed Arti Verma and Rakesh Kumar.

53. The second witness for the 1st accused was Joeli Nabogi. He stated that the first accused was under a Mango tree in the Balawa cemetery when they went to the Balawa shopping centre. According to him only three persons went to the Balawa shopping centre. Those were Maciu, Navitalai Sadilo and himself. Three of them had robbed two Indian men while the two accused were at the cemetery. The cemetery is about 75-80 m away from the shopping centre.

54. In cross examination he maintained the position that the 1st accused was at the cemetery at the time of robbery. He admitted that when police came to Field 40 sub division the two accused were there and that he ran away.

55. Second accused did not give evidence but he called a witness on his behalf. Witness Rubeni Nauchi stated that six of them went to the Balawa shopping centre on the date in question. When he saw the robbery he moved away from that place. The second accused came with the drinks. Only three persons took part in the robbery.

56. In cross examination he admitted that 1st accused also went to the shopping centre. He was with others when the police vehicle came to Filed 40 sub division. He ran away.

57. You have heard the evidence of five prosecution witnesses and the 1st accused and three defence witnesses. You have watched them in Court giving evidence. What were their demeanors like? How they react to being cross examined and re-examined? Were they evasive? How they conduct themselves generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide which witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and which witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation.

58. Remember, it is for the prosecution to prove the accused's guilt beyond reasonable doubt. It is not for the accused to prove their innocence. The burden of proof lies on the prosecution to prove the accused's guilt beyond reasonable doubt, and the burden stays with them right throughout the trial. If you accept the prosecutions version of events and you are satisfied beyond reasonable doubt and sure of each accused's guilt, you must find them guilty as charged. You must consider the case against each accused separately and each charge separately. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt and not sure of their guilt, you must find them not guilty as charged.

59. Your possible opinion in this case is:

1 st charge of Aggravated Robbery	1 st Accused Guilty or Not Guilty
	2 nd Accused Guilty or Not Guilty

2 nd charge of Aggravated Robbery	1 st accused Guilty or Not Guilty
	2 nd Accused Guilty or Not Guilty

60. You may retire to deliberate. Once you have reached your decisions, you may inform the clerk so that we could reconvene to receive them.

Sudharshana De Silva
Judge

Solicitors for the State: Office of the Director of Public Prosecution, Lautoka
Solicitors for the Accused: Both Accused in person