

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 76 of 2008

STATE

v

JOJI KACIVAKAWALU

Counsel: Ms. L. Latu for the State.
Mr. A. Vakaloloma for the accused.

Dates of hearing: 13, 14, 15 April 2015.

Date of Ruling: 16 April 2015.

SUMMING UP

Ladies and Gentleman assessors. It is now my duty to sum up to you. In doing so, I will direct you on matters of law which you must accept and act on. You must apply the law as I direct you in this case.

2. As far as the facts of this case are concerned, what evidence to accept, what weight to put on certain evidence, which witnesses are reliable, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts, or if I appear to do so it is entirely a matter for you whether you accept what I say or form your own opinions. In other words you are masters and the judges of facts.

3. Counsel for the prosecution and the defence made submissions to you yesterday about how you should find the facts of this case, they have the right to make these comments because it is part of their duties as counsel. However you are not bound by what counsel for either side has told you about the facts of the case. If you think that their comments appeal to your common sense and judgment, you may use them as you think fit. You are the representatives of the community in this trial and it is for you to decide which version of the evidence to accept or reject.
4. You will not be asked to give reasons for your opinions, but merely your opinions themselves, and you need not be unanimous although it would be desirable if you could agree on them. Your opinions are not binding on me and I can assure you that I will give them great weight when I come to deliver my judgment.
5. On the issue of proof, I must direct you as a matter of law that the onus or burden of truth lies on the prosecution to prove the case against the accused. The burden remains on the prosecution throughout the trial and never shifts. There is no obligation upon the accused to prove his innocence. Under our system of criminal justice an accused person is presumed to be innocent until proved guilty.
6. The standard of proof is one of proof beyond reasonable doubt. This means that before you can find the accused guilty of the offence charged, you must be satisfied so that you are sure of his guilt. If you have a reasonable doubt about the guilt of the accused, then it is your duty to express an opinion that the accused is not guilty. It is only if you are satisfied so that you

feel sure of the guilt of the accused that you can express an opinion that he is guilty.

7. Your opinions must be based only on the evidence you have heard in the courtroom and upon nothing else. It is not relevant as Mr. Vakaloloma says that there was no identity parade, nor is it relevant that the accused was not searched and his residence was not searched for the stolen property. It is not for him nor for you to speculate on what evidence there should have been or might have been. You judge the case solely on the evidence before you.
8. Similarly, you must not speculate in this case. It is speculation to say that he was suspected because he was a stranger in Nailaga; again we judge the case on evidence not guess work.
9. You will see from the information in front of you that the accused Joji Kacivakawalu has been charged with two counts of robbery with violence, one for the married couple and one for the mother staying with them. There is a third count of unlawful use of a motor vehicle.
10. The elements of the offence of Robbery with Violence in the 1st and 2nd charges are:
 - (i) A person,
 - (ii) Committed Theft,
 - (iii) At the time or immediately before committing theft uses or threatens to use any personal violence to any person.

The elements of the 3rd charge are:

- (i) A person

- (ii) Unlawfully and without colour of right but not so as to be guilty of stealing
- (iii) Uses any vehicle.

11. So to find the accused guilty of the two robbery counts you must find first, that there was a robbery and that items were stolen and I don't think you will have much difficulty with that; secondly that it was this accused, Joji, who was one of the robbers. It doesn't matter what he might have done at the robbery because in law and in this particular situation any one of the group who participated is just guilty as any one other. You must also find that at the time of the robbery one or more of the group used violence against one or more of the victims putting them in fear.
12. To find the accused guilty of the crime of unlawful taking of a motor vehicle you must find that one or more of the robbers took and drove a vehicle belonging to the victims and that whoever did take it did not have the authority of the owner to do so.
13. There are three charges against the accused and you must look at each one separately. Just because you may think he is guilty of one does not mean necessarily that he is guilty of the other two. The evidence on each charge must be examined in isolation from the other charges.
14. I now turn to the evidence Ladies and Gentlemen. I know that you have heard the evidence only this week and it will be fresh in your mind, but it is my duty to set out the evidence for you (and for anyone looking at this trial) both for the Prosecution and the Defence. I must direct you however that as the facts are in your domain, you do not have to accept what I say

about them. If I appear to stress something as important and you do not agree then discard what I say and vice versa: if I don't mention something which you think is important then you must give that fact the weight that you think fit.

15. The Prosecution evidence comes to us in what can be summarized as three parts; that is the robbery evidence, the big spending evidence and the Police evidence.
16. I do not think you will have trouble in accepting that on the night of 31 July/1 August 2008 Mr. Hassan Ali and his family were robbed by 2 or 3 men with pinch bar, long knife and a wooden stick. They hit Mr. Ali with the wooden stick and punched him and in law that is violence. They forced their way into Mr. and Mrs. Ali's bedroom and stole cash, phones and jewelry while using violence. After loading the goods stolen into pillow case(s) they took the keys to one of Mr. Ali's refrigerated vehicles and drove off in it.
17. It doesn't matter Ladies and Gentleman that Mr. Ali said that there were 3 robbers and Mrs. Ali said 2. It is also irrelevant that the charge is that others were involved with the accused. You are dealing with evidence against this accused and only him and you must decide whether he and only he was one of the robbers. Don't concern yourself with anybody else.
18. The defence say , well we accept that there was a robbery but it wasn't me; I was at home that night and in any event not one of the victims was able to identify me as a one of the robbers.
19. The second part of the State's evidence is that this accused was spending up large in the few days after the robbery. Mele

Bete said that he went to Lammy's night Club in Ba with Dianna, Tema and the accused and the two girls were buying drinks all night. After closing time they all went to the black market and they bought more drinks and they went to a drinking spot to consume them.

20. Dianna said that at the invitation of Tema she met Tema, Meli, and the accused who had been staying with her for a few weeks. They went to the night club in Ba on the night of the 1st August and she (Dianna) bought the drinks. At first Dianna said that she used money that Tema gave her from her job in Nadi but when confronted with her Police statement she admitted that she had told Police that Joji the accused had given 3 \$50 notes to Tema. Apart from telling the Court that the statement to the Police was true, she then said that she was forced by the Police to say that because they threatened to arrest her. I must direct you Ladies and Gentleman that in changing her story during her evidence, you might think that she is not a very reliable witness but it is up to you what weight you might want to place on her evidence. Bear in mind that the accused had been living with her for a few weeks.
21. PW7, Inisea said that on the night of the 2nd August she was with a group of people in the night club and one of them was "Caps" who we later learned from the accused himself was his nickname. Most of the group, Inisea says were farmers, and not earning money but they were buying drinks there and later in town to drink at the cemetery.
22. In defence Mr. Vakaloloma appeared to stress in his cross-examination that this was the 2nd August, not the first or the 31st July. You will give whatever weight to this evidence that

you wish to, but whatever it says, it is certainly evidence that the accused was drinking heavily on the 1st and 2nd August 2008.

23. The Police evidence related to the arrest of the accused at Nailaga village and his subsequent interview and charge in the Ba Police Station. You will recall that he was arrested out of a carrier near the village; the Police say he was co-operative, and willingly surrendered to them after being told what he was arrested for and cautioned. He was put into the police vehicle and taken immediately back to Ba Police Station for “processing”. In the vehicle on the way back he admitted to PC Tomasi that he was one of the robbers of Hassan Ali and his family. At the station he was interviewed under caution and made the admissions that you have seen and which are before you.
24. I now direct you Ladies and Gentleman how you should approach this interview and the consequent statement that he made in answer to the formal charge.
25. The prosecution say that the answers given in the interview were answers that he provided and that they are true. The accused’s case is that he was assaulted in the Police Station and he was in pain and in order to stop the assaults he gave those answers but they are not true. He was forced to say that.
26. In deciding whether you can safely rely upon those admissions, you must decide two issues:
 1. Did the accused in fact make the admissions? If you are not sure that he did then you must ignore them. If

however you are sure that he did, then;

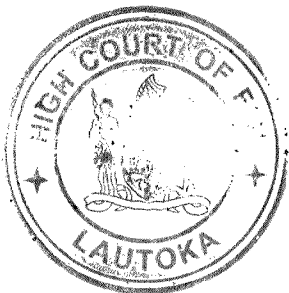
2. Are you sure that the admissions are true? In addressing that issue (whether they are true or not) decide whether they were or may have been, made or given as the result of assaults which may have rendered the answers unreliable. If you decide that the admissions were or may have been obtained as a result of assaults on him by the Police then you must disregard the admissions.
27. In this case the accused says that he was continually assaulted, sat on, beaten on his feet with sticks and nudged in the back, all of which forced him to give the answers that he did. If you conclude that those allegations are or may be correct and that the admissions were or may have been obtained as a result of that conduct, then you must disregard the admissions.
28. If however you are sure that the accused made the admissions and that they were not obtained in that way, you must nonetheless decide whether you are sure that the admissions are true. If, for whatever reason, you are not sure that the admissions are true then you must disregard them. If, on the other hand, you are sure that they are true, you may rely on them.
29. You will appreciate that the case against this accused depends almost entirely on his confessions to the Police. It is for this reason that you should approach the evidence of the manner in which these answers were obtained with special caution.

30. The same directions apply to the statement he made in answer to his formal charge.
31. Well Ladies and Gentleman, that was the end of the prosecution case. You heard me explain to the accused what his rights are in defence. He could give evidence or he could remain silent. In either case he could call witnesses if he wished.
32. As you know the accused did give sworn evidence. That is evidence for you to consider in the normal way and to give it the weight that you think fit. If you think that what he says in evidence is true or maybe true then you will find him not guilty. However if you don't believe him, that does not make him guilty. The State still has to prove to you beyond reasonable doubt that he committed the crimes.
33. The accused says that he is a farmer from Nausori but in July 2008 he went to stay with the ex-wife of his cousin brother in Nailaga, Ba. That was Dianna and he stayed with her for about a month. On the 4th August he was taken out of a carrier going to Ba town and arrested. He wasn't told why. They took him in a Police vehicle to a Feeder Road on the way back to the Station when they got there they asked him where he was at the night of the 31st July. They said there was a robbery and he was involved. When he said he knew nothing about it he was assaulted. They hit him on his stomach and on his back. They hit him in the face and hit his knees with a baton. They kept on doing that for an hour and so he admitted. They hit him on the nose with punches. There were 5 of them assaulting him. He was then taken to the Police station where he was interviewed by PC Belo. He complained to Belo that his back was sore but he was still interviewed and

during the interview he was further assaulted. One officer and another fat one sat on his chest and knees while he was lying on his back and another was hitting the soles of his feet. This went on for 10 seconds. He was assaulted over the whole 2 days of his interview. On the second day he asked to be taken to the hospital. His back was paining and he couldn't walk properly. The interviewing officer didn't take him but PC Bari took him. But then later he said that it was Tomasi who took him. He saw an Indian doctor who saw his injuries and filled in the medical report and recommended an x-ray. He had a cut lip that was bleeding and an injury on his back. He was given a pain killer. The doctor told the Police to bring him back the next day but they didn't.

34. He admitted the crime in the interview because of the assaults.
35. He did not rob Hassan Ali and he didn't drive his vehicle away. In any event he can't drive.
36. In cross examination he admitted that his nickname is "Caps" and on questions from the Court he said that on the night of 31 July 2008 he remembers being at home drinking grog and sleeping. It was fresh in his mind.
37. The money being spent on beer on 1 and 2 August was money he had saved from yaqona farming in Vanua Levu.
38. Well Ladies and gentlemen, that was the evidence of the accused. I have rehearsed it in some detail in all fairness to him. It is for you to make what you want of it, but remember if you think it is true or may be true then you will find him not guilty of the Crimes.

39. The accused called two witnesses in his defence. Inspector Bari confirmed that he filled out the first part of the Police Medical report and that he allowed the accused to be taken to hospital to be examined. He produced the medical report by consent and it is an exhibit before you.
40. A medical consultant came to court and said that the medical report showed that there was contusion to the accused's back. He said contusion is bruising that can be caused by blunt force. He said that there were no other injuries noted by the examining doctor.
41. Well Ladies and Gentleman that was all of the evidence. It is now time for you to retire and consider your opinions. Your available opinions on each of the three counts is "guilty" or "not guilty". It would be good if you can be unanimous but if you can't agree I will take your differing opinions.
42. Please let a member of the Court know when you are ready and I will reconvene the Court. Just before you retire I will ask counsel if there are any additions or alterations they would have to make to this summing up.
43. Redirections counsel?



P.K. Madigan
Judge

At Lautoka
16 April 2015