IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 153 OF 2013

BETWEEN : STATE

AND : NACANI TIMO
FILIPE WAQATA

Counsel : Ms. Kiran for State
The First Accused is in person
The second accused in absence

Date of Hearing : 25th- 28th of May 2015
Date of Summing Up : 1st of June 2015
Date of Judgment : 3rd of June 2015

JUDGMENT

1. The two accused persons are charged with one count of Aggravated Robbery contrary to section 311 (1) (a) of the Crimes Decree 44 of 2009. The particulars of the offence are that;

*"**NACANI TIMO** and **FILIPE WAQATA** **with another**, in company of each other on the 4th June, 2013 at Lautoka in the Western Division, robbed **VINESH KUMAR** of 1 Dell Laptop valued at $3800.00, 1 Toshiba laptop valued at $2100.00, 1 Panasonic camcorder camera valued at $1800.00, 1 Blackberry mobile phone valued at $1000.00, 1 Samsung mobile phone valued at $500.00, 1 ZTE tablet valued at $300.00, 2 Nokia mobile phones valued at $560.00, 1 Sony digital camera valued at $875.00, 1 Hard drive valued at $300.00, 2 Gold chains valued at $2000.00, 1 Wedding ring valued at $400.00, 1 pair earrings valued at $500.00, $394.00 cash, 2 x 40oz Finland liquors valued at*

$240.00, 2 kitchen knives valued at $10.00 and 2 towels valued at $10.00 all to the total value of ***$14,789.00.***

2. The two accused persons pleaded not guilty for this offence; hence this action was set down for hearing from 25th to 28th of May 2015. The second accused did not appear during the hearing. Having satisfied that he was properly informed about the hearing; I proceeded with the hearing in his absence. The Prosecution called nine witnesses and tendered 8 prosecution exhibits during the course of the hearing. At the conclusion of the prosecution case, the accused gave evidence on oath and called one witness for his defence. Subsequently, the first accused person and the learned counsel for the Prosecution made their respective closing submissions. I then delivered my summing up to the assessors.

3. The three assessors have returned with unanimous guilty verdict against the two accused persons. The assessors' verdict was not perverse. It was open for them to reach such conclusion on the evidence presented during the hearing.

4. Having considered the evidence presented during the hearing, respective closing submissions of the prosecution and the defence, and the opinions of the assessors, I now proceed to pronounce my judgment as follows.

5. Section 311 (1) (a) of the Crimes Decree states that;

"A person commit an indictable offence if he or she –
(a) commits a robbery in company with one or more other persons,

6. The offence of robbery has defined under section 310 of the Crimes Decree, where it states that;

"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

(c) (ii) threatens to use force then and there on another person—with intent to commit theft or to escape from the scene.

7. The offence of robbery is an aggravating form of theft. Accordingly the main elements of the offence of aggravated robbery that the prosecution is required to prove beyond reasonable doubt are that;

i. The two accused persons with another,
ii. In accompany of each other
iii. Dishonestly appropriates the properties belong to Vinesh Kumar as mentioned in the information,
iv. With the intention of permanently deprive it,
v. And used force or threaten to use force on Mr. Vinesh Kumar immediately before and/or during and/ or after stealing them,

8. It appears that the prosecution has alleged that the two accused persons have acted together to commit this offence. If a criminal offence has committed by two or more persons, each of them may have played a different part, but if they acted together as part of a joint plan or agreement to commit the offence, they are each guilty. The essence of joint responsibility for a criminal offence is that

each accused shared a common intention to commit the offence and played his or her part in it as to achieve that aim.

9. In view of the evidence presented by the prosecution, I find that their case against the first accused is substantially depended on the identification of the first accused by Mr. Kumar, the complainant. He stated in his evidence that he saw the face of the accused just for 30 seconds or a minute, when the towel he used to cover his face fell down. He has then seen the same person at Salava road, when he was going home from work in his car. He has seen him with two other persons. He did not stop but tried to call the police. Since no one answered from the police, he had gone to the police post to bring a police officer. By the time he returned, that person has gone. Mr. Kumar then identifies the first accused person in the dock, while giving evidence.

10. Accordingly, Mr. Kumar has seen the first accused on three different occasions. The first is at his home when the three robbers assaulted him and robed his house. The second occasion is at Salava road. The third occasion is the dock identification.

11. The identification of the accused person by a witness for the first time in the dock is considered as undesirable and unreliable evidence. Lord Kerr in **Maxo Tido v The Queen (2011) 2 Cr. App.R 23, PC)** held that;

"it is important to make clear that a dock identification is not inadmissible evidence per se and that the admission of such evidence is not to be regarded as permissible in only the most exceptional circumstances. A trial judge will always need to consider, however, whether the admission of such testimony, particularly where it is the first occasion on which the accused is purportedly identified, should be permitted on the basis that its admission might imperil the fair trial of the accused:.

12. Justice Madigan in *Peni Lotawa v Sate (Criminal Appeal No AAU0091 of 2011)* has discussed the characteristic weakness of the dock identification, where his lordship observed that;

> *"dock identification is completely unreliable in the absence of a prior foundation of identity parade or photograph identification because it then becomes the ultimate leading question. The answer is obvious to any witness- the person to be identified is sitting in the dock. The Privy Council had examined the merits and demerits of such identification in the case of Holland v HM Advocate (The Times June 1,2005), where it was held that such an identification was not per se incompatible with a fair trial but other factors must too be considered such as whether the accused was legally represented, what directions the judge gave to the finders of fact on this identification and how strong the prosecution case was in all other respects. It has been decided now in a line of English cases that it should be refused by a trial judge except in situations where the accused has refused to participate in a formal identification parade or where he has otherwise avoided attempts at identification. Even then very strong direction must be given as to how little weight is to be placed on such identification".*

13. In view of these judicial precedents, it appears that the dock identification is unreliable and undesirable in the absence of a prior and proper foundation of identification. In this instant case, there is no identification parade or any form of reliable identification for the first accused before the dock identification. Mr. Kumar only saw his face just for 30 seconds or a minute at the heights of this alleged robbery. Mr. Kumar stated in his evidence that he was shocked and was not able to shout, though he wanted to do so, when he found three men inside his bed room in that early morning of 4th of June 2013. He further stated that the first accused fall as he tried to punch on the accused's face. At that time the first accused was pushing a pillow on his wife's face. Once the first accused fell down, other two robbers came to him and started to beat him. That was the

time; Mr. Kumar claims that he saw the face of the first accused. Moreover, Cpl. Arvind stated in his evidence that he observed that Mr. Kumar and his family was in a state of shock when he visited the house on 4th of June 2013.

14. Lord Widgery CJ in **Regina v Turnbul and another (1977) 1 QB 225 (229)** held that;

"when, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult condition, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification".

15. Mr. Kumar only saw the face of the first accused just for 30 seconds or a minute while other two robbers approached him and started to beat him. Apart from the face, he has observed the other physical features of the first accused with his covered face during the tribulation of this robbery. He stated that he remembers this face because of his big lips and wide forehead. It appears that Mr. Kumar could be in a difficult position to properly and clearly see and remember the face of the first accused, though he is convinced with his memory of the first accused's features. Furthermore, he has observed a tattoo on the accused's forearm. The absence of proper identification prior to this dock identification has reduced the credibility and the desirability of this observation. Moreover, there is a possibility that the complainant might have seen the first accused in the court house prior to give evidence.

16. After a month of this incident, the complainant has seen a person at Salava road and suspected his as the first accused. However, there is no specific evidence that how long and what distance he saw that person.

17. Having considered the reasons set out above, it is my opinion that the evidence of identification of the first accused person by Mr. Kumar is not reliable and desirable, thus, I do not accept them as safe and trusted evidence of identification.

18. I now draw my attention to consider, whether there is other evidence that support the evidence of identification of the first accused person. The prosecution presented evidence of Cpl Alipate and Cpl Arvin to prove that two laptops and a camera, which were stolen from the complainant have recovered from one of the relatives of the first accused person and one Anare. However, the prosecution failed to call that relative of the first accused or Anare to prove that they got those items from the first accused or someone acted on the instruction of the first accused. Therefore, I do not find there is other evidence presented by the prosecution to support the evidence of identification of the first accused person. Accordingly, it is my considered opinion that the prosecution has failed to prove beyond reasonable doubt that the first accused person together with two others have committed this alleged crime on 4th of June 2013.

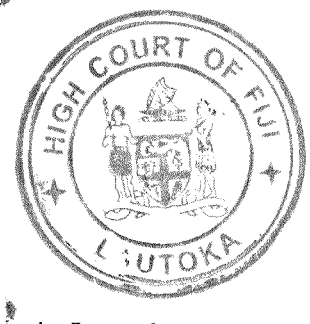
19. I now turn to the case of second accused person. The prosecution's case against the second accused is mainly depended on the confession made by the accused in his caution interview. The court is required to consider the correctness and the truthfulness of the confession made in the caution interview **(Justice Calanchini in Kean v State (2013) FJCA; AAU 95.2008 (13 November 2013).** In his caution interview, the second accused had admitted that he stood near the bed, where the complainant and his wife were sleeping, while other two were searching the room. He has then pulled the gold chain of the complainant from his neck. At that point the complainant woke up. According to the second accused's confession, they then fled away. He has further admitted that he ran away out of the house and other two joined him later. However, the complainant

and his wife testify in their respective evidence that three persons were inside the room and they remained in there until they robbed the house. Accordingly, it is apparent that the prosecution has presented two versions of this alleged incident through their evidence. One is the version of the complainant and his wife and the second is the second accused person's confession. This contradiction undoubtedly raises a reasonable doubt about the correctness and the truthfulness of the second accused person's confession in the caution interview.

20. Having considered the reasons discussed above, it is my opinion that the prosecution has failed to satisfy the court beyond reasonable doubt that the two accused persons are guilty for this offence of robbery as charged in the information. Hence, I have a cogent reason to disagree with the unanimous guilty verdict of the assessors against the two accused persons.

21. I accordingly find the two accused persons are not guilty for the offence of Aggravate Robbery contrary to section 311 (1) (a) of the Crimes Decree 44 of 2009, and acquit them accordingly.

22. Thirty (30) days to appeal to Court of Appeal.



R. D. R. ThusharaRajasinghe

Judge

At Lautoka

3rd of June 2015

Solicitors : Office of the Director of Public Prosecutions

The Legal Aid Commission, Lautoka Office