

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 47 OF 2014

STATE

-v-

1. PENI YALIBULA
2. MIKAELE TURAGANIVALU
3. RUSIATE TEMO ULUIBAU
4. ULAIASI QALOMAI
5. TEVITA QAQANIVALU

Counsel: **Mr. J. Niudamu for the Prosecution**
 Ms. V. Narara for 1st Accused
 Ms. S. Nasedra for 2nd Accused
 Ms. P. Chand for 3rd Accused
 4th Accused *in absentia*
 5th Accused in Person

Dates of Hearing: **23rd May – 03rd June, 2016**

Date of Summing Up: **06th June, 2016**

SUMMING UP

Ladies and Gentleman Assessor,

1. It is now my duty to sum up this case to you. You will then be required to consider your opinions. Each of you must give a separate opinion whether each accused is guilty or not Guilty.

2. In coming to your decision you must apply the law as I explain it to you. It is my duty to regulate the procedure of the trial and direct you on the law. Those directions on the law must be followed by you.
3. However I do not decide the facts. That is for you. As I speak to you, you may feel that I have formed some view on a particular question of fact. If you disagree with the version of the facts that I appear to be expressing, then please feel completely free to disregard my opinion. All matters of fact are for you and you alone. 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. You decide what facts are proved and what inferences you can properly draw from those facts. You then apply the law as I explain it to you and decide whether the opinion should be guilty or not guilty.
4. You must come to that decision solely upon the evidence you have heard from the witnesses. If you have previously heard anything about this case or the people involved, through the media or some other source, you must ignore that completely. The law requires that the accused are to be judged solely upon the evidence sworn to in this Court. In considering that evidence you are expected to apply your common sense and everyday knowledge of human nature and people. You must please put aside any feelings of prejudice or sympathy which may occur to you one way or the other and arrive at your verdicts calmly and dispassionately.
5. The charges against the accused are set out in the information that you each have a copy of. This charge is brought by the Prosecution and the onus of proving it rests on the Prosecution from beginning to end. There is no onus on the accused at any stage to prove their innocence or to prove anything at all. They do not need to give evidence. In this case, except the 2nd accused, accused have chosen to do so but they still carry no onus. The law is that the Prosecution must prove the essential ingredients of the charge beyond reasonable doubt before there can be a verdict of guilty. That is the standard of proof I mean when I say throughout this summing up that the Prosecution must prove some matter proof beyond reasonable doubt. That is a classical phrase that you will have heard

many times. Those words are clear and will be readily understood by you. They mean just what they say. A reasonable doubt is a doubt which you find is reasonable in the circumstances of this case. If, after a full consideration of the evidence, and bearing in mind the directions I give to you, you find the charges are proved beyond reasonable doubt your opinion must be 'guilty'. On the other hand, if you are left with a reasonable doubt, your opinion must be 'not guilty'.

6. You apply that test to the case against each accused. That is an important matter. As you are aware the five accused are jointly charged with the same crime.
7. The law recognizes that more than one person may be parties together committing a crime. In this case it is alleged that the accused were acting on a joint enterprise together. The Prosecution says that they were involved with other persons in the commission of the crime. In view of this allegation it is convenient to deal with their cases together in the one trial.
8. However, they are still entitled to have their charges considered separately. I direct you that you must consider the case against each accused separately. In doing this you must carefully distinguish between the evidence against one accused and the evidence against the other. You must not, for instance, supplement the evidence against one accused by taking into account evidence referable only to another.
9. In the same way, you must bear in your mind that there are four counts in the information. You have to consider each charge separately.
10. This case comes within a small compass and I do not think you will have any difficulty in keeping distinct in your minds evidence which properly and fairly relates to all of them and that which relates to one of them alone. I will refer to this when I discuss the evidence with you.

11. There is one matter I should mention however and that is the caution interview given by the accused Peni Yalibula to the Police. That caution interview can only be used in the case relating to him. As a matter of law, nothing in that caution interview can be regarded as evidence against the other accused.
12. However, accused, except the 2nd accused, have given evidence. All that evidence becomes evidence in the case against the accused. The evidence you can consider in the case against each accused, the caution interview is only referable to the case against the 1st accused.
13. Accused are charged with four counts. I have already given each of you a copy of the information you can refer to it.
14. There are two counts of **Act with Intent to Cause Grievous Harm**. To find an accused guilty of the offence Act with Intent to Cause Grievous Harm, Prosecution has to prove the following elements beyond reasonable doubt.
 - The accused
 - With intent to cause some grievous harm
 - To the complainant
 - Unlawfully wounds him by any means.
15. As I mentioned before, you decide the intent of the accused by considering what the accused did or did not. His actions before, at the time and after the act, the weapon used, the number and the injuries caused and also the place of the body where the injuries were inflicted.
16. Unlawfully means simply without lawful excuse. Grievous harm means and includes any dangerous harm to the body. I must now explain the elements of the offence of Aggravated Robbery to you. It is defined in the Crimes Degree a robbery becomes

aggravated when it is committed by two or more people or in the commission of the offence an offensive weapon had been used.

17. For an accused to be found guilty of **Aggravated Robbery** the Prosecution must prove following elements beyond reasonable doubt.
 - The accused;
 - Committed robbery in company with one or more other persons; **or**
 - Committed robbery and, at the time of robbery, has an offensive weapon with him.
18. Robbery means, the accused immediately before, at the time, or immediately after committing theft, uses force or threaten to use force on the complainant with intent to commit theft or to escape from the scene. Robbery is really an aggravated form of theft. The theft is aggravated because it is carried out by using violence against the victim or by putting the victim in fear of violence. So the offence of robbery becomes aggravated robbery, if it is committed in the company with one or more other persons, or if at the time of robbery the accused has an offensive weapon with him. Offensive weapon includes any article, made or adopted for use for causing injury to or incapacitating a person or any article the accused intends to use or threatens to use to cause injury to a person.
19. Theft is dishonest appropriation of the property belonging to another with the intention of permanently depriving the other of that property.
20. To find an accused guilty of the 4th count of **Damaging to Property**, the prosecution must prove that the accused caused damage to the property of the Complainant.
21. In this case, the Prosecution alleges that accused in a joint enterprise entered Mr. Mani Ram's shop. The accused punched and assaulted Mr. Mani Ram and his security personnel Mr. Naushad with bottles, took away the money and items to the value of \$10000.00 and damaged property to the value of \$6609.00. The accused deny that they

were the persons involved. Now on the Prosecution's version, none of these persons committed all the elements of the offence. It is alleged that on entering the shop, some accused used violence towards the occupants and some of them damaged property and some of them took property away.

22. In these circumstances I must explain to you the liability of a number of people who commit a crime together. If several people decide to commit an offence together, and all of them participate and assist each other in doing it - each of them is guilty of the crime that is committed. This is so, even though individually, some of them may not actually do the acts that constitute the offence.
23. In this case the prosecution alleges that these two accused and one other were on a criminal enterprise together. They set out to rob Mr. Mani Ram's shop. That is to steal property from him by violence as I have explained it to you. If this is proved then each person who participated is a party to that robbery. That is so even though only one of them actually completed the robbery by taking the property. Same principle applies in respect of other two offences as well.
24. If it is proved that all the people concerned embarked upon a criminal enterprise together intending that one or more of them should actually cause personal violence to the victim and damage the property before they robbed Mr. Mani Ram of his property. In that case they were intending to commit the offence of robbery with violence. Each may have played a different part but they were all knowingly assisting each other to commit that offence.
25. There is a final legal matter I must direct you on which is very important. In this case the Prosecution case depends wholly on the correctness of identifications of the accused as the offenders. The Defence challenges this identification and says that the witnesses are mistaken. The Prosecution relies on a CCTV video recording in addition to other evidence adduced to prove the identity of the accused. In respect of the case against the 5th accused, the Prosecution solely relies on the video recording and the identification

done by a police officer, after watching the footage. In these circumstances I must warn you of the special need for caution before convicting the accused on the correctness of this identification.

26. The reason for this is the danger that a wrong identification will cause a miscarriage of justice and there have been cases where this has happened. It is not a question of a witness being untruthful but mistakenly believing the person seen at the crime scene at the crucial time or seen in the video was the accused. With this genuine belief a mistaken witness can nevertheless be a convincing one. I am not saying that is necessarily the case here. I am explaining the reason for the special care with which you must approach this issue.
27. You must consider the case against each accused separately and decide whether the evidence of identification is reliable and should be accepted or whether it is unsatisfactory and should be rejected or leaves you in doubt. To do this you must examine all the circumstances and determine the strength or quality of the identification. It is for you to assess the value of the evidence that has been given.
28. To do this you must closely examine the circumstances in which the identifications came to be made. Generally, this will include such matters as:
 - How long did the witness have the person under observation? Was it a significant period or just a fleeting glimpse?
 - At what distance?
 - In what light?
 - Was the view impeded or obstructed in any way?
 - Was the accused a person known to the witness?
 - Had the witness ever seen the accused before and, if so, how often?

- How long elapsed between the original observation and any subsequent identification of the accused as that person?
- How was the subsequent identification made?

29. Such matters as these go to the quality of the identification evidence. In respect of the CCTV footage, deface challenged the quality of the film. Prosecution witness Mr. Reddy who tendered the CCTV footage himself admitted that it was somewhat blurry. On the other hand, police officer who recognized the 5th accused in the footage said it was clear enough for him to identify the accused who was known to him since 2009. You had the opportunity to watch the video recording and observe its quality. You must take extra care and be satisfied that, by watching the video footage, the officer was able to recognise the person whom he said was the 5th accused. For this purpose you can compare the description of identification given by the witness with the accused sitting in the dock. If after a consideration of all that evidence the quality of the identification remains good the danger of mistaken identification is lessened. But the poorer the quality the greater the danger.
30. In this case the evidence of identification was given by Mr. Mani Ram, Mr. Naushad and Mr. Jone Toga. Mr. Mani Ram and Mr. Naushad say that they observed 3rd and 2nd accused respectively in their shop. They picked them out at the identification parade and identified them as two of the offenders. Jone Toga on the other hand, had not attended an identification parade. He made a dock identification of the 1st accused as the person who gave a chase out of the shop and assaulted him. Witness Mr. Joeli Lotawa, although he did not make a dock identification, said that the person who chased Toga out of the shop was caught at the crime scene and was later handed over to police. The police arresting officer said that the 1st accused was arrested soon after the robbery at the crime scene. You can take into consideration this evidence and draw any inferences you think logical and give such weight as you wish when you evaluate identification evidence.
31. Two separate foundations of identifications are relied upon by the Prosecution; namely the two identification parades and the CCTV footage. Each piece of identification

evidence can constitute support for the identification by the other. That is a matter for you to determine but you must first bear in mind the warning I have given you and remember the possibility of honest witnesses being mistaken. It is possible that several people could all make the same mistake.

32. The circumstances of the identification evidence in this case are that the observation of the offenders was in the shop of the witness Mr. Mani Ram. According to eye witnesses the lights were on. They observed the offenders in close proximity for a reasonable length of time. According to the footage, robbery lasted for nearly 8 minutes. It was not a fleeting glimpse although the whole episode was over fairly quickly. The person identified as Tevita had a yellow cap over his head but it did not cover his face. The robbery occurred at 3.08 a.m. Just 24 -36 hours later witnesses Mr. Mani Ram and Mr. Naushad identified both 3rd and 2nd accused at a formal identification parade at the Police Station. Both positively identify the two accused as two of the robbers.
33. The Defence case is that this identification is incorrect and cannot be relied upon and I will shortly draw your attention to the criticisms that are made.
34. Before leaving this topic of identification I should say something about Mr. Mani Ram's evidence in respect of identification of 1st, 2nd and 5th accused in court. He did not attend an identification parade to identify those accused before coming to court although he said all of them were there at the time of the robbery.
35. Identification of the accused in the dock is notoriously suspicious, particularly when there has been no other identification since the time of the incident. You see, a witness coming into court is expecting to confront the offender. He or she knows that a person has been charged with the offence and there would be a natural tendency in those circumstances to assume that the accused in court must be the offender. He has a special place in the courtroom and is easily identifiable. He is not selected out from a group of people and there is a danger that he may be identified because he is the person in court that the witness assumes must be the offender that the witness saw on the earlier occasion.

36. In addition, there has been such a considerable lapse of time that in this case it would be safer and fairer to the accused to ignore that aspect of his evidence. I stress that I am only referring to his evidence of identification in respect of the 1st 2nd and the 5th accused and not his other evidence.
37. I must also caution you about evidence adduced against the 4th accused Mr. Ulaiasi Qalomai. He was not present in Court and not represented by a Counsel. He did not have the opportunity to cross examine the witnesses called by the Prosecution. You must not draw the inference that he evaded court and waived his right to be present in Court and other rights available to him in conducting his Defence because he was guilty. That does not mean that evidence against him should be rejected. I only caution you and remind that evidence against him was not tested by cross examination.
38. That completes my directions to you on the legal issues.
39. I must also remind you of the evidence given and the cases of both the Prosecution and Defence. In doing this I do not propose going through all the evidence of every witness. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision on this case.
40. I will deal with Prosecution and Defence cases in respect of each accused separately.

Case for Prosecution

Mr. Sevika Nand Reddy

41. Mr. Reddy had been working for Daily Shop located at Lot. 1 Martintar, Nadi for four years. On 6th of April 2014, there was a break in at the shop. He watched, on following day, 7th of April, the CCTV footages taken from eight surveillance cameras installed at different places of the shop the. Cameras had recorded the break in. He made soft copy from the Digital Video Recorder (DVR) using a Universal Serial Bus (USB), burnt into

six Digital Versatile Disc (DVD)s. All DVD copies were given to police between 7th and 9th of April 2014 once made. One copy was tendered in evidence marked as PE.1. He identified the DVD by the writing that belongs to his brother in law Nishal Ram.

42. He played in Court different video files stored under each channel. Whilst watching, he pointed out his father- in- law, the shop owner, Mr. Mani Ram and the security personnel Mr. Naushad.
43. Under cross examination, he recalled giving a statement to the Police on the 9th of April 2014. The USB copy was given to Police officers on the 6th of April. Police had seen the footage the same day that is on the 6th of April.
44. He denied having made any alterations to the DVDs except the transfer before they were given to police on the 8th. He confirmed that the original saved in the hard drive from the DVR was still intact in the laptop and was in his possession though it was not tendered in evidence. He agreed that the video displayed in court was rather blurry and the faces of those that was shown is not that clear.
45. He did not write his name on the DVD because his writing was not that good.
46. He just converted using an available software. Answering the a question asked by court, he said that the original footages saved in the hard drive is available in his laptop to be watched. Police offices watched the original DVR video before he made copies and the original version saved in the USB was given to police officers during investigations. He was not an expert in converting and burning DVDs but had experience. Downloading of the footages was done in the presence of police officer. The first downloading of the USB took place in the daytime in the day the 6th of April and later on he made DVDs at 10 p.m..

Doctor Naveen Kumar

47. On the 6th April 2014, Doctor Victor examined two patients injured in a robbery at the Nadi Hospital. He admitted the patients after examination and made notes in their admission folders. Police Medical Forms were filled referring to those notes.
48. Patient Mani Ram relating the history said that he was hit on the head with a beer bottle and punched on the face several times. Patient was bleeding from the head. Referring to the medical report (PE1), Doctor described the injuries he noted on Mani Ram's head and face. Acute injuries had been caused recently by a sharp object.
49. 2nd patient Mr. Naushad was bleeding from the head. History related to the doctor was that he was assaulted with a bottle and punched on the face. Referring to PE.2 the Doctor described in detail the wounds noted on Mr. Naushad's head. There was acute injury caused less than twelve hours, possibly with a sharp object.
50. Under cross examination, doctor denied examining the patients on the 2nd of June 2014. He said that he examined the patients on 6th April 2014 and, referring to relevant hospital folders, he filled the Medical Forms on 2nd of June 2014. Mani Ram was discharged on the 7th of April 2014.

Mr. Mani Ram

51. Mr. Mani Ram is a businessman for the past 20 years running a shop named 'Daily Shop' at Martintar, Nadi. On the 6th of April 2014, early morning, he was in the shop selling things. During off time he was watching TV. His security man, Mohammed Naushad was also with him.
52. Between 3 a.m. and 4 a.m., one tall iTaukei guy came in and forced him to sell one roll of cigarette. He refused as it's not lawful to sell one roll. After that that he went outside and returned with 3-5 people who helped him force enter the shop through the grill counter.

One of them forced open the grill door and entered the shop. Three of them started assaulting Mr. Naushad and two of them started assaulting him.

53. They punched, kicked and pushed him down. He was twice struck on his head with a beer bottle. He was bleeding from hand and nose and became unconscious for about 2 minutes. There was bright light inside and out side the shop.
54. When he regained consciousness he found items in his shop, missing and damaged. Items like beer bottles, liquor, computer, cash, dried kava, cigarettes valued at \$6000 and \$5,000 in cash had been stolen. Property valued at 6000 was damaged. Only one broken cash register was later recovered.
55. He was admitted in the hospital. On the 7th of April 2014, police took a statement and took him to an identification parade held at the Nadi Police Station.
56. Under cross examination, Mr. Mani Ram said that he was discharged from the hospital between 1 – 2 pm, on the 7th. He denied that police officers accompanied the 3rd accused to his shop on the 7th and seeing him before the ID parade.
57. He had seen the third accused earlier as a customer. Even though the accused was a frequent visitor he had not known his name and where he was actually from, but he knew his face. At the time he gave his first statement to police he was not in a stable condition. He could not recall how many statements were given to police. He later admitted giving a statement on 30th of October, 2014, after watching the CCTV footage. He said that the description- ‘a thin tall Fijian man’ referred to in the 1st statement was about the man who first approached for a cigarette role.
58. Speaking about the ID parade, Mr. Mani Ram said that people lined up were under 30 years of age, different in height and complexion. He did not see any injury on the 3rd accused.

Mr. Mohammed Naushad

59. On the 6th April 2014, Mr. Naushad was employed at Mr. Mani Ram's Daily Shop as a security guard. Around 3 a.m., whilst on duty, three iTaukei people came to the shop first and one of them put his head through the small cage while the other three were trying to push him in through the cage. When they couldn't do that then one of them came and kicked the door and the door broke. Then four of them entered and assaulted him.
60. They punched him and hit him on his head with a filled bottle. Six people were inside the shop for about five minutes. Mr. Mani Ram was beside the counter and another person was assaulting him. When he was hit on his head, he fell down on the bottles. When he fell down they were still kicking and punching.
61. He got admitted to hospital for 24 hours and got his head wounds stitched. His statement was recorded in the hospital. On the 7th of April 2014, he was taken to an ID parade at the Nadi Police Station. Ten young iTaukei boys were lined up in the identification parade. He identified the second accused. He was the person who punched his face. It was the first time he had seen him. Whilst assaulting, he saw the 2nd accused's face clearly for about 2 seconds and when he came back from the hospital he saw the incident on the laptop.
62. Under cross examination, Mr. Naushad said that he saw the 2nd accused's face before the bottle of Rum was smashed on his head. First he was punched, then another one came and smashed with the rum bottle. They were inside the shop for about 8 minutes. First, he said that he had watched the video before he attended the ID parade. Later he said that he watched it after he attended the ID parade. He denied that he was able to identify the 2nd accused at the ID parade because he had seen him in the footage before. He can't forget the person who punched on his face.
63. He did not deny having stated to police on the 7th of April 2014 that one of those he saw was a tall, dark boy and another one was fair in complexion.

ASP Petero Tuinirarama

64. ASP Petero has been in Fiji Police Force for 33 years serving in almost all the branches of the Fiji Police Force. He, on a request of the investigating officer DC Anil, conducted the identification parade for the 2nd and 3rd accused on the 7th of April 2014 at the Nadi Police Station. He was so invited because he was not immediately involved in the investigation.
65. He was guided under Police Force Standing Orders and followed the sequence of having an identification parade. He selected 9 personalities from the same age group, same nationality and same built as the suspects for the line up. Mr. Temo, the 3rd accused, was called first. He did not object to anyone standing in the parade. He was given the option to stand up at any position as he wished. The first suspect chose to stand up at No. 2. First witness Mr. Mani Ram positively identified the 3rd accused Mr. Rusiate Temo.
66. Soon after that the very same sequence was done to the second witness Mr. Mohammad Naushad who was escorted to the very same identification parade. Same sequence was followed before Mr. Mohammed was called in. The second accused was called and was given the same options and rights. He stood up at No. 3 position of the parade. Witness Mohammed positively identified the second accused.
67. Under cross examination, he did not deny that some of the nine young iTaukei boys lined up in the parade were not almost similar but they all were of the same complexion as the two suspects.
68. He denied that witness Mr. Mohammed attended the ID parade on the 8th of April. He did not notice any visible injuries on Rusiate Temo and he was not limping.

Mr. Joeli Lotawa

69. On the 6th of April 2014, around 3 a.m., he came to the Daily shop owned by Mr. Mani Ram with three of his friends and bought six bottles of beer. They were drinking beside the shop when 6 Fijian boys got off from a mini van. They decided to join them in drinking. They offered a bottle of whisky and started to have beer together.
70. Whilst drinking, one of them tried to cause trouble with them. Then, they said they wanted to leave and wanted their drink back. He could sense that something was going to happen. So he gave them their bottle. They left and went inside the Daily Shop from where they bought drinks. In a short while, they could hear a loud voice calling for help coming from the shop. He told his friends that robbery was going on inside the shop and told them that they should go and help the shop keeper.
71. They arrived near the shop and waited for them in front of the shop to catch the robbers. All of them were inside the shop touching all sorts of things on the shelves, just like they were shopping around. One of his friends, Jone Toga went inside the shop and a fight broke out. One of them came out from inside the shop and punched one of his friends. Robbers started throwing beer bottles at them. They started to retaliate. The guy who punched Jone Toga followed him outside. They managed to punch him and catch him in front of the shop. Jone Toga got injured in the fight.
72. The rest of them left leaving the 1st accused behind. They punched and kicked the 1st accused badly in front of the shop and overpowered him. Then they called the Police. Police arrived in 10 – 15 minutes. They handed the 1st accused over to the Police. There was blood all over his face.
73. Under cross examination, he said that he saw only one of them wearing a pompom and one of them wearing a cap. He did not identify the persons who had robbed the shop at an ID parade. He did not describe whether they were wearing pompoms or caps when he made a statement to police because he was not asked to. If they asked he would have

described in detail. Robbers were close to them and the light inside the shop was bright enough to identify them.

Corporal Akariva Nanovu

74. On the 6th of April 2014, when he was attached to the Nadi Polices station, he was called to duty around 4 a.m. as there was a robbery at the Daily Shop in Martintar. When he and his driver arrived at the scene he saw one of the accused badly injured with facial and multiple injuries on his body. He arrested him at the scene and took him to the Nadi Hospital. Plenty members of the public were in attendance. Suspect was treated at the hospital and taken to the Nadi Police Station. He identified the person arrested as the 1st accused.
75. Under cross examination, he denied that the 1st accused was not taken to the hospital on the 6th of April, 2014. He said suspect was not fit to be cautioned at the time of the arrest as he was semi-unconsciousness. The owners of the shop and the villages who helped to arrest pointed out the suspect. Suspect was the only one with injuries. He denied assaulting and punching the 1st accused at the scene.

Constable 3458 Saiyasi Matarugu

76. On the 7th of April, 2014 Cpl. Saiyasi interviewed Mr. Peni Yalibula the first accused in iTaukei under caution at the Nadi Police Station. Detective Sargent Nagata was present witnessing the interview. Accused did not complain of anything. He was given an opportunity to consult a lawyer. There was no inducement or promise given. No assault or threat took place before or during the interview. Accused had facial injuries. He asked if he was taken to the hospital.
77. Interview commenced at 10.30 a.m. and finished at 5.20 p.m. Sufficient breaks were given in between. Original iTaukei interview was marked as PE. 4 and the English translation as PE.5. He read PE.5 in evidence.

78. Under Cross-examination, he denied assaulting, threatening or denying the accused's rights. During reconstruction, he voluntarily pointed out the crime scene.
79. He denied that the caution interview was conducted on the 8th. April 2014. He said that only the translation was done on the 8th.

Inspector Nagata Batidegei

80. On the 7th April, 2014 he was stationed at the Nadi Police Station when the interview of the 1st accused was conducted by Constable Saiasi. He was present throughout interview as the witnessing officer. Accused was treated fairly. Accused did not make a complain of anything during the interview.
81. Under Cross-examination, he confirmed that the interview and the reconstruction were done on the 7th of April and not the 8th. He saw the injuries on the accused.

Mr. Jona Toga

82. In the early morning of the 6th of April 2014, Mr. Toga was in Martintar near the Daily Shop drinking beer with Mr. Joeli Lotawa and two other friends.
83. They went to Daily Shop and bought 6 bottles and started drinking beside the shop when group of five iTaukei people came and joined them. They were drinking together for some time and, after that, they left and went inside the Daily Shop.
84. He knew only one of them. He was Ulaiasi Qalomai one of his school mates at Namaka Public School. When Qalomai recognized him, he came closer to him and was telling stories. There was light. His friend, Ulaiasi Qalomai, went inside the shop with other boys.

85. In a short while, Toga heard a scream from the shop. He and his friends went inside the shop to see what's going on. He was the first one to enter the shop. He saw his friend Ulaiasi Qalomai and other boys breaking in, stealing things inside the shop. They threw beer bottles at him. His forehead got injured. Then he ran back outside and joined Joeli Lotawa and other friends who were standing at the entrance of the shop. One of them chased him outside whom he managed to catch. Person caught was punched. Toga identified the person who was caught and got punched as Peni Yalibula. Police came around 3.00 a.m.
86. After the incident, he saw Ulaiasi Qalomai, attending this case during his first call in Court. Toga came last year as a witness in this case for Ulaiasi Qalomai. He was not to be seen in the accused box today. On the earlier occasion, he came to Court as a witness and identified Ulaiasi Qalomai.
87. Under cross-examination, he said that he had not known Peni Yalibula before. It was Josateki Savou and Joeli Lotawa that had assaulted Peni who followed him out of the shop. He was not taken by Police for a parade at the station. He gave a statement to Police on the 2nd May 2014. In his statement, he did not mention Peni Yalibula's name.

DC 3567 Leone Vurakania

88. DC. Leone was attached to the CID Branch of the Nadi Police Station with 11th years' experience in the Fiji Police Force. On the 25th of May 2014, when he was stationed at the Nadi Police station, the investigation officer of this robbery Cpl. Anil showed him the CCTV footage of the robbery. He identified Tevita Qaqanivalu as one of the 6 robbers involved in the robbery at the Daily Shop in two scenes. He described how he recognised Tevita. He recognised the tattoo, the marijuana leaf, on the left cuff muscle, the distinguished way he walks and the colour of his fair skin as a Tongan descendent.
89. When the CCTV footage was being shown to you Leone explained how he recognised Tevita and described him as the person who was wearing a yellow cap, long sleeved shirt

as he entered the shop and assisting one of his co-accused being lifting up to the the counter and also as the person who was running outside with the cash register.

90. DC Leone described how he came to know Mr. Tevita in 2009. When he was serving in the southern division in Samabula, he first encountered Mr. Tevita and, on number of occasions thereafter, they had encountered each other in the Court house in Suva.
91. He said he knew Mr. Tevita personally and described his personal details like his origin, his place of residence.
92. Mr. Tevita appearing in person cross examined the witness. Under cross examination witness said that he was at Samabula Police station from 2005 until he was transferred to Nadi Police station on 13th February 2014.
93. Tevita was also known as 'Boat' and he encountered him for the first time when he arrested him in 2009. Last time he had seen him before he watched the CCTV footage was in 2013 in Suva at the Magistrate Court # 2. During the robbery took place he was in Suva attending Court. When he returned to Nadi he watched the CCTV footage on the 25th of May, 2014.
94. When Mr. Tevita suggested that he was a serving prisoner in 2013 and that he had no case in Suva, witness said that he saw him attending Court sessions in Suva. Witness said that he made a statement on the same day as he watched the the CCTV footage on 25th May, 2014. He made a second statement on 2.9.2015 since the statement made on the 25th May had gone missing.
95. Witness later admitted that he was part of the interview of Ulaiasi Qalomai the 4th accused when he returned from Suva. But he was not aware if Mr. Tevita was arrested and later released after questioning.

96. Witness admitted that he knew Mr. Tevita as a suspect when he was arrested once by the Samabula Police Station. Investigation officer stated that one of the robbers was 'Boat' and asked him to watch the CCTV footage because of his experience in Suva and wanted him to verify whether he could recognise the person. He then watched the CCTV footage and recognised Mr. Tevita in the footage. He admitted that he did not mention about the tattoo on the left cuff muscle in the statement he made after watching the CCTV footage. He agreed that something seen at a crime scene with natural eyes cannot be caught clearly by watching a CCTV footage. He did not agreed that the CCTV footage was blurry.
97. That was the case for the Prosecution. At the closure of the Prosecution case You heard me explain to the accused what their rights were in defence and how they could remain silent and say that the Prosecution had not proved the case against them to the requisite standard or they could give evidence in which case they would be cross-examined.
98. As you are aware accused, except the 2nd accused, elected to give evidence. That is their right. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains on the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate. Even if you don't believe a single word a accused person says, you must still be sure that he is guilty of the crime that he is charged with.
99. You will generally find that an accused gives an innocent explanation and one of three situations then arises.
- (I) You may believe him and if you believe him then you must find him not guilty. He did not commit the offence;
 - (II) Alternatively without necessarily believing him you may say "well that might be true". If that is so, it means there is a reasonable doubt in your minds and so again you must find him not guilty;

- (III) The third possibility is that you reject his evidence as being untrue. If that is so, then he has not discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves the charge against him then you must convict him. It is for you to evaluate the separate evidence of each accused and decide what reliance you place on it.

Case for Defence

1st Accused Mr. Peni Yalibula

100. Mr. Peni said that on the 7th of April 2014, he was in Lautoka and was taken to Nadi Police Station in the morning as a suspect of an Aggravated Robbery matter. He did not know how he was taken to Nadi. When he woke up he found himself in the Crimes Office. He was questioned about an Aggravated Robbery. He told police officers that he knew nothing about it. Then police officers started beating him in front of the Police *bure* using a baton. Due to the pressure he admitted the allegation. Only the police officers who gave evidence assaulted him. Rusiate's mom was also present at the police Station.
101. He was badly injured in ribs, his back and legs. Despite his request, he was not taken to the hospital before the interview. He was taken to the hospital only after the interview on the 8th of April 2014 and was examined by Dr. Salote. Only the police officers gave information to the doctor. He tendered the medical report marked as 1DE1. On the 09th day of April, he complained to the Magistrate about the assault when he was produced in court.
102. Under Cross-examination, he admitted that he was drinking near the Daily Shop at Martintar, Nadi on the 6th of April 2014 at around 3 – 4 o'clock in the morning. He could not recall if he was assaulted by police officers near the shop. He denied having entered the Daily Shop, assaulted the occupants and robbed. He also denied that he was

interviewed on the 7th of April, 2014. However, he admitted that he had facial injuries before the interview and his rights were given by police officers.

3rd Accused Mr. Rusiate Temo

103. Temo resided at Waiyavi in Lautoka, Stage I in 2014. On the 5th day of April, 2014, he was in Lautoka. On the 5th of April, he was watching movies during night time with a friend. He knew nothing about the robbery. He was asleep at home. In the early morning of the 7th of April he was arrested and was taken to Nadi by police officers and taken to a shop in Martintar. From there, he was taken to the Nadi Police Station. He was shown to the Indian men there. Mani Ram and the security were present at the shop. He denied having any knowledge about the Daily Shop and the robbery. Then police officers started beating him. He received visible injuries and his leg got swollen. He was taken to the hospital and, on the 8th of April, was taken to an ID parade where some iTaukei people of different height and complexion were lined up. One of the same Indian men who was at the shop came and pointed at him. He was the only person with injuries. He denied shopping at Mani Ram's shop anytime before the incident.
104. Under cross examination, he said he did not know Peni Yalibula although he was from the same settlement. He denied ID parade was conducted on the 7th of April, 2014.

5th Accused Mr. Tevita

105. Tevita said that the day robbery took place he was at home at Nadi, at his girlfriend's house. Few months after the incident he was arrested by Strike Back Unit and released after questioning as there was no evidence against him. He was arrested twice for this matter. 2nd time he was arrested was in Suva, one year after the robbery and was informed that he had been identified by a officer during the alleged incident. He tendered the caution interview (5A1) in evidence and drew your attention to it. He said that he was arrested on the basis that he was identified by an officer at the crime scene but the trial proceeded on the basis that he was identified through a CCTV footage.

106. Under cross examination, Tevita admitted that he was in Nadi Back Road from the 5th to the 6th of April 2014. He also admitted he is part Tongan. He denied taking part in the robbery and denied that the boy wearing a yellow cap in the CCTV footage was him. When questioned, he neither denied nor accepted that he had a tattoo on his left cuff muscle and objected to the question. He admitted that he was arrested for this offence in May, 2015.
107. That in brief, is a summary of the Prosecution and Defence cases in respect of the accused.

Analysis

108. There are four charges charge in the information. As you listened to the closing remarks by the Counsel and the 5th accused, you would appreciate that there is no dispute in this case that a robbery with violence occurred and property damaged at Mr. Mani Ram's Daily Shop at Martintar in the early morning of 6th April, 2104 and five or six people participated in the robbery. You watched on the screen as to how it took place. Only dispute is with regard to the identity of the accused. That is entirely a matter for you to decide. You must consider the identification evidence in terms of the direction that I gave to you.
109. Accused deny that they were present. The Defence case is that it has not been proved and the verdicts should be 'not guilty'.
110. The prosecution says that the Defence evidence is totally untrue and discredited by the prosecution witnesses and therefore, the Defence evidence must be rejected. The conflict is dramatic. The Prosecution says that identification evidence is overwhelming and there is other supportive evidence that strengthens the case against the accused. It says the charge against each accused has been proved and your verdicts should be 'guilty'.

111. Prosecution is relying on the caution interview and other identification evidence against the 1st accused. 1st Accused, in his caution interview, had made certain admissions. Giving evidence in Court, he challenged the voluntariness of the interview and took up the position that those admissions were obtained illegally by police, violating their constitutional rights. Accused maintained that they made those admissions involuntarily due to fear of police torture. Police witnesses vehemently denied those allegations.
112. You have before you the cautioned interview of the 1st accused in which he made those admissions. You heard accused giving evidence in Court. You also heard other evidence and received a copy of his medical report. It is for you to assess what weight should be given to his caution interview. If you are not sure, for whatever reason, that those admissions are true, you must disregard them. If, on the other hand, you are sure that they are true, you may rely on them.
113. Remember, admissions made in 1st accused's caution interview are admissible only against him. If he had implicated one or several of his co-accused in his caution interview, you must completely disregard those parts in evaluating evidence against the co-accused.
114. 1st accused had not been produced for an identification parade. Prosecution version is that he was caught at the crime scene and was later handed them over to police officers. 1st accused denied that he was caught and assaulted by members of the public at the crime scene and put the blame on police officers for injuries he received. You heard evidence given by Mr. Jone Toga, arresting officer Cpl. Akariva and Mr. Josateki. You also watched the CCTV footage. It is up to you to decide what version is true.
115. 2nd accused challenged the Identification Parade procedures. ASP Petero rejected the allegation that the proper procedure was not followed. ID parade had been held within 36 hours of the incident. Mr. Naushad said that the robbers were inside the shop for 8 minutes. He said that the light was bright and he observed the 2nd accused's face clearly for 2 seconds when he was punched on his head. Bearing in mind the caution I have

given, you decide if Mr. Naushad is an honest witness and if he positively identified the 2nd accused at the crime scene. You watched the CCTV footage. It is up to you to decide what version is true.

116. 3rd accused was identified by Mr. Mani Ram at the ID parade within 36 hours after the incident. Mr. Mani Ram said that 3rd accused's face was familiar to him as a frequent visitor to his shop. 3rd accused denied having shopped at his shop earlier. 3rd accused took two different versions as to the basis of his identification at the ID parade. He said that he was pointed out by police officers to Mr. Mani Ram before the ID parade was conducted. On the other hand, he said he was singled out at the parade as the only person having injuries. You watched the CCTV footage also.
117. 3rd accused took up a defence of *alibi*. He said that after watching a movie with a friend, he was sleeping at his house in Lautoka at the time the robbery took place. He did not call his friend as an *alibi* witness. He had not given prior *alibi* notice to police to check his *alibi*. You decide what weight you give to his evidence on *alibi*. However, you must remember, he has no burden to prove his *alibi*. Even if you do not believe a single word of his evidence, burden of proof remains with the Prosecution to prove that he was in fact present at the crime scene at the crucial time.
118. Taking into consideration the caution I have given to you, you decide if Mr. Mani Ram is an honest witness and whether he positively identified the 3rd accused.
119. 4th accused was not present during trial. Mr. Jona Toga said that he recognised Ulaiasi Qalomai before and during the robbery. He knew Ulaiasi as a school mate at Namaka Public. Toga had talked to Ulaiasi in that crucial morning soon before the robbery. He had seen Ulaiasi stealing inside the Daily Shop. In this regard, Mr. Toga had given a statement to police. He had earlier identified Ulaiasi in this case when he testified as a witness. Having considered the caution I have given in respect of trials taken up in the absence of an accused, you decide what weight you should give to Mr. Tog's evidence.

120. 5th accused was not produced for an ID parade. Prosecution relied on the CCTV footage and DC Leone's evidence. You heard accused giving evidence and his final address. Bearing in mind the caution I have given, you decide what weight you give to DC Leone's evidence and whether he had positively identified the 5th accused on the CCTV footage.
121. 5th accused also took up a Defence of *alibi*. He said that he was with his girlfriend at her house Nadi at the time of the robbery. He did not call his girlfriend as an *alibi* witness. He had not given prior *alibi* notice to police to check his *alibi*. You decide what weight you give to his evidence on *alibi*. However, you must remember, he has no burden to prove his *alibi*. Even if you do not believe a single word of his evidence, burden of proof remains with the Prosecution to prove that he was in fact present at the crime scene at the crucial time.
122. It is up to you to decide whether you could accept the version of the Defence and that version is sufficient to establish a reasonable doubt in the prosecution case. If you accept the version of the Defence, then you must not find the accused guilty. Even if you reject the version of the Defence still the Prosecution should prove its case beyond reasonable doubt.
123. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused are not required to prove their innocence, or prove anything at all. In fact, they are presumed innocent until proven guilty.
124. Ladies and Gentleman Assessor it is for you to determine the case of each Accused separately against each count on a consideration of all the evidence and applying the directions that I have given to you.
125. That concludes my summing up of the law and the evidence in this particular trial. We have now reached the stage where you must deliberate together and form your individual

opinions on whether the charges have been proved against each accused. I remind you that you must consider the case against each accused separately. On your return you will be asked to separately state in Court your opinion in respect of each accused whether they are guilty or not guilty of the charges with which they are charged with.

126. Would you please now retire to consider your opinions. When you have made your decisions would you please advise the Court clerk and the Court will reconvene to receive your opinions.

127. Your possible opinion would be as follows:

1st Count - 1st accused guilty or not guilty?

2nd Count - 1st accused guilty or not guilty?

3rd Count - 1st accused guilty or not guilty?

4th Count - 1st accused guilty or not guilty?

1st Count - 2nd accused guilty or not guilty?

2nd Count - 2nd accused guilty or not guilty?

3rd Count - 2nd accused guilty or not guilty?

4th Count - 2nd accused guilty or not guilty?

1st Count - 3rd accused guilty or not guilty?

2nd Count - 3rd accused guilty or not guilty?

3rd Count - 3rd accused guilty or not guilty?

4th Count - 3rd accused guilty or not guilty?

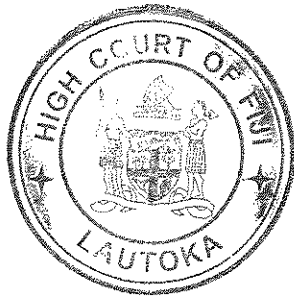
1st Count - 4th accused guilty or not guilty?


2nd Count - 4th accused guilty or not guilty?

3rd Count - 4th accused guilty or not guilty?

4th Count - 4th accused guilty or not guilty?

1st Count - 5th accused guilty or not guilty?
2nd Count - 5th accused guilty or not guilty?
3rd Count - 5th accused guilty or not guilty?
4th Count - 5th accused guilty or not guilty?




Aruna Aluthge
Judge

AT LAUTOKA

On 06th June, 2016

Counsel: Office of the Director of Public Prosecution for Prosecution
Office of the Legal Aid Commission for 1st, 2nd and 3rd Accused
5th Accused in Person