

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

Date of Summing Up: 06th June, 2016
Date of Judgment : 13th June, 2016

JUDGMENT

1. The accused were charged with the following counts and tried before three assessors.

FIRST COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: Contrary to Section 255
(a) of the Crimes Decree 44 of 2009.

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to **MANI RAM**, unlawfully wounded the said **MANI RAM** by kicking, hitting and striking him in the head with a liquor bottle.

SECOND COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to **NAUSAD MOHAMMED**, unlawfully wounded the said **NAUSAD MOHAMMED** by kicking, hitting and striking him in the head with a liquor bottle.

THIRD COUNT

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Decree 2009.

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, robbed **MANI RAM** of assorted liquor valued at \$3,400.00, assorted cigarettes valued at \$1,300.00 and \$5,300.00 cash all to the total value of \$10,000.00 and immediately before the robbery, force was used on the said **MANI RAM**.

FORTH COUNT

Statement of Offence

DAMAGING PROPERTY: Contrary to Section 369 (1) of the Crimes Decree 2009.

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, willfully and unlawfully damaged assorted liquor valued at \$3,200.00, assorted juice valued \$580.00, 1 x computer valued at \$650.00, dried Kava valued at \$220.00 and 1 x cash register valued at \$499.00 all to the total value of \$6,609.00 the property of **MANI RAM**.

2. At the end of the trial, assessors found the accused guilty of all the counts with which they are charged. Having concurred with the majority opinion I proceed to deliver my judgment as follows.
3. Prosecution called eleven witnesses, to prove their case.
4. There is no dispute in this case that a robbery took place at Mani Ram's Daily Shop in Martintar in the wee hours of 6th April, 2104 and five or six people participated in the robbery. There is also no dispute that during the course of the robbery, Mani Ram and his security personnel Nausad were badly injured and property damaged.
5. Prosecution alleges that five accused were on a criminal enterprise together to set out to rob Mani Ram's shop and they were present at the crime scene robbing the shop. Prosecution further says that identification evidence is overwhelming and there is other supportive evidence that strengthens the case against the accused. Accused deny that they were present. The only dispute in this case is with regard to the identity of the accused.
6. Four eye witnesses were called by the Prosecution. In addition to that, a CCTV footage obtained from eight surveillance cameras that had been installed at the crime scene was also relied upon by the Prosecution to prove the identity of the accused. It is the Prosecution's case that accused were the people to be seen in the film. The quality of the film was not of the best. I cautioned the assessors in line with Turnbull rules of identification.

7. Mani Ram and Nausad were inside the shop at the time of the robbery. They said that they clearly identified the 3rd and 2nd accused respectively. Jone Toga who happened to be at the crime scene and received injuries in the incident said that he identified the 1st and 4th accused. DC Leone said that he identified the 5th accused while watching the CCTV footage. Defence rigorously contested the identification evidence.
8. First I look at the evidence adduced by the Prosecution against the 1st accused. Jone Toga made a dock identification of the 1st accused. Toga is an independent witness who intervened to help the shop keeper. He saw robbers stealing things inside the shop. When he approached the robbers he came under attack. One robber chased him out of the shop and apprehended. Witness Joeli Lotawa and Toga's other friends intervened and managed to catch the robber. Robber was severely punched and later handed over to police officers. Toga identified the robber who chased and punched him as Peni Yalibula.
9. The evidence of Toga as to the incident was corroborated by witness Lotawa and by the video footage. The video footage was not clear enough to recognise the face of the 1st accused although his body language and the physique clearly matched with the robber in the CCTV footage. Neither Toga nor Lotawa had been called by police for an identification parade to identify the 1st accused. In my opinion, there was no necessity for 1st accused to be identified in an identification parade. There was a proper foundation for Toga to make a dock identification. The robber who chased Toga was caught and got punched by Lotawa and Toga's other friends and had been handed over to police officers who had arrived at the crime scene soon after the robbery. Corporal Akariva confirmed that the person arrested at the crime scene with facial injuries was the 1st accused. He had been pointed out by the people who made the arrest. 1st accused later admitted under caution having participated in the commission of the crime. Prosecution relied on the admission made in the caution interview of the 1st accused.
10. Giving evidence in Court, 1st accused challenged the voluntariness of the interview and said that admission was obtained using torture. Police witnesses vehemently denied those allegations. In the course of the trial, I reviewed my own finding on *voir dire* proceedings in respect of voluntariness, fairness and the constitutionality of the

caution interview. Other evidence led in the trial including the CCTV footage corroborated what the accused had told police under caution. I am satisfied that caution interview is a truthful statement of the 1st accused.

11. Having considered the caution interview and other evidence led in the trial, I am satisfied that the identity of the accused is properly established.
12. Witness Nausad identified the 2nd accused as one of the robbers. Making a statement to police on the 7th of April 2014, whilst in the hospital, he had described one of the robbers as a tall, dark boy and another one being fair in complexion. Having been discharged from the hospital he attended an identification parade on the same day and identified the 2nd accused as the person who punched his face.
13. Witness Nausad earlier said he watched the video footage before attending the identification parade and later contradicted his earlier statement and said it was after attending the ID parade that he watched it. The Counsel for the 2nd accused cross examined Nausad on the basis that he identified the 2nd accused only because he had watched the CCTV footage before attending the identification parade. He denied the proposition of the defence. The very basis of the cross examination suggests that the video footage is clear enough to recognise people in it.
14. Witness Nausad had seen the 2nd accused's face before the bottle of Rum was smashed on his head. Robbers had been in the shop for about 8 minutes. Light was bright inside the shop. He had clearly seen the 2nd accused's face for two seconds during punching and said that he could not forget the person who punched his face.
15. The 2nd accused challenged the fairness of the identification parade procedures. ASP Petero rejected the allegation. identification parade had been held within 36 hours of the incident. Although he oversaw the crime management in Nadi District, he conducted the parade as an independent officer being not immediately involved in the investigation process. People lined up in the parade were of the same ethnicity, age group and built as the accused. There is no evidence of unfair procedure being followed or accused being singled out at the parade.

16. I am satisfied that witness Nausad is an honest witness and he positively identified the 2nd accused at the crime scene.
17. Witness Mani Ram identified 3rd accused as one of the robbers who entered his shop. He identified the 3rd accused at the identification parade within 36 hours of the incident. He said that 3rd accused's face was familiar to him as a frequent visitor to his shop.
18. The 3rd accused denied having shopped at Mani Ram's shop earlier. He took two different positions as to the basis of his identification at the identification parade. He said that he was pointed out to Mani Ram by police officers before the identification parade was conducted. On the other hand, he said that he was singled out at the identification parade as the only person having injuries.
19. On the 7th of April 2014, Mani Ram gave a statement to police. He had not mentioned in his first statement that he recognized the 3rd accused on the basis of familiarity as a frequent customer. Only description he had given to police was about a 'thin tall Fijian man'. He was not in a stable condition when he made his 1st statement at the hospital. He explained the 'thin tall Fijian man' as the person who first approached for a cigarette role. Video footage corroborated his his evidence.
20. Even though the 3rd accused was a familiar customer, Mani Ram had not known his name and where he was actually from. He knew only his face. In these circumstances, holding of an identification parade was logical.
21. Mani Ram denied that 3rd accused was pointed out to him by police officers before the identification parade. He had been discharged from the hospital in the afternoon of the 7th whereas the 3rd accused had been arrested in the early morning of the 7th. 3rd accused said he was taken directly to Mani Ram's shop after his arrest. By that time Mani Ram was still in the hospital.
22. The 3rd accused failed to prove his *alibi* and failed to create any doubt in the prosecution case. If he was watching a movie with a friend, and was sleeping in his house in Lautoka after that, he could have called his friend to support his version. He

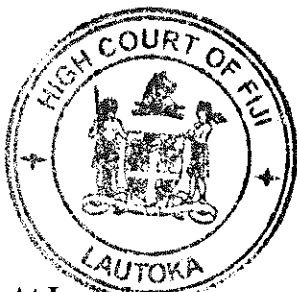
did not call his friend as an *alibi* witness. He had not given prior *alibi* notice to police to check his *alibi*. Although he had no burden to prove his *alibi*, he failed to create any doubt in the prosecution case.

23. There is no reason to reject Mani Ram's evidence. I am satisfied that Mani Ram is an honest and reliable witness. This is not a fleeting glimpse case. Robbers had confronted the witnesses face to face for a considerable time. Their faces were not covered. Lighting condition had been good. Video footage confirmed that conditions were conducive for a proper identification. I am satisfied that Mani Ram positively identified the 3rd accused.
24. Trial proceeded in the absence of the 4th accused Ulaiasi Qalomai. Witness, Jona Toga said that he recognised Ulaiasi Qalomai before and during the robbery. Toga had even talked to Ulaiasi few minutes before the robbery. He had seen Ulaiasi steeling inside the Daily Shop. In this regard, Toga had given a statement to police. Toga had known Ulaiasi as a school mate at Namaka Public school.
25. Ulaiasi was in the dock when Toga was testifying at the *voir dire* hearing. He was recognised in the dock by Toga. Since then Ulaiasi knew very well that Jona Toga is an adverse witness for his defence case at the trial. He could have discredited Jona Toga at the trial if Jona Toga was lying. Ulaiasi, knowing very well the trial date, absconded and waived his right to be present and right to cross examine. Only inference that Court can draw is that Toga told the truth to this court.
26. The 5th accused was not produced for an identification parade. It is not prudent for police to do so as he was arrested nearly one year after the robbery. Prosecution relied on the CCTV footage and DC. Leone's evidence to establish his participation in the crime. I warned the assessors about danger of convicting the accused if they are not sure about his identity.
27. The CCTV footage that was shown to the assessors was not crystal clear, not clear enough to recognise at the first glance the face of the person whom DC Leone described as the 5th accused. However, the body language, the distinguished way he walked and the complexion of the skin were clearly visible. DC Leone described how


he recognized the 5th accused whilst watching the footage. Apart from the body language, the distinguished way he walked and the complexion of the skin, a unique mark on his left cuff muscle had helped DC Leone to identify the 5th accused. He had observed the tattoo of a marijuana leaf on the accused's left cuff muscle which he was familiar with. He showed the tattoo which was clearly visible in the footage to the assessors as it was being played.

28. There can be no doubt that DC Leone was better positioned than assessors to recognize the unique behavioral characteristics of the accused and marks on his body. He denied that the CCTV footage was blurry or of poor quality. He had the advantage of watching the CCTV footage at the police station several times at a closer range. To him, accused was a familiar figure. Witness had known the accused since 2009 when he was arrested by Samabula police station. 5th accused did not deny when he cross examined DC Leone on the basis that he had met DC Leone as a suspect at the Samabula Police Station. Witness had met the accused several times thereafter at the Suva Court Complex last such meeting being in 2013. As a detective constable he is expected to observe marks found on the body of a suspect and make special note of them.
29. Accused was evasive and not prepared to answer when he was cross examined by the prosecutor whether he had such a tattoo on his left cuff muscle. He objected to the question and refused to answer. Although he had nothing to prove in this case he could have created a reasonable doubt in the DC Leone's evidence if he showed his left cuff muscle to the Court and assessors.
30. I invited the assessors in my summing up to compare the person depicted in the video with the accused in the dock. Assessors viewed the video and over the space of a two week trial observed the accused sufficiently to make their own identification. The assessors would have formed their own view on the matter and tested DC Leone's recognition evidence by reference to their own perceptions. DC Leone had two undoubted advantage over the assessors. First, of knowing the accused in a more relevant way than available to the assessors simply by watching them in the dock... secondly, officer in fact said that he made his own recognition independently and spontaneously. That certainly was not a possibility open to the assessors.

31. At the end of the trial, assessors were satisfied, by watching the CCTV footage for themselves, and evaluating DC Leone's evidence on it, that Prosecution was able to establish the identity of the 5th accused. I also watched the CCTV very attentively. I agree with the finding of the assessors.
32. The 5th accused also took up the defence of *alibi*. He said that he was with his girlfriend at her house in 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*. Although he had no burden to prove his *alibi*, he failed create any doubt in the prosecution case.
33. I find DC Leone to be a truthful witness and he had positively identified the 5th accused on the CCTV footage.
34. I accept the version of the prosecution, and reject that of the Defence. Accused failed to create any doubt in the Prosecution case. Prosecution proved the case beyond reasonable doubt.
35. I agree with the unanimous opinion of the assessors which is available on evidence led in the trial.
36. Prosecution discharged its burden and proved each element of counts 1, 2, 3 and 4 beyond reasonable doubt.
37. I find all the accused guilty on all the counts and convict them accordingly.
38. That is the judgment of this Court.



At Lautoka
13th June, 2016



Aruna Aluthge
Judge

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