

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 298 of 2016

[CRIMINAL JURISDICTION]

STATE

V

MOSESE ULUICICIA

Counsel : Ms. U. Tamanikaiyaroi with Mr. E. Samisoni for State
Ms. S. Hazelman for Accused
Hearing on : 25th October - 02nd November 2017
Summing up on : 06th November 2017

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room and the exhibits tendered. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses

have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes we honestly forget things or make mistakes regarding what we remember.

8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared

with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
13. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must find the accused not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
15. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge is proved against the accused.
16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.

17. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

Statement of Offence

AGGRAVATED ROBBERY: *contrary to section 311(1) (a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MOSESE ULUICICIA WITH ANOTHER *on the 6th day of August 2016 at Samabula in the Central Division, robbed Jan Mohammed Sakur of AUD 50 dollars cash, FJD 150 dollars cash, one Apple iPhone valued at \$2,000.00, one Samsung Galaxy 5 valued at \$2,000.00 and Assorted Jewellery valued at \$10,000.00, one Honda CRV registration number FH 787 valued at \$35,000.00, all to the total approximate value of \$49,250.00 and immediately before the theft did use force on the said Jan Mohammed Sakur.*

18. To prove the offence of aggravated robbery the prosecution must prove the following elements beyond reasonable doubt.
- a) the accused;
 - b) committed robbery; and
 - c) the robbery was committed in the company of one or more other persons.
19. The first element involves the identity of the offender. The prosecution should prove beyond reasonable doubt that the accused committed the offence and no one else.
20. A person commits robbery if he immediately before committing theft; or at the time of committing theft; or immediately after committing theft, uses force or threatens to use force on another person with intent to commit theft or to escape from the scene.
21. A person commits theft if that person;
- a) dishonestly;
 - b) appropriates the property belonging to another;
 - c) with the intention of permanently depriving the other of that property.

22. The element 'dishonestly' is about the state of mind of the accused. So is the element, 'intention to permanently deprive'. Inferences may be drawn from the conduct of the accused, with regard to an accused's state of mind.
23. 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. In law, property belongs to a person if that person has possession or control of the property.
24. Robbery becomes aggravated robbery, if the robbery is committed in the company with one or more other persons.

Summary of the evidence

25. First witness for the prosecution was Jan Mohammed Sakur. His evidence was that;
 - a) *He is the managing director of Sakura Cars and Motor Parts Traders Ltd. and he resided at Lot 37 Toganivalu Road, Samabula. On 05/08/16 he was alone at his house and his wife Nasira Mohammed was due to return from Canada on the following morning. He went to bed around 9.30pm that day. Around 2am on the following morning he was awoken by two Fijian youths whose faces were covered. The two Fijian youths told him to keep quiet, punched him a few times and tied his hands at the back. They took his Apple iPhone, switched it on and showed him a \$5 note and asked him where the money is. He told them to check his trouser pocket. Thereafter again they came to him, showed a piece of gold and asked him where the gold is and he told them to check the next room. He saw them walking around the house with torch light ransacking each room till about 5.30am.*
 - b) *Later on when the police came an ambulance was arranged to take him to the hospital. The following items were stolen on that day; \$150 FJD and \$50 AUD, 1 x Apple iPhone valued at \$2,000, 1 x Samsung Galaxy 5 valued at \$2,000, assorted jewelries valued at \$10,000 and 1 x Black Honda CRV registration number FH 787 valued at \$35,000.00. The total value of the items stolen is \$49,150. The two Fijian youths took his phone and asked for the password and punched him. He told them that the password which was his date of birth is 201236. He is the only person who knew the password to his phone. On 09/08/16 the police showed him an Apple iPhone and he identified that phone because it was unlocked when he pressed the password.*
 - c) *He had that phone for approximately 18 months. He identified the phone shown to him in court as the one that was stolen. He entered the password in court and he showed that the phone was unlocked. He also pointed out that there is a message in*

the phone from his daughter that the mother is coming on Saturday. This phone was tendered as PE 2.

- d) During cross examination he agreed that he did not mention about the password in his phone in his first statement given to police. He also agreed that he told the police about the password when the police officers brought the phone to him on the 9th August.*

26. Next witness was Nasira Bibi Mohammed. She said;

- a) She is the wife of the first prosecution witness. They live in the two-storey house at Lot 37 Toganivalu Road for more than 20 years. On 06/08/16 which was a Saturday, she arrived from Canada at about 5am and reached home around 8am. She did not enter the house because the vehicle driven by her husband, registration No. FH 787 was not there. She then went to their shop at Samabula. When she asked the boys at the shop, about her husband she was told that the husband was supposed to go with one of the drivers to pick her up. Then they started looking for him. She came home with Abdul Rasheed. Her neighbour told her that the backdoor in the house is open. Then that lady's son climbed over the fence and opened the gate. They entered the house from the back door which was opened. When she went to their bedroom she saw her husband lying down with his hands tied at the back. She called the police and the ambulance. She said all the rooms were in a mess, everything was on the floor and all drawers were opened. Her jewelry bag was also missing. She said the value of the jewelries which included gold bangles and diamond rings was more than \$10,000.00.*

27. The third prosecution witness was Rigieta Benilili. She said;

- a) When she came to off the light in the garage around 6am on 06/08/16 she noticed that the door of her neighbour's house was open. Her neighbour was Mr. Sakura. Thereafter Mrs. Sakura came to her and asked about Mr. Sakura Mohammed. She informed Mrs. Sakura that the back door is open and then she saw that there is a ladder that was leaning onto the wall where the kitchen window is. The kitchen window was also open. Her son climbed over and opened the gate. They went inside the house through the back door. She entered the sitting room and saw that everything was in a mess. She saw Mr. Mohammed lying down on the floor and she informed Mrs. Sakura. She said between midnight and 6am in the morning she heard the sound of the electronic gate opening. She heard this sound in the morning but it was still dark.*

28. The fourth prosecution witness was Mr. Mohammed Rasheed. He said;

- a) In August 2016 he was employed under the first prosecution witness. On 06/08/16 he went inside the first witness's house with the second prosecution witness, the Fijian lady who is staying beside that house and her son. They saw an aluminum*

ladder leaned on the wall near the kitchen window. He said he saw the first prosecution witness lying on the floor with the hands tied at the back.

29. The fifth witness was Iferemi Suguturaga. He said;
- a) *In August 2016 he was working at a Bakery and was also working part-time at the Sand Dunes nightclub as a bouncer. On 07/08/16 around 1.00am when he took a break while he was working at the nightclub 'Lui' gave him a phone. When he was asked who Lui is, he pointed at the accused. He said he knows Lui because they used to stay together at Raiwai. They have been neighbours for about 15 years.*
 - b) *When Lui approached him that morning he was able to see Lui clearly. Lui showed him the phone and told him that he had no money. It was a silver phone. He then took that phone to Signals nightclub which was about 3 metres away so that he can sell the phone to the bar-tender, Tulia. Tulia did not want to buy the phone for the price quoted by Lui initially which was \$200.00.*
 - c) *He then went outside and told Lui about Tulia's response. Then he was told by Lui to sell the phone for \$160. He again took the phone inside to Tulia and told her that the phone is \$160. Then she took the phone and gave him the cash. He came out and gave the \$160 to Lui. He saw some boys standing beside Lui. When he gave the phone to Tulia she asked the password for the phone as the phone was locked. Though Lui showed him the password when he was outside he forgot it when Tulia asked for the password. Then he went back and asked Lui again. Lui pressed the password on his phone which was 201236. He then went inside and showed the password to Tulia.*
 - d) *He said when Lui came to him with the iPhone one Saimoni Junior who was also a bouncer in the Sand Dunes nightclub was present. He identified PE 2 as the iPhone given to him by Lui on 07/08/16. He pointed at the accused as the person he was referring to as Lui.*
 - e) *During cross examination he said he does not know any other name of the person he referred to as Lui. He said the other bouncer Saimoni Junior is called by the name 'Junior'. He said he only mentioned the name Lui to the police and he did not say that Lui's name is Mosese Uluicicia. When it was pointed out that it is written in his statement made to the police that his colleague 'Joe' saw him giving the phone, he said police had mistakenly written that and 'Joe' is supposed to be 'Junior'. When it was pointed out that it is stated in his statement made to the police that he saw Lui at the top bar around 1am he said it was outside. He said the content the police had put in his statement is wrong. When it was pointed out that he had told the police that Lui gave him \$20 he said Lui did not give him any money. He denied that he told Tulia that the phone belongs to him. He denied the suggestion that he implicated the accused to save himself when the police questioned him about the iPhone.*

30. The sixth prosecution witness was Saimoni Kalidredre Heamasi. He said;
- a) *On 06/08/16 he was working as a bouncer at the Sand Dunes nightclub top bar. His shift started at 6 o'clock and finished at 4.30am. He said Iferemi Suguturaga was also on duty at the top bar with him. Around 1am he saw Lui approached Iferemi. He knew Lui because Lui always come and drink at Sand Dunes. When Lui approached Iferemi he was beside Iferemi and nothing was blocking his view. He said Lui and Iferemi were talking to each other and he saw Lui giving Iferemi a phone. He said it was grey at the back and the front is black and it was an iPhone. After the phone was given to Iferemi they both left. He recognized PE 2 as the same iPhone he saw Lui gave Iferemi that morning. He said he had not spoken to Lui but he knows Lui because they had troubles in the club. He said he can recognise Lui very well. He pointed at the accused as the person he referred to as Lui.*
 - b) *During cross examination when he was asked how can he say he knows Lui if he had never spoken to Lui, he said he knows Lui because one day there was a fight with Lui and after few weeks Lui came to him and apologised. He said his colleagues at work call him 'Junior'. He agreed that he did not tell the police when his statement was recorded that he is also known as Junior. He agreed that he told the police that the mobile phone he saw was a black iPhone.*
31. The seventh prosecution witness was Tulia Raluve. She said;
- a) *On 06/08/16 she was working as a bartender at Signals Nightclub. Around 1am on 07/08/16 an iTaukei man asked her if she can buy his phone for \$200. This was a grey colour phone. When she asked whose phone is it, he said that it was his. She said she thinks that the name of this iTaukei man is Filimoni. She did not want to buy it for \$200. He then went and came back around 2am. He asked her how much money she can give for the phone and she said she got \$160. According to her the iTaukei man told her that his father is really sick and therefore he needs the money. The iTaukei man gave her the phone, the password and the charger for \$160. Thereafter he came back to her again to change a \$20 note.*
 - b) *She had this phone for nearly one week. After that, police from the Samabula Police Station came to her house looking for the iPhone. They took the iPhone from her. She told the police that she got the phone from one bouncer in Sand Dunes Nightclub. She identified the phone she referred to as PE 2.*
 - c) *During cross examination she agreed that the iTaukei man told her that he will put down the price of the phone to \$170 and that she told that to the police.*
32. The eighth prosecution witness was police officer, Mahendra Narayan. He said;
- a) *He is based at Valelevu Police Station in the Traffic Section. On 06/08/16 he reported for work at 10.50pm. Around 4.30am the following morning a taxi driver informed about a vehicle that was parked near Food Town Supermarket at Valelevu. He went with another officer to check the vehicle. The registration*

number of the vehicle was FH 787. The key was in the ignition. They waited for about 45 minutes looking for the driver and thereafter that vehicle was brought to the Valelevu Police Station. Thereafter upon receiving information that the said vehicle was stolen from Samabula area he informed the Samabula Police Station regarding the vehicle and thereafter it was handed over to a police officer from the Samabula Police station.

33. The ninth prosecution witness was the doctor who examined the first prosecution witness. He said;

a) He examined the first prosecution witness on 06/08/16. He tendered the medical report as PE 3. He said he observed abrasion/bruising on both wrists and lips and bruising at the back.

34. The tenth prosecution witness was DC 4643 Vilikesa Baledroma. He said;

a) He is stationed at the Samabula Police station for the past seven years. On 06/08/16 he was instructed by his Crime Officer to investigate this case. As part of the investigation he obtained a search warrant to track the IMEI number of the complainant's phone that was stolen. They received information that a new sim card had been inserted to that stolen phone and the owner of that sim card is Penisoni Bogidua.

b) Thereafter they located Penisoni Bogidua and inquired about the phone. They were informed that his number was used by his wife, Tulia Raluve. Then Tulia Raluve was questioned about the mobile phone and the mobile phone was taken from her. They were informed by Tulia Raluve that she bought the phone from an unknown person in the nightclub. He said he handed over the mobile phone to the crime writer at the Samabula Police Station. He identified PE 2 as the phone he recovered from Tulia.

35. The eleventh prosecution witness was Detective Corporal 3400 Abdul Khan. He said;

a) He is currently based at the Samabula Police Station. He said he recorded the statement of Iferemi Suguturaga. He said Iferemi was given the statement to read before it was signed. He also said he went to the Valelevu Police Station upon receiving information about the vehicle. He arranged the vehicle to be taken from Valelevu Police Station to the Samabula Police Station.

b) During cross examination he said Iferemi Suguturaga's statement was recorded in English. He said Iferemi was first interviewed under caution and after the interview all that was put into the written statement. He denied fabricating the statement of Iferemi.

36. The twelfth prosecution witness was Detective Sergeant 4485 Viliame Naupoto. He said;

- a) *He is based at the Police Crime Scene Unit. He said he had undergone in-house training and also has been trained by Interpol as a crime scene officer. On 06/08/16 he received instructions around 10.58am requesting him to attend a case at Lot 37 Toganivalu Road. When he arrived at the scene he was briefed by DC Munilesh and was escorted to the alleged point of entry. He noticed that the inner window had been removed and placed along a wooden counter at the kitchen. He said he obtained two sets of finger prints that were on the tiles directly beneath the push-out window. The said finger prints were then labeled and packed in a brown envelope. He said he made a note of the address and a basic description of where the prints were taken from when labeling them. He initialed both. The two finger prints he obtained were tendered as PE 4 and PE 5. He identified the envelope which the finger prints were put in and it was tendered as PE 6. He said he handed over the finger prints to the officer-in-charge along with a brief crime scene report he prepared when he went back to the office.*
- b) *During cross examination he said according to their procedure they only take photographs of the prints when the prints are on rough surfaces where they cannot be uplifted using the finger print lifters. When it was suggested that the finger prints were not uplifted from Lot 37 Toganivalu Road but when the accused was held in custody, he said those are the prints that he uplifted from the scene.*

37. The thirteenth prosecution witness was Police Constable 4149 Kalivati. He said;

- a) *He is stationed at the Samabula Police Station. On 11/08/16 he obtained the finger prints from the accused inside the crime office. He tendered the finger print form as PE 7. He confirmed taking the prints that are printed in PE 7. He said he wrote 'Lui' in part C of that form as the alias of the accused based on the information provided by the accused. He handed over PE 7 to Constable Vilikesa.*

38. The final prosecution witness was Mosese Rokobera. He said;

- a) *He served in the Fiji Police Force for 36 years and retired last month. He said he had served in the Fiji Police Forensic Services for 32 years and retired as the Director of the Forensic Services. He had undergone extensive training in crime scene examination and finger prints analysis. He gave an account of the training he had undergone overseas. He said he had dealt with more than 2,000 cases of finger print comparison during his service. He explained the process of comparing finger prints. He said he conducted the analysis of the finger prints in this case on 13/10/16.*
- b) *He said he examined the two prints PE 4 and PE 5 and compared with PE 7. He used the right index finger which he had marked with the box in PE 7 and prepared a chart for the purpose of explaining in court. He tendered the finger print chart he*

prepared as PE 8. On PE 8, he had marked twelve identification characteristics which he found to be in true relative position and coincidence sequence. He explained that coincidence sequence means that the characteristics should be in the same position with the one that is compared with. He also tendered PE 9 where he had recorded the explanations. He said the presence of the twelve characteristics he had identified confirms that finger print from the crime scene and the finger print in the finger print form are from the same person and that is the accused in this case.

- c) He said once the finger prints are brought to his office they will be locked inside the locker in his office, and only he has the key for the locker. He said that it has been established for the last 100 years that two persons have not been found to have the same finger print.
- d) During cross examination he admitted that he spoke to Viliame Naupoto who gave evidence before him, during the lunch break. He denied the suggestion that he discussed regarding the evidence Mr. Naupoto gave in court during this conversation. When it was suggested that he cannot confirm that Mr. Viliame Naupoto actually went to the scene of crime and uplifted the prints, he said it is part of their procedure where crime scene examiners endorse at the back of the lifts where they collect the finger prints from. He said they will only take photographs of the prints if the prints are found on a rough surface or in a situation where it is impossible to lift the print with a finger print lifting tape.
- e) He denied the suggestion that the finger prints were obtained when the accused was in police custody. When it was suggested to him that the accused's finger prints were not uplifted from the kitchen tiles at Lot 37 Toganivalu Road, he said he believed that it was lifted from the tiles at a window in the said address. He further said that in one of the prints there is a white portion across the lift that confirms that it is the joint of white tiles.

39. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give sworn evidence and called three witnesses.

40. The accused said in his evidence that;

- a) He had been residing at Jittu Estate for more than eight years. Before that he was residing at Vatuvaqa and before Vatuvaqa he was residing at Raiwai. He said he was staying at Raiwai for about two years. At Jittu Estate he is living with his father, Sevanaia Matana; mother, Apikali Matana; and his brother, Benjamin Tukana.

- b) *On 05/08/16 he was at home with his parents and his elder brother. That evening he did not go anywhere. He had dinner with the rest of the family and thereafter they all watched movies. He said they watched the movies inside the room. He went to sleep thereafter. He, his father and the brother slept in the room while his mother slept in the sitting room. He said he did not go anywhere between the evening of 05/08/16 and the morning on 06/08/16. He said he can't recall the time he woke up in the morning on 06/08/16. On that evening he went to a youth community meeting in Newtown with a friend. After the meeting there was a grog session. He said he ran away from the grog session and went home. He could not recall the time he went home. He denied the allegation.*
- c) *During cross examination he denied that he is called 'Lui' and said that people call him 'Moji'. When he was asked whether one of his neighbours at Raiwai was Iferemi Suguturaga he questioned 'who is Iferemi Suguturaga?'. But then when he was asked whether he recognised this man who came to give evidence he said 'yes'. He also said 'yes' when it was suggested that he recognised him because they were neighbours in Raiwai. He also admitted the suggestion that he knows him because he works at Sand Dunes Nightclub. He denied knowing Saimoni Kaidredre. When he was asked whether he woke up after he went to sleep on 05/08/16 he said he can't recall. He also said he can't recall when it was suggested that he left the bedroom while his father and brother were sleeping and also he noticed that his mother was sleeping when he went to the sitting room. When he was asked whether he agrees that he cannot explain how his finger prints were found at the crime scene he said 'yes'.*
- d) *During re-examination he said he can't explain his finger prints at the crime scene because he was not there.*

41. The next defence witness was the accused's mother. She said;

- a) *On the afternoon of 05/08/16 only she and the accused were at home because the accused's brother and the father were at work. She said the accused's brother and father usually come home at 7 o'clock. That evening after having dinner they had their prayer session. Then they watched movies. The accused, his father and the brother were watching the movie inside the bedroom while she was in the sitting room. She said the TV was inside the bedroom. She sleeps in the sitting room while the other three sleep in the bedroom. She said when she woke up on 06/08/16 she saw the accused, the father and the brother. She said the accused usually stays at home because he had nothing to do. She said she did not see the accused leave the house between the evening of 05/08/16 and the morning of 06/08/16. On the evening on 06/08/16 a man approached the accused and thereafter the two went to attend a meeting at Nadera. The accused returned from the meeting at 11pm.*
- b) *During cross examination she said the accused was still awake before she slept. She said she used to wake up at 12 o'clock, sometimes 1 o'clock and sometimes 2 o'clock to do her prayers. She agreed that she did not mention to the police that she woke up on the early hours on 06/08/16 when she gave her statement. She said she does*

not know whether the police had asked her that question or not. She said since their house is small if someone go pass her, she could feel that. She denied the suggestion that the accused left the house just after midnight on 06/08/16 while she was asleep.

42. The third defence witness was the accused's father. He said;

- a) *He worked at USP as a cleaner and retired after 12 years. On the afternoon on 05/08/16, his wife and his two sons, the accused and Benjamin were with him at home. That evening after having dinner they watched movies. He slept on the mattress with the accused while Benjamin slept on the bed. His wife slept in the sitting room. He said he did not see the accused leave the house from the evening of 05/08/16 to the morning on 06/08/16. He said the accused was at home on 06/08/16. In the afternoon the accused went to Nadera to attend a meeting and he returned home around 11 o'clock. He couldn't recall whether the accused went anywhere else after that.*
- b) *During cross examination he said when he slept in the night on 05/08/16 he did not wake up until next morning. He denied the suggestion that because he did not wake up till 6am on 06/08/16 he wouldn't know if the accused left the house after midnight. He further said that if the accused goes out he can know.*

43. The fourth defence witness was the accused's brother Benjamin Tukana. He said;

- a) *He is a joiner by profession. On 05/08/16 he returned from work around 6 o'clock. When he came home the accused and his parents were at home. After having dinner that evening they watched movies. They were just watching movies the whole night. He said he can't recall seeing the accused go anywhere between the afternoon on 05/08/16 and the morning on 06/08/16. He said he finished watching the movies around 2 o'clock and by that time the others were sleeping. When he woke up the next morning the accused was at home. That day he went for a village meeting and returned at 10 o'clock in the night. When he returned home his parents and the accused were at home. He said he can't recall what they were doing.*
- b) *During cross examination when it was pointed out to him that in his statement to police he had stated that he went to sleep after watching movies around midnight, he said from 12 to 2 o'clock it is midnight. He confirmed that the accused was at home when he came home after the meeting on 06/08/16. When he was asked whether he called the accused by the name 'Lui' he said 'yes'. When it was suggested that other people knows the accused as Lui he said the family calls the accused Lui but the friends call him Mosese.*

44. That is a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit. As I have already explained, which evidence you would accept and do not accept is a matter for you to decide.
45. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence have been proven beyond reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.
46. The evidence in chief of the first prosecution witness was tendered in the form of an affidavit (PE 1) which was read in court. This was done in order to save time because the said witness' hearing is impaired. You should remember however that PE 1 is not a document admitted by the defence as true. You should therefore assess the contents of PE 1 as you would assess any other evidence.
47. The ninth prosecution witness who was the doctor who examined the first prosecution witness gave his opinion based on the observations that were made during his medical examination and tendered his report as PE 3. The fourteenth prosecution witness gave his opinion based on what he had observed and his experience regarding the analysis of the finger prints. You are not bound to accept the evidence given by these two witnesses. You will need to evaluate the evidence of these two witnesses for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by these two prosecution witnesses. Evaluating their evidence will therefore include a consideration of the expertise of each

witness, their findings and the quality of the analysis which supports their opinion.

48. In this case, you heard from the sixth prosecution witness about an incident that took place in the nightclub prior to 07/08/16 which made him remember the person he referred to as 'Lui'. If you believe this evidence, please remember that the said evidence is only relevant to the issue whether the sixth prosecution witness identified the accused on 07/08/16. You should not draw any adverse inference against the accused in relation to this case based on the evidence of the sixth prosecution witness on the previous conduct of the accused.
49. The prosecution relies on circumstantial evidence to prove the case against the accused. Circumstantial evidence is evidence of various circumstances that may lead to the conclusion that an accused committed a particular offence, when taken together. It must not be mere speculation or guesswork. It is not sufficient that the proved circumstances are merely consistent with the accused person's guilt. To find an accused guilty based on circumstantial evidence, you must be satisfied beyond reasonable doubt that the inference of his guilt is the only rational conclusion to be drawn from the circumstances you consider as proven when taken together. Before you draw any inference you must first be satisfied beyond reasonable doubt that the evidence given by witnesses relating to the circumstances is credible and truthful.
50. There were evidence on the following circumstances among others;
 - a) *According to the first prosecution witness, two iTaukei youth assaulted him in the early hours on 06/08/16 inside his house at 37, Toganivalu Road, Samabula and stole several items from his house including his Apple iPhone tendered as PE 2. The total value of the items stolen is \$49,150. During the incident, the password of his phone which was 201236 was obtained by the two persons who attacked the first prosecution witness;*
 - b) *According to the second, third and fourth prosecution witnesses, they found the first prosecution witness lying on the floor inside a bedroom in 37, Toganivalu Road, Samabula in the morning on 06/08/16 and the first*

prosecution witness' hands were tied at the back. The third and the fourth witnesses also said that they saw a ladder leaned on to the wall near the kitchen window and that the said window was open;

- c) According to the twelfth witness for the prosecution, he obtained two sets of prints that was tendered as PE 4 and PE 5 from the tiles below the kitchen window that had been removed at 37, Toganivalu Road, Samabula on 06/08/16;*
- d) According to the thirteenth witness for the prosecution, he obtained the finger prints of the accused on the finger print form tendered as PE 7 and he was informed by the accused that the accused was known as 'Lui';*
- e) According to the final witness for the prosecution, he analysed PE 4 and PE 5 and compared with PE 7. His conclusion was that the finger print from the crime scene and PE 7 are of the same person. He said that it has been established that two persons have not been found with the same finger prints;*
- f) According to the fifth prosecution witness, on 07/08/16 around 1.00am, Lui gave him the iPhone tendered as PE 2 in front of the sixth prosecution witness to sell it and he sold it for \$160 to the 7th prosecution witness who was working at the Signals Nightclub. This witness identified the accused as the person he referred to as Lui;*
- g) According to the sixth prosecution witness Lui gave the iPhone tendered as PE 2 in front of him to the fifth prosecution witness. This witness identified the accused as the person he referred to as Lui;*
- h) According to the seventh prosecution witness an iTaukei person sold her the iPhone tendered as PE 2 at the Signals Nightclub for \$160 in the early hours on 07/08/16 and the police took this phone from her after about one week.*

51. It is important that you examine circumstantial evidence with care as with all evidence and consider whether the evidence upon which the prosecution relies upon to prove its case is reliable and whether it does prove the guilt of the accused, or whether on the other hand the evidence reveals any other circumstances which cast doubt upon or destroy the prosecution case.

52. When you consider the evidence on the identification of the accused by the fifth and the sixth prosecution witnesses as the person who gave the phone to the fifth prosecution witness, please bear in mind that an honest and a convincing witness can still be mistaken. Mistaken recognition can occur even of close relatives and friends. Therefore, you should closely examine the following circumstances among others when you evaluate the evidence given by the aforementioned witnesses on identification of the accused;
- a) Duration of observation;
 - b) The distance within which the observation was made;
 - c) The lighting condition at the time the observation was made;
 - d) Whether there were any impediments to the observation or was something obstructing the view;
 - e) Whether the witness knew the accused and for how long;
 - f) Whether the witness had seen the accused before, how often and special reason to remember; and
 - g) Duration between original observation and identification.
53. The defence points out that there are inconsistencies in the evidence led by the prosecution. The defence pointed out the evidence of the fifth prosecution witness, Iferemi Suguturaga that Lui approached him outside the night club and the sixth witness' evidence that he saw Lui approach the fifth witness inside the nightclub. The defence also pointed out the evidence of the seventh prosecution witness, Tulia Raluve that the fifth prosecution witness told her that the iPhone belongs to him whereas the fifth prosecution witness denied that during cross examination. You should consider these inconsistencies and any other inconsistency you may have noted according to the directions I gave you earlier on dealing with inconsistencies.
54. May I now direct you on the defence of *alibi*. According to the accused's evidence, he was in his house at Jittu Estate and did not go anywhere between the evening of 05/08/16 and the morning of 06/08/16. According to the 2nd, 3rd and 4th defence witnesses who was the mother, father and the brother of the

accused respectively, the accused was inside their house at Jittu Estate from the evening of 05/08/16 and the morning of 06/08/16 and they would know if the accused had left the house. Therefore, the defence of the accused is that he was not at the crime scene but were elsewhere at the time the offence was alleged to have been committed. The accused says that he could not have committed the offence because he was not at 37, Toganivalu Road, Samabula at the material time.

55. Though an accused raises the defence of *alibi*, please remember that there is no burden for the accused to prove that he was elsewhere during the time the offence was alleged to have been committed. The prosecution should still prove that it was the accused that committed the offence and therefore the *alibi* is not true.
56. When you consider the evidence of the accused regarding his *alibi*, if you think that the version of the accused is true or it may be true, then you must find the accused not guilty of the offence.
57. However, you should also bear in mind that you should not assume that the accused is guilty of the offence merely because you decide not to accept his *alibi*. You should remember that sometimes an accused may invent an *alibi* just because it is easier to do so rather than telling the truth. The main question remains the same. That is, whether you are sure that it was the accused who committed the offence.
58. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
59. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;

- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
- (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
- (iii) The third possibility is that you reject his evidence. But if you disbelieve the accused and/or his witnesses, that itself does not make the accused guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

60. Any re-directions?

61. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. You have copies of the documents tendered as exhibits. If you wish to peruse the other exhibits tendered in court, you may seek the assistance of the court clerk accordingly. When you have reached your separate opinion you will come back to court and you will be asked to state your opinion.

62. Your opinion should be whether the accused is guilty or not guilty.



Vinsent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Legal Aid Commission, Suva.