

IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 34 OF 2014

STATE

V

1. PITA NATEKURU

2. LAITIA NALAWA

3. JALE FATIAKI

Counsel: Mr. J. Niudamu for State
Ms. K. Vulimainadave with Ms Manueli for 1st and 3rd Accused
Mr. R. Vananalagi for 2nd Accused

Dates of Hearing: 9th to 12th of July, 2018

Date of Summing Up : 16th July, 2018

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 Counsel for Prosecution and Defence made submissions to you about the facts of this case. That is their duty as counsel. You are not bound by their submissions. However, you may properly take their submissions into account when evaluating evidence.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
7. The Counsel put certain propositions or suggestions to witnesses during the course of cross examination. An assertion put to a witness is not evidence unless it is accepted or adopted as being true.
8. 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. 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. 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'.

9. You apply that test to the case against each accused. That is an important matter. As you are aware on the first count all three accused are jointly charged with the same crime.
10. 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.
11. 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.
12. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a complainant who saw, heard and felt the offence being committed. In this case, for example, the Complainant Marion is a witness who offered direct evidence as to what she saw, heard or felt.
13. Documentary evidence is evidence presented in the form of a document. In this case, several documents were tendered in evidence. In this case, the caution statements of the accused are an example if you believe that such records were made. The oral evidence as to the contents of a document is not evidence unless that particular document is tendered and admitted in evidence.

14. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who gave evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.
15. Another relevant aspect in assessing truthfulness of a witness is his or her demeanor or manner of giving evidence in court. You have seen how the witnesses' demeanor in the witness box when answering questions.
16. You must bear in mind that the evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you and I suffer insofar as our memory is concerned.
17. In testing the credibility of a witness, you may consider whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.
18. You may also consider whether there is a reason or motive on the part of the Complainants to make up an allegation against the Accused. If he or she had such a motive, then you may think that this allegation has been fabricated.
19. Please remember, there is no rule in Fiji for you to look for corroboration of complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.
20. First Accused is charged on both counts. 2nd and 3rd Accused are charged only on the 1st Count. I have already given each of you a copy of the information. Please refer to it. The information reads as follows:

FIRST COUNT

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311(1) (a) read with Sections 45 and 46 of the Crimes Act, 2009.

Particulars of Offence

PITA NATEKURU, LAITIA NALAWA and JALE FATIAKI, on the 10th day of March 2014, at Volivoli, Rakiraki, in the Western Division, dishonestly appropriated (stole) 1 x Dell laptop valued at \$900; 1 x Acer Tablet valued at \$600; 1 x Toshiba Laptop valued at \$300; 1 x FUJI camera valued at \$300; 1 x CANON camera valued at \$300; 1 x APPLE I-phone valued at \$500; 1 x Ladies purple bag valued at \$100; 1 x Prada ladies bag valued at \$100; 1 x Gold plated watch valued at \$29; 2 x Sunglasses valued at \$175; 2 x Hats valued at \$30; Car keys with tags valued at \$300; \$260 cash in Fijian currency; \$300 Canadian currency, \$140.00 cash in US Currency, 1 x ALCATEL phone valued at \$800; Assorted cigarettes valued at \$99; 1 x Wi-Fi device valued at \$200; 7 x 350ml Fiji Bitter Stubby valued at \$21; 1 x Phillips DVD deck valued at \$800; and 1 bottle of wine valued at \$15, all to the total value of \$6269.00 and being the property of Marian Lavictoire and William Masek, and prior to stealing the said items **PITA NATEKURU, LAITIA NALAWA and JALE FATIAKI** used force on **MARIAN LAVICTOIRE and WILLIAM MASEK**.

SECOND COUNT

Statement of Offence

RAPE: Contrary to Section 207(1) and (2)(a) of the Crimes Act, 2009.

Particulars of Offence

PITA NATEKURU, on the 10th day of March 2014, at Volivoli, Rakiraki, in the Western Division, had carnal knowledge of **MARIAN LAVICTOIRE** without the said **MARIAN LAVICTOIRE's** consent.

21. 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.

22. 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.
23. Theft is dishonest appropriation of the property belonging to another with the intention of permanently depriving the other of that property.
24. I will now deal with the elements of the offence of Rape. In order to prove the 2nd charge, the Prosecution must prove beyond reasonable doubt that the 1st Accused penetrated Complainant Marion's vagina with his penis without her consent. Insertion of penis fully into vagina is not necessary. A slightest penetration is sufficient to satisfy this element.
25. Consent as defined in Section 206 of the Crimes Act, means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Simply put, if somebody does not resist physically it does not necessarily mean that she or he had given consent. Different people react differently to situations. You don't necessarily need violence, kicking, and shouting etc. to show that one is not consenting.
26. In this case, the Prosecution alleges that all accused persons acting on a joint enterprise committed the 1st offence of Aggravated Robbery by entering the Starfish Blue Villa at Volivoli and, using force, took away the money and items to the value of \$6,269.00. It is alleged that on entering the said villa, some accused used force towards the occupants and some of them ransacked and took the property away.
27. 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.

28. In this case the prosecution alleges that these three accused were on a criminal enterprise together. They set out to rob the villa occupied by the complainants that is to steal property from them by force. 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.
29. The prosecution relies on circumstantial evidence to prove that the accused persons are responsible for the robbery and that there is no other reasonable explanation for the robbery other than that the accused robbed the complainants that night.
30. The law on circumstantial evidence is that if, on considering a series of pieces of evidence, you are satisfied beyond reasonable doubt that the only reasonable inference to be drawn is the guilt of the accused, and there is no other reasonable explanation for the circumstances which is consistent with the accused's innocence, then you may convict the accused of the offence charged.
31. The Prosecution tendered caution statements of each accused. The caution interview of a particular accused can only be used in the case relating to him and not evidence against the others. As a matter of law, nothing in that caution interview can be regarded as evidence against other accused persons.
32. I now direct you as to how you should approach caution statement evidence. Defence says caution statements were obtained by police officers using illegal means or using various unfair practices, threats, and assaults and therefore, they should not be relied upon as true statements. Witnesses for Prosecution on the other hand denied threatening or having used any kind of unfair practices to obtain those statements. It is for you to assess what weight should be given to those caution statements. 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.
33. However, when an accused person chooses to give evidence and the same is admitted that becomes evidence you are supposed to take into account. 2nd and the 3rd accused, have given evidence although they are not required to do so. Once evidence is admitted, that evidence becomes evidence in the case and you are at liberty to consider the evidence given by an accused against each accused.

34. I will now deal with the summary of evidence in this case. In doing this I do not propose going through all the evidence. 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.

Case for the Prosecution

PW 1 Ashneel Rao

35. Ashneel said that on 10th of March, 2014, at around 10.45 he was on a night shift at Wananavu Beach Resort located at Volivoli, Rakiraki. Two guests, a lady and a man came to him and informed that they are from Starfish Blue Villa and that they were robbed. The lady was really scared. He informed the Supervisor as to what has happened and called the Police and the Manager of Starfish Blue.

PW 2 Jai Ram

36. Jai Ram, the Manager for Starfish Blue Resort gave evidence and said that in the night of the 10th of March, 2014 he got a call from one of the security guy that two guests of his resort had been robbed and they needed assistance. He went and assisted the Canadian couple. They were very scared and the lady was crying.
37. On the 12th of March, 2014, he was summoned to the Rakiraki Police Station where he was asked to identify whether the items recovered belonged to the Starfish Blue. He identified a DVD deck (PE1) and a Wi-fi device (PE.2) and told police that both were from Starfish Blue. He said that he was the one who purchased the Philips DVD player for the resort and the one who instructed the guest to operate it. He said that the wi-fi device (PE.2) was also purchased by him and it belonged to the resort. He said that the SIM card of the wi-fi device was registered under his name. Witness identified the Philip DVD deck (PE.1) and described special features that helped him to recognize it.
38. Under cross examination the witness agreed that the items he bought was also freely available in stores in Fiji. He said that Starfish Blue is a single villa and therefore he did not put an identification mark on the DVD deck. It was a part of the home theater system. He did not know the serial number. He said he was not sure if the police officers verified that the registration of the SIM card was under his name.

PW 3 Sgt. Rajnesh Prasad

39. On 15th of March, 2014, when Sgt. Prasad was based at Rakiraki Police Station he received information that one of the suspects in the robbery case had been in Vaidoko Village. He then proceeded to Vaidoko Village with Sgt. Rakesh and Cpl. Eremasi. They arrived at the Turaga-ni-Koro's house where Pita Natekuru had voluntarily surrendered himself to the Turaga-ni-Koro. Pita's mother was also present. He arrested Pita and brought him to Rakiraki Police Station and handed him over to Sailosi at the Crime Office.
40. Witness denied that Pita was already arrested at his house on the 14th of March, 2014 and taken to Waimecia Police Post, where he was questioned, threatened and assaulted by four police officers before being released on the same day. He also denied that Pita voluntarily surrendered himself to Rakiraki Police Station on 15th of March, 2014.

PW 4 Marian

41. Marian who is a Canadian citizen gave evidence via Skype. She is a registered nurse in Canada. She had come to Fiji as a tourist with her husband William Masek. On 10th of March, 2014 they were staying in Starfish Blue Resort. At around 10.15 pm they were lying down watching television. All of a sudden three men entered the room carrying items. They were dark skin, men. Her husband jumped out of bed to confront them. She wets herself. As he is confronting them, one of them came to her and grabbed her wrist where-by she slipped and landed on the floor.
42. Her husband was led downstairs by two men, while other one held her by the wrist and kept on demanding money. She said "I don't have any" and then he started to pull her in to the bathroom. Then he penetrated her vagina with his penis. When she got out of the bathroom she grabbed a sheet to wrap herself around. This man ran over to the TV and the DVD player then he came around and took her downstairs where her husband was still confronting the other two men. They went towards the safe and one of them was ransacking the electronics in that room. Then they left through the back door. Her husband was scared to go out because of the threats he had received. She persuaded him to go out and both of them then ran out and came to a security box where they received help.

43. Marian then described some of the items that were stolen; Canadian, Fijian and US dollars, two computers, bags, set of keys, cellphone, a wi-fi device that belonged to Starfish Blue, an Apple phone, an Ipad, a tablet to the value of approximately \$6,200.00.
44. Under cross-examination, Marian confirmed that the police took samples or swabs of liquid on the floor.

PW 5 William Arnold Masek

45. Masek said that items valued at \$6,000.00 were stolen including two laptops, Dell and a Toshiba, an Acer tablet, two cameras Fuji and Cannon, an Apple Ipad, a DVD player, three types of cash, Fijian, Canadian and US, car keys, wife's bags and some beer and wine. He said that one short man had a knife and two other taller men, one carrying a pinch bar or crow bar and the other either a hammer or an iron bar.
46. He said that as they entered the room, two of them came to him and brought him down the stairs by force and demand money and forced him to open the safe removed whatever cash he could and while the other one was ransacking whatever he could acquire. He admitted that some of the items stolen are not mentioned in the police report.

PW 5 Senitiki Nakatasavu

47. Senitiki said that on 12th of March, 2014, whilst patrolling around Lautoka area with Mosese Volavola he received information of one of the suspects of the Rakiraki robbery and managed to arrest Laitia Nalawa near the Lautoka Wharf at around 8 – 9 pm. The suspect was afforded all his rights at the arrest and escorted him to Lautoka Police Station, locked in the cell, and on the next day, on the 13th, they escorted him to Rakiraki Police Station. The suspect was cooperative. He was treated well during arrest and detention. After handing the suspect over to the Charge Room at the Rakiraki Police Station he came back to Lautoka with Mosese.
48. He said that when he returned to Lautoka on the 13th in the afternoon, he received information that one of the stolen properties, the Acer Brand Ipad, had been sold to one of the scrap metal yard in Lautoka, Nasoki Street. Upon receiving that information, he follow up the information and the receiver, Tony Towiri, voluntarily give the Acer brand ipad which he had bought for \$125.00.

Senitiki recognized the item in Court and tendered the search list (PE 3) and the Acer ipad and the charger (PE4) he had received.

49. Under cross-examination, Senitiki denied that he was present at the Rakiraki Police Station on the 15th of March, 2014 and that he had taken the 1st and 3rd accused to an empty room situated behind Rakiraki Police Station and, he with other itaukei officers including Mosese Volavola, Bula, Sailosi, Makitala, brutally assaulted the accused. Senitiki also denied that he and Mosese Volavola had brutally assaulted the 2nd Accused inside the Police vehicle and then in the Lautoka Police Station.
50. He said that he had received information about the tablet from the Investigation Officer Makitala and that he had just handed it over to her and had no chance to show it to the complainants.

PW 6 Detective Constable Mosese Volavola

51. Volavola gave evidence and said that he and Senitiki arrested the 2nd Accused from the Lautoka wharf and transported him first to the Lautoka Police Station and then to the Rakiraki Police Station. Under cross examination he denied that on the 15th of March, 2014, he was present in Rakiraki Police Station and had assaulted any of the accused.

PW 7 Sgt. Solomone Nainima

52. On the 15th of March, 2014, Nainima said that he searched and locked the 1st Accused in the cell at the Rakiraki Police station and escorted the 2nd Accused to the Crime Office. He said that Laitia Nalawa and Pita Natekuru are related to him.
53. Under cross-examination Nainima denied that on the 14th of March, 2014, he and three other police officers had gone to 1st accused's village, Vaidoko, and taken him to the Waimecia Police Post, questioned about the robbery and tortured.

PW 8 Inspector Anup

54. IP Anup said that on the 15th of March, 2014, when he was based at the Rakiraki Police Station he had witnessed the formal charge of the 2nd accused, which was conducted by Cpl. Makitala. He said that 2nd accused was given his rights and

treated fairly and received no complaints. The charge statement was marked through him for identification.

PW 9 Constable Sailosi Bawaqa

55. Bawaqa is the interweaving officer for 2nd accused Nalawa. He said that on the 14th of March, 2014, he interviewed the 2nd accused in the English language under caution at the crime office of the Rakiraki Police Station. Former Inspector Vana and IP Anup were the witnessing officers. Accused's rights were afforded. Accused was not assaulted, threatened or oppressed. Accused cooperated and gave the interview voluntarily. He did not complain of anything. Accused signed the record having understood the content. Bawaqa tendered the original interview of Laitia Nalawa (PE5) and read it in evidence. Witness recognized the Acer tablet and the Philip DVD player that were shown to the 2nd Accused at the interview.
56. Under cross –examination, Bawaqa denied that there was an empty room situated behind Rakiraki police station, and on 15th of March before the interviews, the accused were brutally assaulted in his presence by police officers in that room. Witness also denied that at the time of the caution interview he had slapped Laitia Nalawa on his mouth and threatened to admit the offence and forced to sign the interview. He admitted that he charged the 3rd accused Fatiaki on the 14th of March, 2014 and admitted that there is an inconsistency between his previous statement and his evidence as to the date of the charge. Explaining the discrepancy witness said that several interviews were conducted at the police station with the same accused and the investigating officer had made a mistake.

PW 10 Isireli Vananalagi (Vana)

57. Officer Vana was the Crime Officer at Rakiraki Police Station during investigation. On the 10th day of March 2014 he received the report and supervised the investigation. On the 12th of March, 2014, upon receiving information, he went with two other police officers to Naboutolu and arrested one Jale Fatiaki and cautioned him. Accused voluntarily accompanied. He was treated well.
58. Apart from this arrest, he witnessed all three interviews. He said that accused were treated well and afforded their rights; they were not forced assaulted or intimidated during the interviews. All accused gave their interviews voluntarily.

None of them complained of anything. Witness said that on the 15th day of March, 2014 he personally checked the accused in the cell, and only the first accused complained that he was feeling hot in the cell. He instructed the Station Orderly at that time to release the 1st accused from the cell so he can have some fresh air outside. He did not see any injury on them.

59. Under cross-examination Vana said that the Crime Office, where the interviews were conducted, and the Rakiraki Police Station where the Station Orderly was based, is situated separate to each other and the Station Orderly, who makes entries, sometimes forgets to make relevant entries in the Station Diary. Witness denied that on the 15th of March, 2014 the Accused were taken to a room before the interview and brutally assaulted by police officers. He also denied that he had assaulted Nalawa during caution interview. He denied that the 3rd accused was arrested by Mosese and another.

WC 11 Alanieta Vueti

60. Alanieta said that when she was stationed at Tavua Police Station, she was called to the Rakiraki police station on the 16th of March, 2014 to charge the 1st accused. She charged the 1st accused in iTaukei under caution. There was no threat or force used. She received no complaints from the accused. She tendered the original and translation of charge statement of the 1st accused marked respectively as PE6 and PE7.
61. Under cross-examination, witness denied that the charge statement was given to the 1st accused while he was in the cell without giving him an opportunity to read it.

PW 12 Corporal Makitala Masira

62. Cpl. Makitala was the investigating officer of this case. She also interviewed 1st and 3rd accused and charged the 2nd accused at the charge room at Rakiraki Police Station. She said that when she was based at Rakiraki Police Station, she was detailed to be the investigating officer for this case. On the 10th day of March, 2014, upon receiving the report of rape and robbery at Starfish, she visited the crime scene with other support services like the Forensic Unit. She recorded statements from the complainants and the list of stolen items they had given was sent to all police stations in Fiji to locate those items.

63. During investigation she uplifted certain exhibits, including an Acer tablet, the cash in Canadian dollars, ladies bag and a laptop. The Acer Tablet was recovered by Const. Senitiki from one Tiware, a known receiver of stolen items in Lautoka. She herself recovered the cash, the cigarette packet and wi-fi device during the interview when the 3rd accused showed the place where he had hid the money under a drum beside his house. The HP laptop with its charger, black ladies bag, and purple ladies bag was recovered from a vacant house near Pita Natekuru's house at Naboutolu when he took her to that house during the reconstruction of the crime scene.
64. Uplifted items were exhibited at the respective interviews. The Acer tablet was given to Const. Sailosi who was doing the interview for 2nd accused and the rest of the exhibits were shown to the two accused she interviewed. By the time the recoveries were made, both the complainants had left the country on the 11th the day after the robbery. She said that she managed to contact them through email and sent photographs of stolen items for identification. She said that the complainants identified the cash, the Acer tablet and the ladies handbag and the laptop to be theirs. Witness tendered the items recovered from 1st accused's direction as PE 8.
65. Cpl. Makitala interviewed the 1st accused on 15th of March, 2014, in the Crime Office at Rakiraki Police Station, in the presence of Inspector Vananalagi. 1st Accused was cautioned. All his rights were given and he was treated well. 1st Accused looked well and co-operated. He gave the interview voluntarily. He signed the record having understood the contents. She received no complaints. Witness tendered 1st accused's interview (PE 7) and read it in evidence.
66. Cpl. Makitala also interviewed the 3rd accused in itaukei on the 12th day of March, 2014 at the Crime Office at Rakiraki Police Station, in the presence of Inspector Vananalagi. 3rd Accused was cautioned. All his rights were given and he was treated well. 1st Accused looked well and cooperated. No assault, intimidation or force used. Accused gave the interview voluntarily and signed the record having understood the contents. She received no complaints. Witness tendered 3rd accused's interview (PE 9) and read it in evidence. She identified the recovered items, foreign currency (PE8 C), Wi-fi device (PE 2), cigarette packet PE 8(d) recovered upon the 3rd accused's direction.
67. Cpl. Makitala said that she also charged the 3rd accused at the Crime Office at Rakiraki Police Station. The charge statement of the 3rd accused was tendered marked as PE 10 and read in evidence.

68. She said that drops of liquid, suspected to be of semen, was found on the floor, when shown by Marion and the swabs taken thereof was sent to the forensic unit but no result was sent.
69. Under cross-examination Cpl. Makitala admitted that some of the important movements of the interview and reconstruction of the scene are not recorded in the station diary. She admitted that the complaints she recorded refer to a Dell brand laptop and the one recovered and exhibited is that of HP brand. She said that she recovered and photographed a HP brand laptop. She tendered the photographs sent to the complainants marked as PE 11. She explained the reason for the discrepancy and said that the complainant Marion was in a state of shock when she was recording her statement. She denied that accused were brutally tortured before their interviews and forced them to make confessions.
70. Under re-examination the witness said that Naboutolu mentioned in the caution interview as 1st accused's address and Vaidoko where he was arrested are two villagers situated just near to each other separated only by the main highway.
71. That was the case for the Prosecution. At the close 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.
72. As you are aware 2nd and 3rd 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.
73. 1st accused exercised his right to silence. By remaining silent, he was exercising his constitutional right. You must not hold against him for his silence and infer that he remained silent because he was guilty. He does not have to prove innocence or anything at all. The burden is always on the prosecution.

Case for Defence

DW.1 - Ilaitia Nalawa (2nd Accused)

74. Nalawa said that on 12th of March, 2014 at around 9.00pm, he was arrested by Mosese, Senitiki and two other officers near the Lautoka wharf and loaded into a twin cab. He was punched inside the vehicle and then, at the Lautoka police station, handcuffed and assaulted for nearly 30 minutes until he became unconscious. On the 13th he was taken down to Rakiraki police Station and again assaulted on the way questioning the whereabouts of Pita. Whilst at Rakiraki Police station, he was taken to a vacant room where, Pita was already being assaulted. He was also brutally assaulted before the interview. He said that at the interview, he was threatened and slapped by Bawaqa informing him to tell the truth. He admitted the offence and signed those documents because of the amount of assaults and not from his own free will. He received injuries on his lips and chest. He said that he was not referred to a medical examination by police officers or magistrate despite his requests.
75. Nalawa admitted that he was associated with selling the Acer tablet. He explained and said that the Acer tablet was brought by one Simione, his friend. He admitted that he at his caution interview had revealed information about the black DVD player and the white Acer tablet and admitting the offence. He said he admitted because of the amount of the assaults he received. He said that his father had returned the black DVD player to police. He said that he bought it for \$ 100 because it was cheap and that he had a television with the same brand. He said that he didn't know that it was a stolen item.
76. Under cross-examination, he admitted that he did not have broken ribs although assaulted with timber and desert boots. He said that bongo red chillies were given to him and Pita to eat one by one.

DW.2 - Jale Fatiaki (3rd Accused)

77. Fatiaki said that he was arrested on 12th of March, 2014, from his house at Naboutolu Village by three police officers, Mosese, Senitiki and another and taken to Rakiraki Police Station. While at the police station, he was taken to a room behind the station and brutally tortured. He said that he answered questions and did not admit the offence. He only signed papers Makitala brought to him. He denied signing the caution interview and that it is his signature. He said that the police had fabricated the answers.
78. That in brief, is a summary of the Prosecution and Defence cases.

Analysis

79. Only the 1st accused is charged with rape on the 2nd count in the information. To prove the 2nd count, Prosecution relies on the evidence of the complainant Marion and the confessions said to have been given by the 1st accused at the caution interview and in the charge statement which the Prosecution says were given by the 1st accused voluntarily.
80. Marion said that one of the robbers who entered the room was armed with a knife and he took her forcefully to the bathroom and penetrated her vagina with his penis. She had not identified the person who penetrated her. She said that she was shocked and she wet herself due to fear. She also said that she made a prompt complaint to police soon after the incident.
81. Prosecution says that it was the 1st accused who penetrated Marion on the basis of the caution statements and circumstantial evidence led in trial. In answer to question 40 the 1st Accused has said that he penetrated the vagina of the European lady with his penis. In the charge statement also he admits that he raped that lady.
82. In answer to questions 35, 44, 45, the 1st accused admits that he used force and robbed some items.
83. If you are satisfied that the 1st accused had given those statements and in those statements he had told the truth to the police, they are important evidence against the 1st accused that you should act upon.
84. In ascertaining whether the 1st accused had told the truth to police, you may look for other evidence, especially what Marion said in her evidence, to see if it supports what the accused had told the truth to police. If the caution statement given to police is satisfactorily supported by other evidence, you may think that 1st accused had told the truth to police.
85. In answer to questions 47, the 1st accused says that he hid some of the stolen items inside an empty house, besides his house. The investigating officer Makitala said that upon being pointed out, by the 1st accused, certain stolen items were recovered from the place he mentioned in his interview. If you believe that the items recovered by police are the stolen property of this case then you may draw the inference that 1st accused knew the place where the stolen items were hidden. Because he had this knowledge, you may infer that he was associated

with this robbery unless an acceptable explanation for his knowledge is forthcoming.

86. By the fact of recovery of stolen items by police as a result of the information provided in the caution statement, (if you believe they are stolen property of this case), you may also infer that the accused had told the truth to police at the interview. You decide if 1st accused had told the truth to police.
87. Before making those inferences, I must emphasize that you have to be satisfied that what was recovered by police is the property stolen from the complainants. The Counsel of the Defence are disputing the fact that one of the recovered items namely the HP brand computer exhibited at the trial is not a stolen property of this case because the complainants in their statements had told police that they had lost a Dell brand computer. You heard what the investigating officer Makitala had to say about this discrepancy. Makitala said that the complainant was in a shock and was in a rush to go back when complainant's statement was being recorded. She also said that the complainants had confirmed that what was exhibited is the stolen property when photographs of those items were emailed to the complainants. It is up to you to form your own opinion if the Prosecution had proved that what was recovered by police is the stolen property of this case.
88. To prove the 1st charge against each accused, Prosecution relies on circumstantial evidence and the confessions said to have been given by each of them.
89. In their respective interviews, all three accused admit that they planned to break into the Starfish Blue and in execution of that plan they entered the said villa on the 10th of March 2014, used force and took the belongings of the complainants.
90. In answer to question 34, the 2nd accused admits that he used force and, in answer to question 37, he admits that he took an Acer tablet, Black DVD player from the Complainant's possession. In his charge statement also he admits that he robbed the complainants.
91. Senitiki said that he recovered the white Acer tablet and black DVD player from a receiver in Lautoka. 2nd Accused admits that police recovered the DVD player from his house. He also admits that he went with a friend to sell the Acer tablet. The black DVD player was identified by the manager of the hotel as the one stolen from the Villa. Having made those admissions, 2nd accused gave some

explanations as to how he was associated with those items. It is for you to decide whether you believe him and what weight you attached to his explanations.

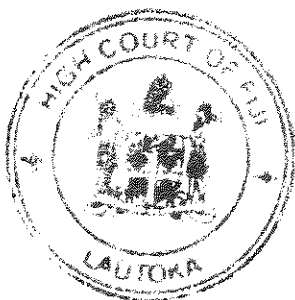
92. 3rd accused in his interview at Q 35, 36 37 and 39 admits that he used force and robbed some items including a pocket wi-fi device, foreign currency and some cigarette packets. The investigating officer Makitala said that she recovered the pocket wi-fi device and foreign currency when being pointed out by the 3rd accused. The Manager Jay Ram identified the pocket wi-fi device.
93. The third accused completely denies that he had made any admissions in his caution interview. His position is that caution statement tendered by prosecution is a police fabrication. At the same time he says he was brutally assaulted by police to obtain his interview. It is for you to decide if he had given a statement and had told the truth to police.
94. 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.
95. 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.
96. 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.
97. 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 they are charged with.

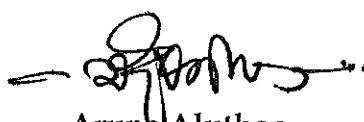
98. Would you please now retire to consider your opinions? When you have made your decisions would you please advise the Court clerk and the Court will reconvene to receive your opinions?

99. Your possible opinion would be as follows:

1st Count - 1st Accused guilty or not guilty?
2nd Accused guilty or not guilty?
3rd Accused guilty or not guilty?

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




Aruna Aluthge
Judge

AT LAUTOKA
On 16th July, 2018

Counsel: Office of the Director of Public Prosecution for Prosecution
Office of the Legal Aid Commission for 1st, and 3rd Accused
Vananalagi Lawyers for 2nd Accused