

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 85 of 2017

[CRIMINAL JURISDICTION]

STATE

V

TURI LESUBULA

Counsel : Ms. U. Tamanikaiyaroi and Mr. E. Samisoni for the State
Ms. L. Ratidara for the Accused

Hearing on : 01 - 05 October 2018

Summing up on : 05 October 2018

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. 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.
5. 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.
6. 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.

7. 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.
8. 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.
9. 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 the witness to be reliable.
10. 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.

11. 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 proven 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 proven 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 proven facts, then you should not draw the adverse inference.
12. 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 an 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.
13. In order to prove that an accused is guilty of an offence, the prosecution should prove all the elements of the offence beyond reasonable doubt. If you have a reasonable doubt concerning any one of those elements, that is, if you are not sure that the prosecution has proved that element beyond reasonable doubt, then you must find the accused not guilty of the offence. 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.
14. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the charges are proved against the accused.

15. 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.
16. Let us now look at the amended Information. The Director of Public Prosecutions has charged the accused for the following offences;

COUNT 1

Statement of Offence

Aggravated Robbery: contrary to section 311 (1) (a) of the Crimes Decree 2009.

Particulars of Offence

TURI LESUBULA WITH OTHERS on the 26th day of February 2017, at Samabula in the Central Division, robbed Ameendra Kumar Mudliar of 1 x black Samsung mobile phone valued at approximately \$975.00 and 1 x white Vido mobile phone valued at \$250.00, all to the total approximate value of \$1,225.00, the said property of Ameendra Kumar Mudliar.

COUNT 2

Statement of Offence

Aggravated Robbery: contrary to section 311 (1) (a) of the Crimes Decree 2009.

Particulars of Offence

TURI LESUBULA WITH OTHERS on the 26th day of February 2017, at Samabula in the Central Division, robbed Tarita Mudliar of 1 x iPhone 6 plus mobile phone valued at \$1,700.00, all to the total value of \$1,700.00, the said property of Tarita Mudliar.

17. The accused is charged with two counts. However, please remember that you should consider each count separately. That is, you must not assume that the accused is guilty of the other count just because you find him guilty of one count.
18. On both counts the accused is charged with the offence of aggravated robbery. 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; or at the time of robbery, has an offensive weapon with him.
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. At law, property belongs to a person if that person has possession or control of the property.
24. Robbery when committed in the company with one or more other persons or if at the time of robbery the accused had an offensive weapon with him, that amounts to aggravated robbery. This is the third element of the offence of aggravated robbery which you are required to consider.

25. Please remember that an offence may be committed by one person acting alone or by more than one person acting together with the same criminal purpose. The offenders' agreement to act together need not have been expressed in words. It may be the result of planning or it may be a tacit understanding reached between them on the spur of the moment. Their agreement can be inferred from the circumstances.
26. Those who commit crime together may play different parts to achieve their purpose. The prosecution must prove that the accused took some part in committing the crime.
27. On each count, if you are sure that the offence of aggravated robbery was committed by more than one person and that the accused acted together with the others to commit that offence and took some part in that offence you should find the accused guilty of the offence of aggravated robbery.
28. Further, please remember that a person who aids and abets the commission of an offence by another person is taken to have committed that offence. A person may be found guilty of aiding or abetting the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.
29. For a person to be guilty for an offence on the basis that he is an aider or abettor;
 - (a) the person's conduct must have in fact aided or abetted the commission of the offence by the other person; and
 - (b) the offence must have been committed by the other person.
30. Further, the person must have intended that;
 - (a) his or her conduct would aid or abet the commission of any offence of the type the other person committed; or

- (b) his or her conduct would aid or abet the commission of an offence and have been reckless about the commission of the offence that the other person in fact committed.

31. However, a person cannot be found guilty of aiding or abetting the commission of an offence if, before the offence was committed, the person –

- (a) terminated his or her involvement; and
- (b) took all reasonable steps to prevent the commission of the offence.

Summary of the evidence

32. First witness for the prosecution was PC 4321 Asaeli Rauli. He said that;

- a) *He is the interviewing officer of the Accused. He tendered the original cautioned interview of the accused as PE 1 and a typed copy was tendered as PE 1A. He said that there was no witnessing officer due to the lack of officers in the police station when the accused was interviewed under caution. He said he explained to the accused his rights and the accused gave all 237 answers recorded in PE 1.*
- b) *He identified a vehicle registration number plate with the number IL 711 as the number plate that was shown to the accused at Q213 of PE 1 and tendered the said number plate as PE 2. He said he had written the number as IL 771 in that question mistakenly and he apologized for that. He said the accused showed him the said number plate during re-construction.*
- c) *He said that the accused did not make any complain during the interview or during the re-construction.*
- d) *During cross-examination he denied the suggestion that the answers in PE 1 was made up by him. He also denied the suggestion that the accused only signed because he told the accused that the accused would be made a state witness. He admitted the suggestion that it would have been proper to take pictures during re-construction.*
- e) *He admitted that he did not prepare a statement regarding the uplifting of the number plate during re-construction. It was pointed out to him that according to the cautioned interview it was not the accused who hid the number plate, but his evidence was that the accused hid the number plate and was suggested that his evidence is different from the answers reflected in the cautioned interview. He denied the said suggestion.*
- f) *It was suggested to him that the number written in Q213 is different from the number plate shown, because he had written down his own answer and he said that it was a mistake.*

- g) *He admitted the suggestion that it was impossible for the number plate to remain at the same place given that the incident had taken place on 26/02/17 and the re-construction was done on 01/04/17.*
- h) *During re-examination he said they did not have a professional photographer to accompany them during the re-construction. He said he did not note down the place where the number plate was taken because it is mentioned in the cautioned interview.*
33. The second prosecution witness was PC 5041 Peni. He said that;
- a) *He was the charging officer of the accused. He charged the accused after the cautioned interview was conducted and the accused did not complain to him about the manner the interview was conducted or about the interviewing officer.*
- b) *He was not cross-examined.*
34. The third prosecution witness was Yonal S. Sen. He said that;
- a) *He was residing at 81, Augustus Street, Toorak on 26/02/17. Around midnight that day, he heard shouting and screaming from the neighbour's house which is 83, Augustus.*
- b) *He said he saw through the neighbour's curtains shadows of someone punching the people inside. He rushed out of his house. Then he saw more than 3 men running out of that house to a car that was parked outside. They got in to the car and the car went towards Browns Street. He saw the car from about 30 metres through street lights. He said that it was a white Prius, registration number was IL 711. Nothing was obstructing his view.*
- c) *He said the men who were running out of the neighbour's house were wearing masks and two of them had cane knives. He saw one of them struck a neighbour's head when that neighbor was trying to stop them. He does not know the names of the neighbours.*
- d) *He was not cross-examined.*
35. The fourth prosecution witness was Ameendra Kumar Mudliar. He said that;
- a) *On 26/02/17 he was at 83, Augustus Street. He had come from Auckland for his father's funeral. He had a few drinks with his partner, his brother, his sister, his cousin and his brother-in-law in the night. Around 11.50pm as they were about to finish, four to five masked men entered through the front door. They were armed and they closed the curtains. He said that they had knives like cane knives, an axe, and an iron bar.*

- b) *He said the masked men attacked them and during the attack three of his fingers were cut to the bone. He also said that one of the assailants hit the left side of his face in front of his house with a knife and his face opened up.*
 - c) *He said the assailants took one Samsung phone and another phone that belongs to him. He tendered his medical certificate as PE 3.*
 - d) *He was not cross-examined.*
36. The fifth prosecution witness was Talita Mudliar. She said that;
- a) *On 26/02/17 while she was having a few drinks with her family members in the dining room at 83, Augustus Street, four masked men entered the lounge. They had knives. She said they took her pink iPhone. She moved away from the dining room when she saw her brother-in-law got hurt.*
 - b) *She was not cross-examined.*
37. 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 not to adduce evidence. Please remember that it is his right to do so and you should not draw any inference against the accused for his decision not to give evidence.
38. Please remember that I have only given a summary of the evidence given by the witnesses and therefore 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.
39. Remember that you should first consider the credibility and the reliability of the witnesses who gave evidence in this case in order to decide on what evidence you accept. Based on the evidence you accept you should then decide what facts are

proved and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence of each charge have been proven beyond reasonable doubt based on those proven facts and reasonable inferences. You should remember to follow my directions on law during this process.

40. Now I will turn to PE1 (the typed copy is PE 1A), the cautioned interview statement. Please remember that you should decide whether the accused made the admissions recorded in PE 1 and whether those admissions are true. You should rely only on the admissions you would consider to be true. After carefully considering the evidence you heard in this case and the contents of PE 1 if you are satisfied beyond reasonable doubt that the accused gave the answers recoded in PE 1, then you should consider whether those answers are true. You may accept the entire statement recorded in PE 1 to be true or only a part of it to be true or you may decide that the entire statement is not true.
41. The first witness for the prosecution who was the interviewing officer said that there was no fabrication and all the answers in PE 1 were given by the accused. The second witness who was the charging officer said that the accused did not make any complaint to him regarding the recording of the cautioned interview.
42. The defence has taken up the position that the answers recorded in PE 1 were not given by the accused. According to the defence those answers are the answers of the police officer and the accused just signed. If you believe this version of the accused or if you have any reasonable doubt that the admissions in PE 1 may have been fabricated, then you should disregard PE 1 and find the accused not guilty.
43. It was pointed out in cross-examination of the first prosecution witness (PW 1), the interviewing officer that the fact that the number written in Q 214 is IL 771 and the

fact that the number in the plate tendered as PE 2 is IL 711 indicates that the answers in the cautioned interview were not the accused's answers but of PW 1. It was also pointed out by the defence that there is an inconsistency where PW 1 said in his evidence that the accused had hid the number plate, whereas what is stated in the cautioned interview (PE 1) is that two others hid it.

44. The defence also pointed out that there was no witnessing officer during the cautioned interview. PW 1 said that it was due to the lack of officers in the police station. It was also pointed out that no photographs were taken during the scene reconstruction. PW 1 said that there was no photographer to take with them. Defence pointed out that PW 1 had not made notes regarding the place where the number plate (PE 2) was uplifted from. However, PW 1 said that he did not make notes because that information is noted in the cautioned interview.
45. Please note that the pertinent question is whether you believe the evidence given by PW 1 when he said that the accused gave all the answers recorded in PE 1. Absence of a witnessing officer during the cautioned interview does not itself make the evidence of PW 1 or the cautioned interview (PE 1) unreliable. Further, the fact that photographs were not taken during scene re-construction does not make the evidence of PW 1 regarding the uplifting of PE 2 unreliable. On the other hand, even if you believe the evidence of PW 1 that the accused gave all the answers recorded in PE 1, that does not necessarily mean that those answers are true. You should consider all the evidence and decide whether the accused made the admissions recorded in PE 1 and whether those admissions are true as I have directed you.
46. In the event you find that the accused gave the answers recorded in PE 1, you would note the following facts among other facts;


- a) the accused had been driving a white hybrid car which had a fake number plate on 25/02/17 after 7.00pm with four individuals (Jimilai, Gudru, Nem and Juju);
 - b) the accused had taken the said individuals to several places on the instructions given to him;
 - c) the four individuals were armed (Q & A 176);
 - d) he dropped the four individuals at Augustus Street around 12.00am and waited at the junction at Brown's Street (Q & A 187);
 - e) they came back after 30 - 35 minutes, they were arguing and Gudru told him to drive out fast (Q & A 196).
47. Further, the third prosecution witness said that he saw more than three men run from the house at 83, Augustus Street to a white Prius car with the registration number IL 711 parked outside.
48. You would note that the accused had said that he had dropped the four individuals travelling with him at Augustus Street, he was waiting for them at the junction at Brown's Street and then picked them after 30 - 35 minutes. Given the evidence you may decide to accept, if you conclude that the offence of aggravated robbery was committed by the four individuals travelling with the accused at 83, Augustus Street as alleged in each charge but there was no agreement between the accused and the said four individuals to commit the said offences at 83, Augustus Street; you may consider whether the accused is guilty of each offence as an aider or abettor.
49. Accordingly, in order to decide whether the accused is guilty or not guilty of the offence of aggravated robbery as an aider or abettor you should consider the following;

- a) Did the accused's conduct in fact aided or abetted the commission of the offence of aggravated robbery by the other persons; and
 - b) Did the accused intend that his conduct would aid or abet the commission of any offence of the type of offence that was committed by the other persons which is aggravated robbery; or
Did the accused intend that his conduct would aid or abet the commission of an offence and was he reckless about the commission of the offence of aggravated robbery committed by the other persons?
50. It is not necessary for the accused to intend that his conduct would aid or abet the commission of the offence of aggravated robbery. It is sufficient that;
- a) he intended that his conduct would aid or abet the commission of any offence which is in the nature of aggravated robbery; or
 - b) he intended that his conduct would aid or abet the commission of an offence and he was aware of a substantial risk that the persons travelling with him will commit the offence of aggravated robbery and having regard to the circumstances known to him it is unjustifiable to take the risk and do what he did.
51. Further, you should find the accused not guilty of aiding or abetting the commission of each offence if you find that the accused;
- a) terminated his involvement; and
 - b) took all reasonable steps to prevent the commission of the offence.

52. You would note that in answer to Q186 which is; *"Why didn't you report it at Toorak Police Post when it's just a walking distance from the target area?"*, the answer is; *"I was scared because they threaten me."*
53. Please remember that the accused is not criminally responsible for each offence if he carried out the conduct constituting the offence under duress. A person carries out conduct under duress if and only if he or she reasonably believes that -
- (a) a threat to cause death or serious harm has been made that will be carried out unless an offence is committed; and
 - (b) there is no reasonable way that the threat can be rendered ineffective; and
 - (c) the conduct is a reasonable response to the threat.
54. Therefore, for the accused not be criminally responsible based on duress, he should have reasonably believed at the material time that a threat to cause his death or serious harm has been made that will be carried out unless he commits the offence, there is no reasonable way that the threat can be rendered ineffective and his conduct is a reasonable response to the threat.
55. Any re-directions?
56. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. If you wish to peruse the other exhibit tendered in court apart from the documents of which you have given copies or you want to peruse the originals, 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.

57. Your opinion should be whether the accused is guilty or not guilty on each charge.




Vincent S. Perera
JUDGE

Solicitors;

Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused