

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

CRIMINAL CASE NO. HAC 18 OF 2019

STATE  
V  
RUSIATE TAUBALE

Counsel: Ms. M. Konrote for State  
Ms. L. David for Defence

Dates of Hearing: 29, 30 October 2019  
Date of Summing Up: 31 October 2019

**SUMMING UP**

Ladies and Gentleman Assessor,

1. We have now reached the final phase of this case. The law requires me, as the judge who presided over this trial to sum-up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my Summing-Up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.

3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of fact. 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.
5. The counsel for the Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the counsel. They were their arguments, which you may properly take into account when evaluating the evidence. It is a matter for you to decide which version of the facts to accept, or reject.
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. On the matter of proof, I must direct you as a matter of law that accused person is innocent until he is proven guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find an accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty. However, the doubt must be reasonable and not be based on mere speculation.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this court room. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial.

10. This summing-up is not evidence. Statements, arguments, questions and comments by the counsel are not evidence either. A thing suggested by a counsel during a witness' cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as being true. You may take into account the arguments and submissions made by the counsel in evaluating the evidence.
11. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence or 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 tests and standards in applying them.
12. In the course of cross-examination, the Defence Counsel referred to previous statements of the complainant recorded by police. A previous statement made by a witness is not evidence in itself unless it is adopted and accepted by the witness under oath as being true. You can of course use those statements to test the consistency and credibility of the witness if you are satisfied that such statements were made.
13. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the witness' demeanor in the witness box when answering questions. But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
14. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
15. Proof can be established only through evidence. Evidence can be direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. You are also free to draw reasonable inferences in the circumstances of this case if such inferences are based on facts proved by evidence.

16. In testing the consistency of a witness you should see whether he is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and whether what the witness has told court contradicts with his earlier version. You must however, be satisfied that such contradiction is material to the core issues of this trial and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. There may be reasonable explanations for contradictions. You must consider overall evidence of the witness, the demeanor, the way he faced the questions etc. in deciding on a witness's credibility.
17. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth.
18. The agreed facts of this case are:
  - a. That the person charged in this matter is RUSIATE TAUBALE (“Rusiate”).
  - b. That the complainant in this matter is NALIN NAVNEET SINGH (“Complainant”).
  - c. That Rusiate resided at Gaji Road, Raiwaqa at the time of the offending.
  - d. That the offence is said to have occurred on the 25th day of December 2018.
  - e. That at the time of the offending Rusiate was there at the alleged scene of crime.
  - f. That the complainant was assaulted just before he was robbed of his properties.
19. Let us now look at the information, a copy of which has been given to you.

### Statement of Offence

AGGRAVATED ROBBERY: contrary to section 311(1) (a) of the Crimes Act 2009.

### Particulars of Offence

RUSIATE TAUBALE on the 25th of December, 2018 in Raiwaqa in the Central Division, in the company of others, robbed NALIN NAVNEET SINGH of 1xblack Samsung J5 mobile phone and \$70 in cash, the properties of the said NALIN NAVNEET SINGH.

20. To prove the offence of Aggravated Robbery in this case, the prosecution must establish the following elements beyond reasonable doubt;
  - a. the accused, Rusiate Taubale
  - b. committed robbery ; and
  - c. the robbery was committed in the company of one or more other persons;
21. The first element involves the identity of the offender. That is the main issue of this whole trial. The prosecution must prove beyond reasonable doubt that the accused Rusiate Taubale was involved in the company of others to commit the offence.
22. The offence of Robbery is defined in the Crimes Act. 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. The robbery becomes aggravated robbery when it is committed in the company one or more other persons or when an offensive weapon is used to commit the robbery.
23. An offence may be committed by one person acting alone or by more than one person acting together with the same criminal purpose. In this case, the Prosecution says that the accused committed the offence in the company of other persons. The complainant's

evidence is that when the accused punched the complainant for him to fall down, others took out the things from complainant's pocket.

24. I must explain to you the liability of a number of people committing 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. 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.
25. Those who commit a crime together may play different parts to achieve their purpose. The prosecution must prove that the accused took some part in committing the crime. 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.
26. There is a final legal matter I must direct you which is very important in this case. In this case the Prosecution case depends wholly on the correctness of identification of the accused as the offender. The Defence challenges this identification and says that the complainant is mistaken. In these circumstances I must warn you of the special need for caution before convicting the accused on the correctness of this identification.
27. The reason for this is the danger that a wrong identification will cause a miscarriage of justice and there have been cases where this has happened. It is not a question of a witness being untruthful but mistakenly believing the person seen at the crime scene at the crucial time was the accused. With this genuine belief a mistaken witness can nevertheless be a convincing one. I am not saying that is necessarily the case here. I am explaining the reason for the special care with which you must approach this issue.

28. You must decide whether the evidence of identification is reliable and should be accepted or whether it is unsatisfactory and should be rejected or leaves you in doubt. To do this you must examine all the circumstances and determine the strength or quality of the identification. It is for you to assess the value of the evidence that has been given.
29. To do this you must closely examine the circumstances in which the identifications came to be made. Generally, this will include such matters as:
- How long did the witness have the person under observation? Was it a significant period or just a fleeting glimpse?
  - At what distance?
  - In what light?
  - Was the view impeded or obstructed in any way?
  - Was the accused a person known to the witness?
  - Had the witness ever seen the accused before and, if so, how often?
  - How long elapsed between the original observation and any subsequent identification of the accused as that person?
  - How was the subsequent identification made?

Such matters as these go to the quality of the identification evidence.

30. That completes my directions to you on the legal issues.
31. I must also remind you of the evidence given and the cases of both the Prosecution and the Defence. In doing this I do not propose going through all the evidence of every witness. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision on this case.

Case for Prosecution

PW.1 Nalin Navneet Singh (The Complainant)

32. Complainant Nalin Singh is a taxi driver. He resides at Gaji Road, Samabula. On the 25th December 2018, at around midnight on the Christmas Eve, he was talking to a friend near his cousin brother's house at Falney Raod, Raiwaqa, when a group of boys approached him. One of the boys asked for a roll (cigarette). When he told that he did not have any, he was punched on his face by this boy. He fell down and all the boys then started taking things out of his trouser pocket. They took his mobile phone and around \$ 70 in cash while he was still lying down. His cousin brother was coming to his house at that time and when the boys saw the light of the car, they started running away from scene. He then went to wash his face which was badly swollen. He had a black eye and bled from his nose.
33. Describing the circumstances under which the identification was made, the complainant said that there was nothing obstructing his view. He had seen those boys before the incident on several occasions. The boy who asked for a roll and punched him is his neighbour whose house is situated about 3 meters away from his house. He had known this boy for about one year. He knew him as Rusiate. He also knew that Rusiate was involved with a daughter of his neighbour. He could clearly see the face of the boy who punched him. He was standing right next to him face to face. The 4 feet long tube light of his cousin's house was lighting that place. The incident took 5-10 minutes. He told his cousin what had happened soon after the incident and later informed Rusiate's partner before going to police. He went to the police station where he was given papers to go to the hospital. He went to the CWM hospital, received treatments for his right eye from the eye department and went back home.
34. At around midday on the same day, he saw Rusiate and his friends still drinking at his mother-in-law's place. He informed police about this. When the police party arrived, Rusiate was still drinking with his friends. A police officer asked him to point out Rusiate. When he pointed out, Rusiate was arrested. He pointed out only Rusiate because he was the one who assaulted him.



35. Under cross-examination, he denied that the light was coming from behind and it had casted some shadow. He denied that Rusiate had come to save him from the boys who were robbing him. He denied that he was mistaken in the dark. He denied that Rusiate ran away from the scene only when the other boys started to chased him. He admitted that his evidence is somewhat different from what the police had written in his statement dated 25 December 2018. He said that the boys started searching his pocket only after he was punched. He said that it has been more than one year since the incident occurred and he could not recall if he had received injuries on the right side or the left side of his face. He admitted that when he gave a statement to police he was not aware of the name of the person who had asked for a roll and punched him.

PW.2 PC Atunaisa

36. PC Atunisa said that on the 25 December 2018, after receiving a report from the complainant, he proceeded to Grantham Police Post where the complainant was. He was assisted by the complainant to locate the accused. He was directed by the complainant to a house at Gaji Road where a group of boys were drinking. The complainant pointed out the person who committed the offence. Upon being pointed out, he arrested the person by the name of Rusiate and escorted him to the police station.

37. Under cross-examination, PC Atunisa admitted that at the time of arrest, the accused denied the allegation and his hands were shown denying the punching. He said that the complainant pointed out only Rusiate and he was not aware that the other boys who were drinking with Rusiate were also involved in the incident.

38. That was the case for the Prosecution.

39. At the close of the Prosecution's case you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case they would be cross-examined.

40. The accused elected to give evidence under oath although he is under no obligation to prove his innocence. 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 with 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.

#### Case for Defence

41. Rusiate said that on the 25 December 2018 at around midnight he was drinking with his friends and came to buy some more drinks through a short cut which was dark. He saw the complainant being assaulted by a group of boys. The boys were trying to take something from complainant's pocket. He approached them and told them that 'he is not an animal'. One of them then turned to him and punched his nose. He ran away from the scene. Then he was followed by the boys. He ran straight home. He denied punching or robbing the complainant. When he was drinking at home in the morning with his friends, a police team arrived at his house with the complainant and, upon being pointed out by the complainant, he was arrested. He saw the complainant bleeding from his eyes and that is way he was blamed.
42. Under cross-examination Rusiate admitted that the complainant is his neighbour but denied having met him before the incident. He admitted that light was coming from behind to the scene where the incident took place.

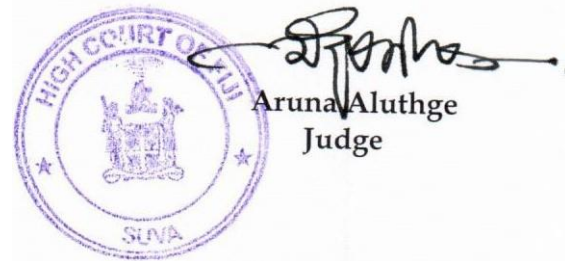
#### Analysis

43. If you look at the admitted facts and have listened to the evidence of the accused carefully, you would realise that there is no dispute that the complainant Mr. Nalin Singh was robbed by a group of boys on 25 December 2018 at Raiwaqa. The only dispute is with regard to the identity of the accused. That is entirely a matter for you to decide.

44. The accused does not deny being present at the crime scene at the material time. However he completely denies that he took part in this robbery. Defence takes up the position that the complainant was mistaken when he, in difficult conditions, identified the accused as one of the robbers. Version of the accused is that he in fact tried to save the complainant from the robbers.
45. You must consider the identification evidence in terms of the directions I have already given to you. The circumstances of the identification evidence in this case are that the observation of the offender was done during night time. According to the complainant, there were no street lights but there was light coming from the tube light of his cousin's house. The tube light was close to the crime scene. The complainant said that he observed the offender in close proximity, face to face, while he was being punched once and also when the offender asked for a roll. The incident had taken more than 5 minutes. The complainant said that nothing was obstructing his view and he could particularly recognise assailant as his neighbour who had been living in the neighborhood for nearly a year. The complainant had pointed out the accused to a police officer within hours after the incident. This fact was not disputed by the accused in his evidence. The Prosecution says that the complainant is an honest witness and that his identification was not mistaken.
46. The Defence does not deny that the complainant is an honest witness. The Defence Counsel highlighted some inconsistencies between complainant's evidence and his previous statement to police and she argues that given those inconsistencies, it is possible that the complainant could have been mistaken in his identification. You decide if the inconsistencies are material enough in the circumstances of this case for you to reject the identification evidence of the complainant.
47. 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, 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. 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.

48. 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 charge has been proved against the accused. On your return, you will be asked to separately state in Court your opinion whether the accused is guilty or not guilty of Aggravated Robbery as charged.
49. 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?
50. Any redirections?



At Suva

31 October 2019

Counsel: Office of the Director of Public Prosecution for Prosecution  
Legal Aid Commission for Defence