

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 291 OF 2016S

STATE

vs

1. LUKE SENICEVA
2. VILIAME MOTOKAINAVA

Counsels : Ms. M. Chowdhury for State  
Ms. N. Mishra for Accused No. 1  
Ms. S. Daunivesi for Accused No. 2

Hearings : 20, 21, 22, 25, 26 February, 4 and 5 March, 2019  
Summing Up : 6 March 2019  
Judgment : 7 March, 2019

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## JUDGMENT

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1. On 25 February, 2019, the two accuseds appeared in court on the following information:

*COUNT 1*

*Statement of Offence*

**AGGRAVATED BURGLARY:** *Contrary to section 313 (1) (a) of the Crimes Act 2009.*

*Particulars of Offence*

*LUKE SENICEVA and VILIAME MOTOKAINAVA in company of each other, between the 1<sup>st</sup> to the 4<sup>th</sup> July, 2016 at Nasinu in the Central Division, broke*

and entered into the Tamavua Primary School as trespassers with intent to commit theft.

**COUNT 2**

**Statement of Offence**

**THEFT: Contrary to section 291 (1) Crimes Act 2009.**

**Particulars of Offence**

**LUKE SENICEVA and VILIAME MOTOKAINAVA between the 1<sup>st</sup> to the 4<sup>th</sup> July, 2016 at Nasinu in the Central Division, dishonestly appropriated (stole) assorted ice-cream valued at \$39, bottles of ice pops valued at \$45, hard drive valued at \$150, USB valued at \$20, Nokia mobile phone valued at \$10, 2 x digital cameras valued at \$690, 1 x 42 inch Phillip TV valued at \$2000, VIDO notepad valued at \$199, 1 x HP laptop valued at \$1,200, 5 x ukulele valued at \$400, 3 x Proscan tablet valued at \$2,700, safe valued at \$150 and cash of \$1575 all to the total value of \$9178, the properties of Tamavua Primary School with the intention of depriving Tamavua Primary School.**

2. The information was read and explained to them, in the presence of their counsels. They said, they understood the same, and pleaded not guilty to both counts. The matter then proceeded to trial before myself and three assessors on 25, 26 February, 4 and 5 March 2019. On 6 March 2019, I delivered my summing up to the assessors, and after 31 minutes, the three assessors returned with a unanimous not guilty opinion on both counts against the accuseds. I said I would deliver my judgment today. This is my judgment.
3. The law at this stage of the trial is section 237 (1), (2), (4) and (5) of the Criminal Procedure Act 2009, which reads as follows:

- “...237 (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
- (2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors...*
  - (4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –*
    - (a) written down; and*

- (b) pronounced in open court.
- (5) *In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for... all purposes...*

4. In **Ram Dulare, Chandar Bhan and Permal Naidu vs Reginam** [1956 – 57], Fiji Law Report, Volume 5, pages 1 to 6, page 3, the Fiji Court of Appeal, said the following, on an equivalent section of the then Criminal Procedure Code:

*“...In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a Jury in a trial. In the case of the King v. Joseph 1948, Appeal Case 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with the assessors is that of the trial Judge and the trial judge alone and in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors...”*

5. In **Sakiusa Rokonabete v The State**, Criminal Appeal No. AAU 0048 of 2005, the Fiji Court of Appeal said as follows:

*“...In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only, to offer their opinions, based on their views of the facts...”*

6. I have reviewed the evidence called in the trial, and I have directed myself in accordance with the Summing Up I gave the assessors yesterday. The assessors' verdict was not perverse. It was open to them to reach such conclusion on the evidence. However, I am not bound by their opinion. On my analysis of the case based on the evidence, and on my assessment of the credibility of the witnesses, I am bound to disagree with the unanimous not guilty opinion of the three assessors.

7. My reasons are as follows.
  
8. During the trial, the evidence of the first three prosecution's witnesses, that is, Ms. Hamidan Hanif (PW1), Mr. Ritesh Kapoor (PW2) and Ms. Mereoni Nawaitabu, were not disputed by the parties. It was accepted that some persons broke into Tamavua Primary School, as trespassers, with intent to commit theft, between 1 and 4 July 2016. It was also accepted that these persons stole the properties itemized in count no. 2, and the same belonged to Tamavua Primary School. I accept PW1, PW2 and PW3's evidence. I find their evidence credible. I therefore find as a matter of fact that some persons broke into Tamavua Primary School, as trespassers with intent to commit theft, between 1 and 4 July 2016 (count no. 1). I also find as a matter of fact that, the above persons, stole the properties itemized in count no. 2, which belonged to Tamavua Primary School (count no. 2).
  
9. I accept that the prosecution failed to provide any eye witness to connect the two accuseds to the crimes alleged in count no. 1 and 2. I accept that the only evidence that had the potential to connect the two accuseds to the crimes alleged in count no. 1 and 2, was their alleged confessions to the police, when they were caution interviewed at Valelevu Police Station in July 2016. I note the two accused's alleged confessions, were tendered in evidence, as Prosecution Exhibit No. 1 (Accused No.2's interview statements), and Prosecution Exhibit No. 2 (Accused No. 1's interview statements).
  
10. The acceptance or otherwise of the two accuseds' alleged confessions depended on whether or not the two police witnesses were credible, that is, the caution interview officer PC 4663 Taitusi Lualala (PW5) and DC 2659 Eliko Kaumaitotoya (PW4). PW5 caution interviewed both accuseds. I have carefully considered and analysed PW5 and PW4, when they were giving their evidence. I had carefully examined their demeanour. I had also listened very carefully to the two accuseds' sworn evidence. Although the burden of proof is not on them, I had carefully listened to their evidence, and compared it with PW5 and PW4's sworn evidence. The parties' versions of events were obviously different. The police said the two accuseds gave their statements voluntarily to the police and out of their own free will. They said, they did not assault, threaten or make false promises to the two accuseds, while they were in police custody. The two accuseds said the police repeatedly assaulted and threatened them to confess to the crimes. They said, they were frightened

and thus confessed to the police. Both accused admitted when cross-examined by the prosecution that they made no complain to the police, the Magistrate Court nor the High Court of any alleged police brutality. Neither did they ask for a medical examination from the Magistrate Court or High Court, to verify possible injuries suffered, while in police custody.

11. When examining the whole evidence, I am led to accept the evidence of PW5 and PW4. I find they were credible witnesses. As for the two accuseds, I find them not to be credible as witnesses, and as a result, I reject their version of events. I find as a matter of fact that the two accuseds voluntarily confessed to the police that they committed the crimes in count no. 1 and 2, and that they gave their caution interview statements out of their own free will. I find also that their confessions were true.
  
12. Given the above, I do not accept the three assessors' unanimous not guilty opinions on the two counts. I find the two accuseds guilty as charged on both counts and I convict them accordingly.



  
**Salesi Temo**  
**JUDGE**

**Solicitor for State** : **Office of the Director of Public Prosecution, Suva**  
**Solicitor for Accused No. 1** : **Legal Aid Commission, Suva**  
**Solicitor for Accused No. 2** : **Legal Aid Commission, Suva**