

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 293 of 2017

STATE

-vs-

KITIONE CAGI

Counsel: Ms. S. Lodhia with Mr. Z. Zunaid for the State
Accused is absent

Date of Hearing: 03rd and 4th June 2019

Date of Summing Up: 05th June 2019

SUMMING UP

1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you at the commencement of the hearing that we have two different functions to perform. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. You have to determine the facts of the case, based on the evidence that has been placed before you and then reach your opinion. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion.
4. You must reach your opinion on the evidence, and only on the evidence itself. The evidence is what the witnesses said from the witness box, and the materials received as exhibits. A few things you have heard during the cause of the hearing are not evidence. This summing up is not evidence, and statements, arguments, questions and comments made by the counsel are not evidence either. The purpose of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel is not evidence either. They were arguments of the prosecution, which you may properly take into account when you evaluating the evidence, but the extent to which you do so are entirely a matter for you.
5. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. Have regard only to the testimony and the exhibits put before you in this courtroom. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss and deliberate of facts of this case among yourselves only. However, each one of you must reach your own conclusion and make your own opinion. You are not required to give reason for your opinion, but merely your opinions themselves. Your opinion need not be unanimous, though it would be desirable if you could agree on them. I must emphasize you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.
6. Moreover, I must caution you that you should dismiss all feelings of sympathy or prejudice, whether it is sympathy for or prejudice against the accused, the complainant or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts upon the

whole of the evidence. It is your duty to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

7. Matters which will concern to you are the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to decide whether a witness is telling the truth and correctly recalling the facts about which he has testified.
8. You have seen how the witnesses presented in the witness box when answering questions. Many witnesses are not used to giving evidence and may find the different environment distracting. Consider the likelihood of the witness's account. Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or know the things that the witness testified about. Another point may be; has the witness said something different at an earlier time? These are only few general considerations which I assumed will assist you in your deliberation. It is, as I have said, up to you to assess the evidence and what weight, if any, you give to a witness's evidence or to an exhibit.

Burden and Standard of Proof

9. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused guilty to the offence.
10. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused to prove his innocence, as his innocence is presumed by law.
11. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused's guilt. If there is a riddle

in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information and elements of the offences

12. The accused is charged with one count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act. The particulars of the offence are before you hence, I do not wish to reproduce them in my summing up. According to the information, the prosecution has alleged that the accused has committed this offence with the company of few other accomplices.

13. The main elements of the offence of the Aggravated Robbery are that:
 - i) The accused with others,
 - ii) In the company of each other,
 - iii) Committed the robbery on Jang Wan Ban and Myoung Hee Kim and stolen the items as stated in the information,

14. The first element involves the identity of the offenders. The prosecution should prove beyond reasonable doubt that the accused committed this offence with others. The prosecution's case is that the accused committed this offence together with others. When a criminal offence is committed by two or more persons, each of them may play a different part, but if they are acting together as part of a joint plan or agreement to commit the offence, they are each guilty.

15. The word plan and agreement do not mean that there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It can be made with a nod and a wink, or a knowing look, or it can be inferred from

the behaviour of the parties. The essence of joint responsibility for a criminal offence is that each accused shared a common intention to commit the offence and played his part in it, however great or small, so as to achieve that aim.

16. Robbery is an aggravating form of theft. A theft becomes robbery, if the accused, or any of his accomplices immediately before committing theft; or at the time of committing theft; or immediately after committing theft, use force or threaten to use force on another person with intent to commit theft or to escape from the scene.

17. Accordingly, the prosecution has to prove beyond reasonable doubt that:
 - i) The accused with others,
 - ii) In the company of each other,
 - iii) Dishonestly appropriates the items as stated in the information which are belonged to Jang Wan Bang and Myoung Hee Kim,
 - iv) With the intention of permanently deprives it,
 - v) And used force on Jan Wan Bang and Myoung Hee Kim immediately before or after stealing the said items.

18. According to the evidence presented by the prosecution, the case against the accused is founded on the principle of “Recent Possession”. You have heard that the complainant has not seen or identified the accused person when the robbers came into his house. However, few weeks after the incident, the accused was found in possession with some of the stolen items. They were Swiss Military Wristwatch, Casio Wristwatch, Nike canvass and HP Laptop.

19. The principle of “Recent Possession” means that if someone is found in possession of stolen property soon after it has been stolen, and he fails to give a reasonable explanation of the manner in which the stolen property came in to his possession, it is justified in inferring that he was either the thief or else a guilty receiver of that stolen property.

20. In view of the principle of recent possession you have to be satisfied with the following three elements that:
- i) The accused possessed the goods;
 - ii) The goods possessed by the accused were the subject matter of the offence, as complained to by the complainant; and,
 - iii) There is no explanation from the accused in regard to his possession of the suspected goods.
21. It is important to remember that the prosecution is required to prove beyond reasonable doubt the first two elements. Then only the accused is required to give an explanation regarding the manner in which the said stolen property came into his possession.
22. I now draw your attention to the definition of “Possession” under the principle of recent possession. The prosecution is required to establish beyond reasonable doubt that the accused has some form of physical possession or control over those stolen properties.
23. The requirement of the accused to give an explanation of his possession is not higher as of the primary burden of proof beyond reasonable doubt. The accused is only required to give a reasonable explanation which may reasonably true, even though it is not convinced that it is true.

Evidence of the Prosecution

24. Let me now remind you briefly the summary of the evidence presented by the prosecution and the defence during the course of the hearing. This is a very short hearing and lasted only for two days. Therefore, I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
25. On the 29th of August 2017, the complainant, his wife and a nephew were sleeping at their home at Bhimji Street. The complainant suddenly woke up as he heard a big sound, like his house was falling. He then realized that few people were inside his room. They have tried to open the door of the room forcefully, that was the reason for that big sound. These people

were masked and armed with knives and pinch bars. They have told the complainant and his wife not to shout. They then tied up their mouth, hands and legs by using the neck ties of the complainant. They made the complainant to lie downwards on the bed and one person held him from his back, preventing him to get up. They then took his wife out of the room. After a while they have stolen certain items from the home and took his Kia Sorento car bearing the registration number FZ 079 and left.

26. The complainant then went to the police post in his wife's car and reported the matter to the police. On the 18th of September 2017, he was shown certain items stolen from his home at the Samabula Police Station, they were the Swiss Military wristwatch, Casio wristwatch which was belonged to his nephew, Nike canvass, and HP brand laptop which was used by his nephew. The complainant identified those items in the court as the items that were stolen from his home.
27. The second witness of the prosecution is Sale Oresea. He is a cousin of the accused. He could recall that on the Friday of the first week of September 2017, he met the accused on his way back home from his work. The accused had shown him two wristwatches, one of them was Swiss Military wristwatch and other one was Casio wristwatch. The accused had told Mr. Sale that he is selling them for \$20.00 each. Mr. Sale had only \$25.00, and the accused agreed to sell both wristwatches for \$25.00. Mr. Sale then paid the accused \$25.00 and got the two wristwatches. When Mr. Sale asked the accused who is the owner of the wristwatches, the accused had replied, saying they were his own. On the early hours of the 18th of September 2017, a police officer came to his house, looking for these two wristwatches. Mr. Sale had given the two wristwatches to the police officer. During his evidence, Mr. Sale identified the Swiss Military wristwatch and Casio wristwatch as the same two wristwatches that he purchased from the accused and given to the police subsequently.
28. The third witness of the prosecution is DC Peter Voi. On the 18th of September 2017, he has gone to the house of Mr. Sale and uplifted the Swiss Military wristwatch and Casio wristwatch and listed them in the search list which he prepared. He identified the Swiss

Military wristwatch and the Casio wristwatch as the same two wristwatches that he had uplifted from Mr. Sale. Moreover, he had conducted a search at the house of the accused and found a green and yellow colour Nike canvass and a black HP laptop. DC Voi had made a search list for these recovered items as well. During his evidence, DC Voi identified the green and yellow colour Nike canvass and the black HP laptop as the same items that he recovered from the house of the accused.

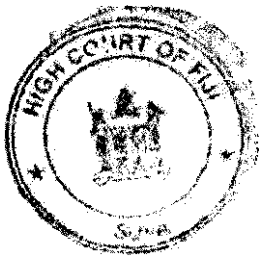
29. The last witness of the prosecution is DC Murthi. He is the Investigation Officer of this matter. You have heard that he explained the investigation which he had carried out in respect of this matter. He tendered the recovered items as prosecution exhibits during his evidence.
30. I have summarized the evidence presented during the course of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence. What I did only was to draw your attention to the main items of evidence and help you in recalling yourselves of the evidence.

Absence of the Accused

31. You have seen that this hearing is conducted in the absence of the accused person. The fact the accused is not present to defend himself does not make him automatically guilty to this offence. The fact he is not present in court does prove nothing.
32. Having taken into consideration all the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused in company with other have committed the offence of aggravated robbery as charged, you can find the accused guilty.
33. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused in company with others have committed the offence of aggravated robbery as charged, you can find the accused not guilty.

Conclusion

34. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.
35. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe
Judge

At Suva

05th June 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Accused is absent.