

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

**Crim. Case No: HAC243 of 2018**

**STATE**

**vs.**

- 1. EPELI TAWAKE**
- 2. MELI LESUMAIROMA CAMA**

**Counsel:** Mr. E. Samisoni for the State  
Ms. N Mishra with Ms. M. Singh for the 1<sup>st</sup> Accused  
Mr. M. Young for the 2<sup>nd</sup> Accused

**Date of Hearing:** 08<sup>th</sup> July 2019

**Date of Closing Submissions:** 09<sup>th</sup> July 2019

**Date of Summing Up:** 09<sup>th</sup> July 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 before the commencement of the hearing, we have different functions. 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. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or

refuse. You will then apply the law, as I 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 when considering the facts. However, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.
4. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes 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 of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is 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. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise 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 emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused, 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 solely 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.

### **Burden and Standard of Proof**

7. I now draw your attention to the issue of burden and standard of proof. The accused are presumed to be innocent until they are proven guilty. The presumption of innocence is in force until you form your own opinion that the accused are guilty for the offence.
8. The burden of proof of the charge against the accused is on the prosecution. It is because the accused are presumed to be innocent until they are proven guilty. In other words there is no burden on the accused persons to prove their innocence, as their innocence is presumed by law.
9. 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 offence**

10. The two accused are 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 the summing up.
11. The main elements of the offence of the Aggravated Robbery as charged in the information are that:

- i) The two accused persons,
  - ii) In the company of each other,
  - iii) Robbed the items as stated in the particulars of the offence, in this case, have snatched the bag containing the items as described in the particulars of the offence, and
  - iv) Those items were belonged to Samisoni Raiwalui
12. The first element involves the identity of the offenders. The prosecution must prove beyond reasonable doubt that the two accused persons in the company of each other committed this offence and no one else.
13. The prosecution's case is that the two accused committed this offence together. Where 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.
14. 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.
15. Robbery is the aggravated form of theft. A theft becomes robbery, if the two accused 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. It is important that you have to be satisfied beyond reasonable doubt that the force or threatened to use force were used with the intention to commit the stealing or escape from the scene.

16. The robbery becomes aggravated robbery, if such a robbery is committed with the company of one or more people or committed with an offensive weapon. In this case, the prosecution alleges this robbery was committed with the company with two persons.
17. A person commits theft if that person:
  - i) Dishonestly,
  - ii) Appropriates the property belonging to another,
  - iii) With the intention of permanently depriving the other of that property.
18. The elements of 'dishonestly' and "the intention of permanently depriving the other of the property" are the state of mind of the two accused at the time of committing the offence. It is not possible to have direct evidence regarding a person's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of an accused from the facts and circumstances you would consider as proved.
19. '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.
20. Accordingly, the prosecution has to prove beyond reasonable doubt that:
  - i) The two accused, in this case Epeli Tawake and Meli Lesumairoma Cama
  - ii) In the company of each other,
  - iii) Dishonestly appropriated the items as described in the information which were belonged to Samisoni Raiwalui, in this case, snatching the bag containing those items from its straps,
  - iv) With the intention of permanently deprive it,
  - v) And used force on Samisoni Raiwalui, before stealing the said items.

### **Admitted Facts**

21. I now take your attention to the agreed facts, which are before you. They are the facts that the prosecution and the defence have agreed without any dispute. Hence, you are allowed to take them into consideration as proven facts beyond reasonable doubt. I must advise you that the admitted facts of the first accused is only apply against the first accused and you cannot use it against the second accused. Likewise, you are not allowed to use the admitted facts of the second accused against the first accused.

### **Evidence of the Prosecution**

22. Let me now remind you briefly the summary of the evidence presented by the prosecution. This is a very short hearing and lasted only a day. Therefore, I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
23. The complainant returned home from the city after drinking beer at a night club on the early hours of 15th of April 2018. He got down from the taxi near Kubukawa road. He had then started to vomit. The complainant had been drinking beer for nearly five hours on that night. He was drunk. According to the complainant he could not recall everything that took place on that morning as he has gaps in his memories about this incident as he was drunk on that morning.
24. As he got down from the taxi, he had seen two young men around the place. Apart from these two men, there were no one in the area. While he was vomiting, he felt that someone had hit him on his head and then on his face. His bag which he was carrying on his shoulder was then snatched from its strap and the two men then ran away. The strap of the bag remained on his shoulder. The complainant had tried to chase them but he was drunk and failed to catch them. The complainant had then gone home and reported this incident to the police later on the day. You have heard the complainant explained about the items that were in the bag. The bag was a pouch type bag.

25. You may recall that the learned counsel for the prosecution asked the complainant that, were the two young men that he saw when got down from the taxi, eventually hit him. The complainant answered saying that he does not remember seen the faces of them and only remember their body features. He has not approached the two men when he got down from the taxi.
26. During the cross examination by the defence the complainant said that he could not remember whether he had approached the two men and touched the penis of the first accused over his three quarter short. Moreover, he could not remember whether he continued to touch the penis of the first accused irrespective of the warning of the first accused to stop it. The first accused then punched him and the complainant fell down on the ground. He then got up and left the place. The complainant said that he did not leave the bag on the ground as the bag was snatched from its strap, leaving the strap on his shoulder. He had gone home with the strap of the bag.
27. You have heard that the complainant said during the cross examination by the learned counsel for the second accused that he was heavily intoxicated on that morning. The complainant said the taxi in which he came, had gone when this incident took place. The place has street lights. His house is about 6 meters away on the steep hill from the place this incident happened. The complainant further said that he did not see the perpetrators clearly as he was drunk and only can explain them from their body features. The complainant further said that there was a canteen at the carwash.
28. The complainant said that he cannot remember whether he approached the two accused when they were sitting near the canteen. Moreover, he cannot remember whether he touched the front side of the second accused and then turned to touch the front side of the first accused when the second accused refused him. The first accused then punched the complainant and he fell down. The complainant said that he cannot remember these incidents as he was drunk.

29. You have heard that the learned counsel for the second accused asked the complainant whether he left the place, dropping his belongings, after he was punched by the first accused and fell down. The complainant said that he cannot remember as he was drunk.

### **Right to Remain Silence**

30. At the conclusion of the prosecution case, both accused were explained about their rights in defence. Both of them opted not to give evidence on oath and exercised their rights to remain silent. The accused does not have to give evidence. You must not assume that they are guilty because they have not given evidence. The fact that they have not given evidence prove nothing. It does nothing to establish their guilt.

### **Analysis and Directions**

31. The prosecution alleges that the two accused came and hit the complainant on his head and face when he was vomiting at Kubukawa road on the early hours of the 15th of April 2018. After hitting the complainant, the two accused had then snatched the bag of the complainant from it strap, containing the items as described in the information therein, and run away. The strap of the bag remained on the shoulder of the complainant.
32. The complainant, during the cross examination said that he cannot remember whether he had approached the two accused and made certain sexual advancement to them. The defence suggested to the complainant that the first accused had warned the complainant to stop that sexual advancement. The complainant had still made his sexual advancement, irrespective of the warning of the first accused. The first accused then punched him. The complainant had fallen down on the ground. He then got up and left the place, leaving his bag on the ground. The complainant did not deny the above versions of events suggested by the defence. He said that he cannot remember those events as he was drunk. The complainant said during the cross examination, that he cannot remember whether he got up and left the place, leaving his belongings, after he was punched by the first accused,



as he was drunk. The complainant said that he cannot remember everything as his memory about this incident has gaps as he was drunk on that morning.

33. In order to determine whether the two accused had actually committed this offence as alleged, you have to evaluate the evidence given by the witness of the prosecution. Therefore, I now take your attention to the directions of evaluation of evidence.

### **Reliability of Evidence**

34. You must be satisfied that you can rely on the evidence as true, reliable, and credible evidence. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.

### **Credibility of Evidence**

35. The assessment of credibility of evidence is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his motivations, his relationship to and the reaction to the particular situation.
36. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to determine whether a witness is telling the truth and is correctly recalling the facts about which he has testified.
37. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking about in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required

to consider the consistency of the witness not only with his own evidence but also with other evidence presented in the case.

38. It is your duty to consider the demeanour of the witness, how he react to being cross examined and re-examined and was he evasive, in order to decide the credibility of the witness and the evidence. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he may be accurate in saying one thing and not accurate in another thing.

### **Caution Interview of the First Accused**

39. You have seen that the prosecution tendered the caution interview of the first accused as an exhibit of the prosecution with the consent of the first accused. According to the caution interview, the complainant had approached the two accused when they were smoking cigarette at the carwash. The complainant had started to touch the front side of his trousers. The first accused had then told the complainant to stop it. However, the complainant had continued his advancement. The first accused then punched the complainant and the complainant fell down on the ground. The complainant then stood up and walked away, leaving his bag on the ground. The first accused had then picked the bag.
40. The learned counsel for the prosecution in his closing address suggested you that the first accused had admitted certain elements of the offence in the caution interview. As I explained you before, the allegation against the two accused is that they have assaulted the complainant and snatched the bag from its strap.
41. As I said before, the first accused had stated in the caution interview that he punched the complainant once and then picked the bag when the complainant left the place leaving it on the ground.

42. You have to take into consideration the whole of the statement in the caution interview in order to determine whether the accused has made any admissions to this offence in the caution interview. You have to determine whether the first accused had made any admission that he assaulted the complainant while the complainant was vomiting at Kubukawa road on the early hours of 15th of April 2018. You have to then proceed to determine whether the first accused had admitted in the caution interview that he snatched the bag of the complainant, from it straps, and run away. Having taken into consideration the whole of the statements in the caution interview, if you are not satisfied or not sure of that the accused has actually made admission in his caution interviews, you must ignore the caution interview.
43. If you are satisfied, that the accused has made such admission to this alleged offence in his caution interview, then it is for you to decide whether it is truthful, and what weight you give to it as evidence. It is for you to decide whether you consider the whole of admission or part of it or none of it as truthful, reliable and credible. You must consider all other evidence adduced during the course of the hearing in deciding the truthfulness, credibility and reliability of the admissions made in the caution interview.
44. The caution interview of the 1<sup>st</sup> accused is only admissible against the 1<sup>st</sup> accused and you cannot use it against the 2<sup>nd</sup> accused.

### **Final Directions**


45. 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 two accused, in company with each other have committed the offence of Aggravated Robbery as charged, you can find them guilty of the offence of Aggravated Robbery.
46. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the two accused in company with each other have committed the

offence of Aggravated Robbery as charged, you can find them not guilty of the offence of Aggravated Robbery.

**Conclusion**

47. 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.
48. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



  
R.D.R.T. Rajasinghe  
**Judge**

**At Suva**  
09<sup>th</sup> July 2019

**Solicitors**  
Office of the Director of Public Prosecutions for the State.  
Office of the Legal Aid Commission for 1<sup>st</sup> Accused.  
Office of the Legal Aid Commission for 2<sup>nd</sup> Accused.