

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 393 of 2018

STATE

vs.

- 1. TEVITA LESIVOU**
- 2. TEVITA BOLA**

Counsel: Ms. S. Tivao for the State
1st Accused In Person
2nd Accused In Person

Date of Hearing: 29th, 30th and 31st and 1st August 2019

Date of Closing Submissions: 01st August 2019

Date of Summing Up: 02nd August 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. A few things you have heard during the course 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 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.

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 guilty to 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 to prove their innocence, as their innocence are 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 offences

10. The two accused are charged with one count of Attempted Aggravated Robbery, contrary to Sections 44 and 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 two accused has committed this offence in the company with each other.

11. The main elements of the Attempted Aggravated Robbery as charged are that:
 - i) The two accused,
 - ii) In the company with each other,
 - iii) With an intention to rob the complainant,
 - iv) Attempted to rob the complainant.

The Identity of the Accused

12. The first element of the offence is involved with the identity of the two accused. It is the onus of the prosecution to prove beyond reasonable doubt that two accused were the two perpetrators who attempted to rob the complainant on the early hours of the 13th of October 2018 at the Carnavon Street Suva.
13. Then the prosecution has to prove that the two accused committed this offence in the company of each other. Hence, 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.

Intention to Rob

15. The second element concerns about the state of minds of the two accused. It is the duty of the prosecution to prove beyond reasonable doubt that the two accused had the intention to rob the complainant.
16. Robbery is stealing by using force. Therefore, the prosecution is required to prove beyond reasonable doubt that the two accused had the intention to steal the complainant by using force.
17. 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.
18. In order to conclude that the two accused had the intention to steal the complainant by using force, you must be sure that they really had that intention when they attack the complainant. In order to do that you should consider all the evidence and draw appropriate inferences to ascertain whether the two accused had the said intention.

Attempt

19. I now draw your attention to the fourth element. The prosecution is required to prove beyond reasonable doubt that the two accused have done something in order to actually execute their intention of stealing complainant by using force and not something that amount to mere preparation to execute their said intention.

Evidence of the Prosecution

20. Let me now take your attention to the evidence presented by the prosecution. This is a very short hearing. Therefore, I trust that evidence still fresh in your mind.

21. The complainant had gone to a night club with his friends on the 13th of October 2018. At around 1 a.m. in the morning, he had gone to the vendor who sells food at the corner of the Carnarvon Street. Having bought food from the vendor, he had stood there and started to consume the food. At the same time, a group of boys, came close to him and started to touch his pocket. There were five or six boys. He tried to move away from them, but they grabbed him. One of them tried to cover his mouth with the hand and another was trying to hold his hand and others were trying to put their hands into his pocket of the jeans. He managed to get himself free from the person who tried to cover his mouth. He then shouted for help, while struggling to get himself free from the boys. He tried to stop the hands of the boys to go into his trousers' pockets as he wanted to save his mobile phone and the wallets as they were inside the pocket. The boys tried to rob his mobile phone and the wallet.
22. At the same time the police vehicle came and stopped in front of them. Few of the boys managed to run away but two of them were arrested by the police. The complainant managed to get hold of the hand of one of them when that boy was trying to put his hands into the pocket of the jean of the complainant. When that boy saw the police, he tried to run away but the police managed to catch him just 2 meters away from the complainant. The boy was wearing a hoody and a 3/4 jean. Another boy was also caught by the police within the same radius of the incident. Once the two boys were arrested, the police took them to the police station.
23. The complainant also had gone to the police station in the same vehicle in which the police escorted the two suspects. He was seated in the front and the two suspects were in the back. At the police station he was shown the two suspects and he identified them as two of those boys who tried to rob him. Moreover, the complainant said that the two suspects came to him and asked him saying "Was it me? Was it me".
24. The second witness of the prosecution is PC Romulo. He was in the police patrol car, doing their city operation during the early hours of the 13th of October 2018. While they were approaching the corner of the Carnarvon Street, he saw from the street lights and as well as from the light of the car, two i-taukei youths were trying to rob one Indo-Fijian man. The

Indo-Fijian man was lying down and two boys were trying to rob him. There were no other people apart from the victim, the two perpetrators and one roti seller. PC Romulo said that he saw the incident from its beginning. You may recall that PC Romulo consistently reiterated that there were only two youths who were trying to rob one Indo-Fijian man. One of them were in a black pull over and other one was in a blue coloured t-shirt.

25. PC Romulo then got off the car with PC Savu and managed to arrest the two youths. The two youths did not try to elude away when PC Romulo got off the car as they were focusing on their victim. Upon arresting the two suspects, PC Romulo escorted them to the police station and handed them over to PC Prasad. The complainant also travelled with them to the police station.
26. The third witness of the prosecution is PC Prasad. He received the two suspects on the early hours of the morning of 13th of October 2018 at the police station. PC Romulo brought the two suspect and handed them over to him. They were brought into the police station in connection to aggravated robbery. PC Prasad then entered the details of the two suspects and check their physical condition. PC Prasad identified the two accused as the same suspects that he received on the 13th of October 2018 at the Police Station.

Right to Remain Silence

27. At the conclusion of the prosecution case, the two accused were explained about their rights in defence. The first accused opted not to give evidence on oath and exercised his right to remain silent. The first accused does not have to give evidence. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.

The Evidence of the Second Accused

28. The second accused in his evidence said that he was drinking with two of his workmates at Ritz night club and then walked to another night club at Carnarvon Street. After having few

drinks he had gone out of the night club to have a cigarette. While he was smoking a cigarette, a police officer came and took him to the police station.

29. 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.

Analysis and Directions

30. In view of the evidence presented by the prosecution and the defence, the main issues that you have to determine in this matter are that:
- i) Whether this alleged incident as stated in the information has actually taken place?
 - ii) If then, whether the two accused actually took part in committing the alleged crime?
31. In order to determine these issues, you have to evaluate the evidence presented by the prosecution and the defence and determine the reliability and credibility of evidence given by the witnesses.

Reliability of Evidence

32. You must be satisfied that you can rely on the evidence as the 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

33. The assessment of credibility of evidence does not concern with unintended inaccuracy, mistakes or errors. It 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.
34. 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 judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
35. 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 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 or her own evidence but also with other evidence presented in the case.
36. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence. In doing that you have to keep in your mind that some witnesses are not used to giving evidence in court and may find the different environment in the court house distracting.
37. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.

Evidence of the Second Accused

38. I now kindly draw your attention to the evidence adduced by the second accused. The second accused elected to give evidence on oath. The second accused is not obliged to give evidence. He does not have to prove his innocence. However, the second accused decided to give evidence. Therefore, you have to take into consideration the evidence adduced by him when determining the issues of fact of this case.
39. Accordingly, it is for you to decide whether you accept or not the evidence given by the second accused. If you consider that the account given by the second accused is or may be true, then you must find second accused not guilty.
40. If you neither believe nor disbelieve the version of the second accused, yet, it creates a reasonable doubt in your mind about the prosecution's case. You must then find the second accused not guilty.
41. Even if you reject the version of the second accused that does not mean that the prosecution has established that the second accused guilty of this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the second accused has committed this offence as charged in the information.
42. I would like to take your attention to some of the issues that you have to take into consideration when you determine the issues of this matter.
43. According to the information which is before you, the prosecution alleges that these two accused have committed this offence. The prosecution does not allege in the information that the two accused have committed this offence with some others accomplices. However, you have heard the evidence of the complainant, where he said that he was surrounded by five to six youth and they tried to rob him. Then PC Romulo in his evidence said that he saw only two i-taukei youths were trying to rob an Indo-Fijian man.

44. You have heard the evidence of the complainant, he said that the group of five to six boys tried to rob him while he was standing. Then the police car came and parked. After that, few of the boys managed to run away but two of them were caught. PC Romulo in his evidence said that he saw the incident from its initiation. According to PC Romulo, there were only two i-taukei youths and the victim the Indo-Fijian man, who were lying down while the two youths were trying to rob him.
45. You may recall that the complainant said during the cross examination, that he also travelled to the police station in the same police vehicle with the two suspects. He was seated in the front and the two suspects were in the back. At the Police Station, the two suspects were shown to the complainant and he identified the two suspects as the two of the boys in the group that tried to rob him. Moreover, the complainant said the two suspects communicated with him while he was at the police station. You have seen that the complainant in his evidence did not say that the first and second accused are the same two suspects that were caught by the police while they were trying to rob him with few others and also as the same two suspects that he identified in the police station.
46. The complainant in his evidence said that the group of boys including the two suspects that eventually caught by the police tried to run away when the police car came and stopped in front of them. According to PC Romulo, the two youths did not try to elude away when the police came and stopped. When PC Romulo got off from the car, the two youths were still focusing on the victim.
47. You have further seen that PC Romulo did not say in his evidence that the second accused is one of the suspects that he arrested on the 13th of October 2018. PC Romulo had then handed over the two suspects to PC Prasad at the Police Station. He did not say in his evidence that he explained PC Prasad that the two suspects that he handed him over were in connection of attempted aggravated robbery of Hitesh Lal. Neither PC Prasad said that PC Romulo explained him that the two suspects were brought into the police in relation to the alleged attempted aggravated robbery of Hitesh Lal. According to PC Prasad the two suspects were brought into the police station in relation to an incident of aggravated robbery.


The complainant did not come with the two suspects. The complainant came to the police station later.

48. Moreover, you have seen PC Prasad identified the two accused as the two suspects brought into the police station by PC Romulo on the early hours of 13th of October 2018. He did not identify the two accused as the two suspects that tried to rob one Indo- Fijian man. Therefore, you are not allowed use the evidence of identification made by PC Prasad as the evidence that the two accused were at the scene of crime. He only saw them at the Police Station and made the identification as the two suspects that brought into the police station by PC Romulo on the early hours of 13th of October 2018.
49. You have to take into consideration those evidence when you make your deliberation about the facts of this matter.
50. Madam and Gentlemen assessors, I now take your attention to the final directions of the summing up.
51. 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 Attempted Aggravated Robbery as charged, you can find them guilty of the offence of Attempted Aggravated Robbery.
52. 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 Attempted Aggravated Robbery as charged, you can find them not guilty of the offence of Attempted Aggravated Robbery.

Conclusion

53. Madam and Gentlemen 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.
54. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?




R.D.R.T. Rajasinghe
Judge

At Suva

02nd August 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

1st Accused In Person.

2nd Accused In Person.