

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 331 of 2018

STATE

vs.

- 1. ASESELA NAUREFURE**
- 2. MAIKA TOVAGONE**

Counsel: Ms. U. Tamanikaiyaroi with Mr. U. Lal for the State
Ms. L. Ratidara for 1st Accused
Ms. S. Hazelman with Mr. K. Skiba for 2nd Accused.

Date of Hearing: 26th, 27th, 28th, 29th, 30th October, 2020, 3rd and 4th November 2020

Date of Closing Submission: 05th November 2020

Date of Summing Up: 11th November 2020

Date of Judgment: 20th November 2020

JUDGMENT

1. The two accused have been charged with one count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act. The particulars of the offence are that,;

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to Section 311 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

*ASESELA NAUREURE and MAIKA TOVAGONE with others on the 20th day of August 2018, at Suva in the Central Division, in the company of each other committed theft of assorted properties namely \$100 cash, 1 x brown leather Wallet and 1 x Oakley bag belonging to **ROY FARRELES** and immediately before committing the theft, used force on **ROY FARRELES** and **PRIYA KUMAR**.*

2. The hearing of this matter commenced on 26 October 2020 and concluded on 4 November 2020. The Prosecution presented the evidence of thirteen witnesses and tendered fifteen exhibits in evidence. The two accused gave evidence and tendered four exhibits in evidence. Subsequently, the counsel for the Prosecution and the Defence made their respective closing addresses. I then delivered the summing up. The three assessors, in their unanimous opinions, found both the accused guilty of this offence.
3. Having carefully considered the evidence adduced during the hearing, the closing addresses of the parties, the summing up, and the three assessors' opinions, I now proceed to pronounce my judgment as follows.
4. According to the evidence presented during the hearing, the Defence did not dispute the robbery at the Rubina Medical Centre. Moreover, they did not dispute that the first accused was arrested by a civilian man when he was hiding behind a banana plantation. The first accused said that he had to run and hide behind a banana plantation when he saw the police vehicle. The second accused did not dispute that the police arrested him near the Sagali housing. However, the first and second accused claim that they were not involved in this alleged robbery.
5. In his evidence, the first accused claims that he was on his way to buy tobacco from one Kevox when this alleged robbery took place. Though he is not disputing that a civilian man arrested him, the first accused denies that he had the stolen "Oakley" bag and the brown leather wallet in his possession.

6. The second accused claims that he was at home looking after his sickly sister and then went to Sagali Housing to meet a friend at around 1.20 p.m. The second accused further said that he was not dressed in black coloured surf shorts with blue stripes and black coloured "puma" shoes with white stripes at the time of his arrest. He further claimed that he was not holding a blue coloured shirt with black stripes in his hand at the time of his arrest. According to his evidence, the second accused was dressed in a yellow vest, black running shorts, and flip-flops.
7. Accordingly, the main dispute in this matter is to determine whether both accused or one of them were involved in this alleged robbery, or they were elsewhere at the time of this incident.

Inconsistent Nature of the Evidence

8. The Defence focuses much on the inconsistent nature of the evidence presented by the main witnesses of the Prosecution with their respective statements given to the police during the investigation. It is impossible to expect the witnesses to testify in evidence precisely the same things they have stated in their statements made to the police. However, the Court is allowed to consider such inconsistencies and omissions to determine the credibility and reliability of the evidence.
9. Mr. Peceli, in his statement made to the police, had not stated that the first accused had a bag when he was running away. Moreover, he has not mentioned in his statement that the first accused tried to drop the brown coloured leather wallet. Mr. Peceli said that he explained everything to the police officer, but the police officer had not recorded them properly. Besides that, Cpl. Nilesh Kumar explained that Mr. Peceli gave him the bag when Mr. Peceli handed him over the first accused. SC Paula stated that Cpl. Nilesh gave him the bag, and the first accused gave him the wallet. The evidence of Cpl. Nilesh and SC Paula corroborates the evidence presented by Mr. Peceli regarding the bag and the wallet. Therefore, I do not find the inconsistent nature between the evidence of Mr. Peceli and the statement he made to the police has adversely affected the credibility of his evidence.

10. The statement made by SC Paula states that he searched the first accused and found the wallet. It further states SC Paula seized the bag from the first accused. However, in his evidence, SC Paula said that the bag was given to him by Cpl. Nilesh. Moreover, the wallet was given to him by the first accused when he asked the first accused if he got anything else in his possession. The first accused was under SC Paula's custody at that time. Mr. Peceli, in his evidence, said that he found the bag in the first accused's possession and handed it over to Cpl. Nilesh. Cpl. Nilesh confirmed it in his evidence, and then the bag was given to SC Paula. According to Mr. Peceli's evidence, the first accused had put the wallet back into his pocket. Mr. Peceli and Cpl. Nilesh's evidence corroborate the evidence given by SC Paula in respect of the bag and the wallet. In view of these reasons, I do not find the above-stated inconsistencies between the evidence of SC Paula and his statement has caused any adverse effect on the credibility of his evidence.
11. I find the inconsistencies highlighted by the Defence counsel in the evidence of Sgt. Tabalilai and DC Inoke have not materially affected the credibility of their evidence. Having observed the manner and how Sgt. Ofati gave evidence, I find him a forgetful witness than a witness who purposely lied in his evidence.

First Accused

12. The Prosecution case against the first accused is founded on the contention that he was found in possession of the two stolen items, namely the bag and the wallet, a few minutes after this incident, at a location closer to the crime scene. Accordingly, the Prosecution case against the first accused is based upon the principle of "recent possession".
13. Laidlaw J.A. in **Regina v Morin (1957) O.R. 337 (CA)** has discussed the principle of recent possession, where it was held that:

"If the prosecution establishes the fact of theft and the fact of recent possession by the accused of the stolen goods, then, in the absence of any

evidence to explain how the accused obtained possession of them, the jury may convict the accused."

14. The Court of Appeal of England in **R v Smythe (72 Cr App R 8, CA)** has discussed the scope of the principle of recent possession, where it was held that:

"In Cross on Evidence (5th ed, 1979) the effect of all these authorities is cogently and clearly summarised at P 49. We respectfully adopt the words there used; "if someone is found in possession of goods soon after they have been missed and he fails to give a credible explanation of the manner in which he came by them, the jury are justified in inferring that he was either the thief or else guilty of dishonestly handling the goods, knowing or believing them to have been stolen."

15. The Supreme Court of Fiji in **Timo v State [2019] FJSC 1; CAV0022.2018 (25 April 2019)** has discussed the principle of recent possession and found it as circumstantial evidence, which allows the Court to make a further inference that the person who is found in possession of the stolen items has stolen the said property or party to the theft. Keith J in **Timo v State (supra)** found that:

"Indeed, this was a classic example of the application of that strand of circumstantial evidence commonly called "recent possession". In cases where a defendant is found to have been in possession of property which has been stolen very recently, so that it can be said that he was in recent possession of it such that it plainly calls for an explanation from him about how he came to be in possession of it, and either no explanation is given, or such explanation as is given is untrue, the Court is entitled to infer, looking at all the relevant circumstances, that the defendant stole the property in question or was a party to its theft. And if the property had been stolen in a burglary or a robbery, the Court is entitled to infer, again looking at all the relevant circumstances, that the defendant took part in the burglary or the

robbery in which the property was stolen: see, for example, Blackstone's Criminal Practice 2016, paras F.63-F.64, and applied in Fiji in Wainiqolo v The State [2006] FJCA 49 and Rokodreu v The State [2018] FJCA 209."

16. Accordingly, if someone is found in possession of property soon after it has been stolen, and he fails to give a reasonable explanation of how he came to have the said stolen item, it is justified in inferring that he was either the thief or else a guilty receiver of the said stolen property. In view of the principle of recent possession, as explained above, it is the onus of the Prosecution to prove beyond a reasonable doubt that:

- (i) The first accused was found in possession of green coloured "Oakley" branded bag with orange coloured stripes and a brown leather wallet.
- (ii) The items were recently stolen from Doctor Roy.
- (iii) The accused was found in possession of these stolen items a few minutes after the alleged incident.
- (iv) He was found in possession of these stolen items at a location closer to the place of the incident.
- (v) There are no reasonable explanations by the accused regarding his possession of the said items.

17. In his evidence, the first accused claims that he did not have the said bag and wallet in his possession when he was arrested. In order to establish the guilt of the first accused, the Prosecution presented the following circumstantial evidence:

- (i) Mr. Peceli arrested the first accused at a plantation of cassava, dalo, and banana.

- (ii) The first accused also said that he was arrested by a civilian man when he was hiding at a banana plantation.
- (iii) Doctor Roy saw the thieves were entering into a cassava patch along the Church road.
- (iv) The first accused was found in possession of the stolen bag and the wallet.
- (v) He was found in possession of these stolen items a few minutes after the incident at a location closer to the place of the incident.
- (iv) The video footage of Camera 7. The Prosecution did not expressly point out any of the suspects in the footage as the first accused. However, still, the Court is allowed to consider the video footage as circumstantial evidence against the first accused. In his evidence, the first accused said that he was dressed in a blue coloured t-shirt with the Fiji Bitter logo on the back and black lee shorts. SC Paula noted that the first accused was dressed in a round collar t-shirt and black shorts. The third suspect, who was leaving the Medical Centre after the robbery, in the video footage of camera 7, was dressed in black coloured shorts. I further observed something in blue colour under the round neck collar of his long sleeves t-shirt.

18. I accept the above evidence as credible, reliable, and truthful evidence. These evidence lead me to further indisputable inference that the first accused was one of the suspects who invaded the Rubina Medical Centre and robbed therein on 20 August 2018.

19. In view of the above conclusion, I find the first accused's alibi defence is false and not true.

Second Accused

20. In respect of the second accused, the Prosecution tendered in evidence three video footage of the incident, captured by three CCTV cameras from three different directions. The Prosecution claims the first person, who entered the Medical Centre wearing a blue coloured shirt with black stripes, black coloured surf shorts with blue stripes, and a pair of black coloured "puma" shoes with white coloured stripes, is the second accused. Apart from these three video footage, the Prosecution presented evidence to establish that the second accused was arrested a few minutes after the alleged incident at a location closer to the Rubina Medical Centre. The second accused was still wearing the same black coloured surf shorts with blue stripes and black coloured "puma" shoes with white stripes and holding the blue coloured shirt in his hand when he was arrested.
21. I now take my attention to discuss the purpose of CCTV footage in evidence and the appropriate approach of evaluating the CCTV footage in evidence.
22. In **Dodson and Williams ([1984] 79 Cr App R 220)**, Watkins LJ held the photographs taken by the security camera during the robbery are admissible in evidence for two reasons. The first reason is that the photographs could establish the offence was committed, and the second reason is that it could establish who committed the crime. Furthermore, Watkins LJ found that the jury can compare the accused in Court with the suspect in the photographs. Watkins LJ held that:

"In performing this task juries cannot possibly in our judgment be regarded as acting as experts, as for instance they might be if they were invited to be judges of handwriting or fingerprints, in which specialities special training and expertise are demanded. They are called upon to do no more than the average person in domestic, social and other situation does from time to time, namely to say whether he is sure that a person shown in a photograph is the person he is then looking at or who he has seen recently."

23. In **Attorney General's Reference (No 2 of 2002)** ([2003] 1 Cr App R 321), the Court of Appeal of England was asked to consider the following questions:

- i) *When a suspect is filmed committing an offence, is the evidence of identification by recognition from a witness, not present at the scene, but who knows the defendant and who, having seen the film, identifies the suspect as being the defendant, inadmissible, because the film can be played to the jury without calling witness and the jury will have the opportunity to compare the defendant in the dock to the suspect on the film and can decide themselves if they are one and the same person,*
- ii) *For an identification of such a witness to be admissible, is it a requirement of law that the witness must have special skills, abilities, experience and knowledge which the jury does not have,*
- iii) *If so, what should those special skills, abilities, experiences and knowledge be?*

24. In considering the above. questions, the Court found that:

In our judgment, on the authorities, there are as it seems to us at least four circumstances in which, subject to the judicial discretion to exclude, evidence is admissible to show and, subject to appropriate directions in the summing up, a jury can be invited to conclude that the defendant committed the offence on the basis of a photographic image from the scene of the crime:

- i) *Where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock (Dodson and Williams).*

- ii) *Where a witness knows the defendant sufficiently well to recognize him as the offender depicted in the photographic image, he can give evidence of this (Fowden and White, Kajala v Noble, Grimer, Caldwell and Dixon and Blenkinsop); and this may be so even if the photographic image is no longer available for the jury (Taylor v Chief Constable of Chester).*

- iii) *Where a witness who does not know the defendant spends substantial time viewing and analyzing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury (Clare and Peach).*

- iv) *A suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene, (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury (R v Stockwell (1993) 97 Cr App R 260, R v Clarke [1995] 2 Cr App R 425 and R v Hookway [1999] Crim LR 750.*

25. In view of these judicial precedents, it appears that the jury would play the role of a witness of the event in analyzing the video footage. However, the jury's task in identifying or comparing the suspect in the photograph or video recording with the accused is different from a witness identifying a suspect at the scene of the crime (*Blenkinsop [1995] 1 Cr App R 7*). A full "Turnbull directions" is not necessary for this kind of comparison or

identification. Still, the jury must exercise special caution in comparing or identifying the accused, such as the quality of the images, changes in the accused's appearance since the time of the offence, *etc.* (*Dodson (supra)*). I prefer to adopt these guidelines in analyzing and evaluating the video footage in this case.

26. Having carefully observed the three video footage, I find the height and physical stature of the suspect in the blue shirt are more similar to the height and the physical stature of the second accused. Though the suspect in the footage had no beard as of the second accused sitting in the accused box in the Court, I consider the following evidence to determine whether the suspect in the blue shirt in the video footage is the second accused, that;

- (i) Prosecution Exhibits No 1, 2, and 3. The first man who entered the Medical Centre was dressed in a blue coloured shirt with black stripes, black surf shorts with blue stripes, and black coloured "puma" shoes with white coloured stripes.
- (ii) The man in the blue shirt with black stripes, black surf shorts with blue stripes, and black coloured "puma" shoes with white coloured stripes went in and talked to Priya, the Receptionist, and then he pulled her down to the ground.
- (iii) Priya was asked during the cross-examination by the counsel of the second accused if she has seen any distinguishing mark on the man, like a tattoo or scar, for which she replied, stating that the man had a gold tooth.
- (iv) The second accused in his evidence said that he has a gold tooth.
- (v) In her evidence, Priya identified the Prosecution Exhibit 14, the black surf short with blue stripes, and Prosecution Exhibit 15, the blue shirt with black stripes as the same shorts and the shirt the man in the blue shirt was dressed in during the incident.

- (vi) Sgt. Tabalailai and DC Apolosi arrested the second accused when he was dressed in black coloured surf shorts with blue stripes and black coloured "puma" shoes with white stripes. At the time of the arrest, the second accused was holding a blue coloured shirt in his left hand.
- (vii) The second accused was arrested a few minutes after the incident at the same location where the first accused was arrested, which is closer to the place of the incident.
- (viii) The suspect placed his hands closer to his chest when he left the Medical Centre in Prosecution Exhibit 3 and 1. It appears like that he was trying to remove the buttons of the shirt he was wearing (video footage one and three).
- (ix) The second accused was dressed in the same clothing and shoes while holding the blue shirt in his hand when he was locked in the cell at the Nabua Police Station.
- (x) Both Sgt. Tabalailai and DC Apolosi identified Prosecution Exhibit 13, the puma canvas and Prosecution Exhibit 14, the black surf short as the same shoes and the shorts the second accused was wearing at the time of his arrest.
- (xi) DC Inoke and DC Willy gave evidence, saying that the second accused was dressed in a blue shirt with black stripes, black surf shorts with blue stripes, and black coloured "puma" shoes with white coloured stripes on 21 August 2018. The two officers then seized those items and made a search list for them.
- (xii) DC Inoke tendered the blue shirt as Prosecution Exhibit 15. The black surf shorts as Prosecution Exhibit 14 and black puma shoes as Prosecution Exhibit 13, saying they were the same items he seized from the second accused. DC Willy also identified them in his evidence.

27. I accept the above evidence as credible, reliable, and truthful evidence. The above evidence and my observation of the second accused with the suspect in the video footage, lead me to an indisputable and conclusive inference that the suspect, who were dressed in a blue shirt with black stripes, black surf shorts with blue stripes, and black coloured "puma" shoes with white coloured stripes in the video footage, is the second accused. Accordingly, I find the second accused is one of the suspects who invaded Rubina Medical Centre and robbed therein on 20 August 2018.
28. In view of the above conclusion, I find the second accused's defence of alibi is false and not true.
29. As a result of the above findings, I find no compelling reasons to disagree with the assessors' unanimous guilty opinion.
30. In conclusion, I find the first and second accused guilty of this offence of Aggravated Robbery, as charged in the information, and convict them to the same accordingly.




.....
Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

20th November 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the 1st Accused.

Office of the Legal Aid Commission for the 2nd Accused.