

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 63 of 2018
[CRIMINAL JURISDICTION]

STATE

V

- 1. ARTHUR APOROSA VUALIKU**
- 2. GAUNAVOU DELAI**
- 3. RUSIATE ROKOBULOU**

Counsel : Mr. E. Samisoni for the State
Accused in person

Hearing on : 23 November – 01 December 2020

Summing up on : 03 December 2020

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless you agree with that opinion. You are the judges of facts.
2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room and the exhibits tendered. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. You have to bear in mind that a statement made by a witness out of court is not evidence. Therefore, a statement made to police by a witness can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. However, if a witness admits that a certain statement in such police statement was made by that witness and that it is true, then that portion of the police statement becomes part of that witness' evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or any complainant. No such emotion should influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same

weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.

8. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
9. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may find inconsistencies when you compare the evidence given by different witnesses on the same issue. Inconsistencies may lead you to question the reliability of the evidence given by a witness.
10. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should see whether there is any acceptable explanation for it. In this regard, you may bear in mind that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail given by a witness to be the same from one account to the next.
11. Accordingly, if there is a significant inconsistency in the evidence given by a witness, it might lead you to conclude that the witness is generally not to be relied upon and reject the entire evidence of that witness; or, you may reject the part of that witness' evidence that you may find unreliable given the inconsistency and accept the part of the evidence you consider reliable; or if you find that the inconsistency has been duly explained you may disregard the inconsistency and accept the entire evidence of the witness as reliable.

12. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
13. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
14. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
15. In order to prove that the accused is guilty of a particular offence, the prosecution should prove all the elements of the offence beyond reasonable doubt. If you have a reasonable doubt in respect of even one of those elements, as to whether the prosecution has proved that element beyond reasonable doubt, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.

16. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not those charges have been proved.
17. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
18. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

Statement of Offence

Aggravated Robbery: contrary to Section 311(1)(a) of the Crimes Act 2009.

Particulars of Offence

ARTHUR APOROSA VUALIKU, GAUNAVOU DELAI and RUSIATE ROKOBULOU with another on the 24th day of January, 2018 at Nasinu in the Central Division, in the company of each other, robbed **NARAYAN PRASAD** of 1x TFL Switch Board set, 1x TFL handset phone, 1x router internet connection, 12x 300ml cans of Coca Cola, 1x TG silver hard drive, 1x tablet red bag, 1x pinch bar, 1x digital camera, 1x pair of black safety boots and \$75.00 cash the property of **DIGNIFIED CREMATORIUM**.

19. You may note that the first and the second accused in this case have pleaded guilty to the above offence. That is why they are not present before the court for this trial and the reason that this trial proceeded only against the third accused (hereinafter referred to as the “accused”). Their pleading guilty to the charge has nothing to do with the accused’s guilt in relation to the above charge.
20. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

21. The first witness for the Prosecution was one Narayan Prasad ("PW1"). He said that:

- a) *On 23/01/18 he was on duty as a Security Officer at the Dignified Crematorium at Nakasi where that day he started his work at 7:00pm. Around 1:15am, the following morning, the alarm went off. He walked around the building and because he did not notice anything he called the control room and cleared it as a false alarm. The alarm went off like this on three occasions thereafter. When it went off for the third time it was around 1:45am. While he was walking around the building after the third time, he stopped at the entrance to the office because he noticed lots of lizards near the alarm sensor.*
- b) *While he stood there someone held his hands from behind. He got very scared and then he saw four people standing there. They were wearing black caps and their faces were covered. They asked him for the keys to the building and the location where the money is kept. When he told them that he doesn't have the keys and that he does not know where the money is, he was punched on the face and on the back of his head. While he was being assaulted, he heard these individuals talking in the iTaukei Language.*
- c) *At one point he was hit with a stick on his leg where he fell down and he knew that the leg was broken. Thereafter they tied his legs and the arms with a rope. They carried him to the back of the building. While one of them stayed with him, the other three went in the front of the building. Then he heard glasses breaking and then he heard sounds like someone is breaking into the building. He said that he was tied up at the back of the building for more than half an hour and during that time he heard a lot of noise from the building like they were breaking the door inside the building.*
- d) *Thereafter he saw them coming outside with little boxes in their hands. The man who was watching him gave him a can of coke and lit one cigarette for him saying that they are sorry for what they did to him. Then they left. He said that from the time he met them at the main door to the time they left, it took around one and a half hours.*
- e) *After they left he managed to untie himself but when he tried to stand he fell down. He crawled to the front and then he saw a lot of broken glasses near the front door. He then tried to reach the front gate but on the way he became unconscious. Around 5:30am, his supervisor came in his vehicle and thereafter the police arrived.*
- f) *He was taken to Nausori Hospital and thereafter to Wainibokasi Hospital. He said that he had to undergo a surgery as a result of the injuries he sustained. He was told by the Police that they found blood inside the building and he was asked for a blood sample to make sure that it wasn't his blood.*
- g) *During cross-examination he agreed that he did not recognize anyone of the four Fijian youths who assaulted him that day.*

22. The second prosecution witness was one Maurice Ruggiero ("PW2"). He said that:

- a) *He is the proprietor of Dignified Cremations Crematorium. On 24/01/18 around 6:45am he received a call and was informed that the Dignified Crematorium had been robbed. When he reached the crematorium the police were already there. He entered into the building on the instructions of the police. He saw that the building was totally ransacked. He also noted significant amount of blood and bloodied footprints all the way to his office. He said that the point of entry was a low level window pane that was broken. There was a significant amount of blood dripping from the jagged edge. This window pane was right in front of the building.*
- b) *The police cautioned him to be very careful when he entered the building because they wanted to preserve the crime scene. He was also told to identify the items that were stolen. He said that the number of things of electronic nature were stolen. There was one PABX System, the router for the internet connection to the building, a dozen can of coca cola, some cash in the office, a number of items that belongs to his employees and a pinch bar were stolen. He identified the router shown to him as the one which was stolen and it was tendered as PE1.*
- c) *During cross-examination when it was suggested that he would have thought that the suspect who entered the building must have been seriously injured given the amount of blood he saw, he said that he would not characterize it as a serious injury but it would have been a cut obviously.*

23. The third witness for the Prosecution was D/Corporal 4309 Sakiasi Koroi ("PW3").

He said that:

- a) *He had served in the Police Force for the past 12 years and had been a CSI examiner for the past 11 years. He had undergone training in evidence recovery and crime scene management conducted by the FBI. He is also trained in disaster victim identification conducted by the New Zealand Police. He had undergone training in advanced fingerprint and science in India. He said that he had attended more than a thousand crime scenes. He had extracted blood in more than hundred such cases.*
- b) *On 24/01/18 around 7:30am he was instructed to attend the crime scene at the Dignified Crematorium in Davuilevu. He reached the crime scene around 8:30am. He first did a visual examination of the crime scene. He saw that the front glass in the office was broken. The glasses were scattered within the reception area. The door to the reception was still locked and it was opened with the assistance of the owner. When he entered he saw red blood like stains spattered on the point of entry where the broken glasses were. He noticed the blood like stains in the reception area, the control room and the Director's room. The stains were there on the doors and on the floor.*
- c) *He said that he took samples of the blood like stains using cotton swabs he had with him. That was from the desk at the reception area, the control room door, the Director's door and the exit point at the furnace area. He explained that these cotton swabs were in separate sealed containers. DC Pita Moce assisted him and witnessed his*

examination. The four samples were kept in his custody at the CSI Office located at Nausori and then they were handed over to Constable Pita Moce for them to be deposited in the Biology Lab. He said that a reference sample from the victim was also taken to rule out that it is not the victim's blood that was found in the crime scene.

- d) During cross-examination he said that the samples were handed over to Pita Moce on 25/01/18.*

24. The fourth witness for the prosecution was one Nacanieli Gusu ("PW4"). He said that;

- a) He is a scientific officer attached to the Fiji Police Force. He joined the Police in 2013. At the moment he is attached to the Fiji Police Forensic Biology and DNA Lab. He was appointed as a scientific officer in 2018. He said that he has a Bachelor's Degree in Biology and Chemistry. He had been trained in forensics. Some of the training were carried out by the forensics counterparts in Australia and New Zealand.*
- b) On 31/01/18 he was instructed to obtain DNA reference samples from two suspects in this case. They were Mr. Varasiko Adrole and Mr. Rusiate Rokobulou. He obtained the reference sample of Mr. Adrole at the Nakasi Police Station. After that he went to the Nausori Police Station where the accused was kept. He said that he was accompanied only by the task force driver and no one else went with him.*
- c) He said that he explained the accused the purpose the reference sample would be collected. He said that he told the accused that the reference sample is going to be used for comparison with any samples found at the scene. After he explained the reasons, the accused told him 'Okay, set' and then was nodding. He then took steps to have a consent form filled where the accused and him signed. The said form was tendered as PE2. He said that he did not in any way force the accused to provide the reference sample. After obtaining the accused's sample he brought the sample to the lab for the DNA analysis.*
- d) He said the buccal swabs of Varasiko and the accused were kept in a sealed buccal swab container. These two samples were treated as urgent samples and they were both pushed for analysis straight away. He said that there were crime scene swabs submitted a few days before he went to collect the reference samples. They had already proceeded with the DNA analysis of those crime scene swabs.*
- e) During cross-examination he said that only him and the accused were present at the time the buccal sample of the accused was collected. He said that he witnessed the accused signing the consent form and then he countersigned at the bottom. When his police statement dated 08/11/19 was shown he clarified that the date of the DNA extraction process was incorrectly written as 26/01/19.*

25. The fifth witness for the Prosecution was Naomi Niunitoga Tuitoga (“PW5”). She said that:

- a) *She has been employed with the Forensic Biology and DNA Lab for 10 years. She is currently the Senior Scientific Officer and she holds this post for 3 years. She holds a Bachelors of Science Degree, double majoring in biology and chemistry. She also holds a post graduate Diploma in Bio Technology.*
- b) *On 25/01/18 she was instructed to receive a set of exhibits that were submitted by Constable Pita of Nausori Police Station. She said that she received four blood like swabs and a purple cap tube. The tube contained liquid blood. The four samples were uplifted from the crime scene at the Nakasi Cremation Office. She first checked the condition of the exhibits submitted. She checked the swab condition to see if there were any signs of fungal growth. Once she was satisfied with the condition she requested Constable Pita to sign the relevant lab forms. Then she registered the case and the exhibits as per the laboratory protocols. She first registered the case manually and then entered the details into the laboratory information management system (LIMS). Then she proceeded to tag the exhibits individually. Then she photographed the exhibits individually before she uploaded the images to the LIMS. When she received the exhibits, the crime scene swabs were packed in the swab container and the blood was transported in a purple cap tube. The liquid blood was from Mr. Narayan Prasad.*
- c) *She then proceeded to store the exhibits at separate locations. Once the exhibits are stored, the case file is handed over to an assigned colleague for peer review. She said that this stage she described is known as the registration stage. She said that the case number given for this matter which is 18-01-F-02 is unique to this case only. The samples were stored separately because of possible contamination. The liquid blood was stored in a freezer. The registration of this case was done in one day because of the request of the relevant Police Station.*
- d) *She said that ‘peer review’ is a process where an assigned colleague checks the case details entered in the manual register and the Laboratory Information and Management System (LIMS). The peer reviewer also checks the tagging of the exhibits and their storage. She said she tagged the exhibits with numbers 1 to 5. Exhibits 1 to 4 were the crime scene samples and exhibit 5 was the liquid blood. If the registration process was not done properly, the analysis of the case will not begin. The peer review for this stage was done by Mr. Luke Waqavakatoga. She tendered extracts of the manual register maintained at the Lab as PE3. She pointed out to the entries that were made in PE3.*
- e) *She said that according to the entries in PE3 there was a second submission. The entries were made by Ms. Paulini Saurogo and she did the peer review. She said that there were two swabs from each suspect and their names were written as Varasiko Adrole and Rusiate Rokobulou. The relevant entries were made on 31/01/18. She said that the peer review was done approximately 12 days after, because this case was treated as urgent and therefore though the initial verification was done, the LIMS was updated*

first to ensure that the initial stages of the analysis could begin. After the said analysis, additional information was obtained from the crime scene officer and that led to the delay in the completion of the review.

- f) She tendered the summary report she prepared on 27/01/18 as PE4. She said that it was just a preliminary report. She said that the said report reflects that a complete reference DNA profile was obtained from Mr. Narayan's blood sample and also a complete reference DNA profile were obtained from exhibit 1 and 3 of an unknown male. From exhibits 2 and 4, a mixed DNA profile was obtained but the major contributor's profile matched the DNA profile that was obtained from exhibits 1 and 3. She said that the reason to find mixed profiles in exhibits 2 and 4 would be that the said samples could have the major contributor's blood and the minor contributor's skin samples. She was not involved in the final analysis of the samples.*
- g) During cross-examination she denied the suggestion that the exhibits she received from PC Pita Moce were inside one sealed plastic container. She said that the swabs submitted were encased in its own swab container. She said that it is the approved method of the transportation of swabs according to international standards.*
- h) During re-examination she said that she received the samples on 25/01/18 though it is stated in her police statement that she received them on 25/01/19.*
- i) In her answer to questions posed by the Court she said that the swab containers did not have seals but were closed. She said that if there was contamination of the samples while they were being transported it would clearly show in the DNA profiles generated from the samples and in this case no such contamination was noted in relation to the samples received on 25/01/18.*
- j) Thereafter being given the opportunity to ask further questions if necessary both parties further questioned the witness. In answer to the questions posed by the Prosecutor she said that there was no negative effect on the analysis because of the swabs not being sealed. In answer to questions posed by the accused she said that upon receipt of the exhibits she did not observe in any element that would indicate tampering and this was further established or confirmed by the DNA profiles obtained from the samples and upon comparison with the DNA profiles of the police officers in their database.*

26. The sixth Prosecution witness was Luke Tatau Waqavakatoga ("PW6"). He said that;

- a) He has worked as a Forensic Biologist since 2011. He had obtained a Bachelor's Degree for Applied Science under the Auckland University of Technology. He was also trained by the New Zealand Police on Disaster Victim Identification and also by the INTERPOL. He had also received training by the Australian Counterparts on performing DNA analysis. He said that he had conducted more than hundred cases of DNA analysis.*

- b) *He played three roles in this case. First was the peer reviewing of the registration. He said that peer reviewing involves a thorough assessment of the chain of custody. He then recorded the review process in the register that was tendered as PE3.*
- c) *The second role was the witnessing of the extraction process that was conducted by Paulini Saurogo. He said that this was the first stage of DNA analysis. His role was to make sure that it is the same samples that were registered that are tested.*
- d) *His third role was to conduct electrophoresis. This is the last stage of the DNA analysis. For this process they employ a genetic analyzer machine. The extraction process included all the crime scene samples but he was not involved in the extraction of DNA from the samples provided by the suspects.*
- e) *During cross-examination he said that the extraction by Paulini Saurogo was done on 26/01/18.*

27. The seventh prosecution witness was Ms. Paulini Saurago ("PW7"). She said that;

- a) *She had been employed at the Fiji Biology and DNA Lab for almost 6 years. She has a Bachelor's Degree for Applied Science. She said she is a Scientific Officer for the same lab for the past 3 years. As a Scientific Officer she had been involved in around hundred cases of similar nature.*
- b) *She said that she received reference samples of two suspects namely, Rusiate Rokobulou and Varisiko Androle on 31/01/18 from PW4. She received four exhibits altogether. Each exhibit was stored in its own swab container. She said these containers were not sealed, though they should have been re-sealed after collection. However she said that since the swabs were transported in the international standard container, it was proper for PW4 not to re-seal the containers. She said that if the containers were not sealed, there would be chances of contamination, but she did not see any signs of contamination in those four samples. She came to that conclusion due to the end result. That is because no foreign DNA was observed in the DNA profile obtained from each reference sample, there were no mixed profiles in the end results.*
- c) *After registering the samples then they are forwarded for peer review and then they would be forwarded for the DNA analysis. She said that when the sample is collected directly from an individual, there are two stages in the DNA analysis. First is the direct Polymerised Chain Reaction (PCR) and the second is, Capillary Electrophoresis. She said that PW6 did the direct PCR and she was involved with the analysis during both stages. She recorded the analysis. She tendered the final report she compiled as PE 5.*
- d) *Explaining the report, she said that the DNA profile obtained from the reference sample of Varisiko Adrole was not present in the DNA profiles obtained from the crime scene samples but the DNA profiles so obtained from the crime scene samples was a 100% match for the DNA profile of Rusiate Rokobulou.*
- e) *She said that there is an amplification kit which contains 24 locations which targets the DNA strand which contains the information which is different in each individual.*

These 24 locations are specified in each table found in PE5 depicting the DNA analysis results of each reference sample and each exhibit obtained from the crime scene. She said that each individual gets their DNA from their parents, half from the mother and half from the father. The numbers found in the box representing each location represents the combination, the half from the father and the half from the mother. These numbers or 'alleles' found under each location is unique to each person. She explained that the location titled 'AMEL' is the gender marker which indicates whether it is a male or female. If it is 'XX' it is a female. The conclusion was reached that the profile obtained was of a male contributor.

- f) Exhibit 1 which was a blood like swab that was uplifted from the corridor of the director's office at the crematorium according to the label written by the crime scene officer on the swab container, tested positive for blood in the preliminary test. The DNA profile obtained from the said exhibit which was a complete profile was compared with the profiles of the victim Narayan Prasad, Varsiko Adrole and Rusiate Rokobulou and it was a complete match with the profile of Rusiate Rokobulou. Exhibit 2 which was a blood like swab that was uplifted from the exit area of the crematorium according to the label written by the crime scene officer on the swab container, tested positive for blood in the preliminary test. A complete DNA profile from a single contributor was extracted from that exhibit and it was a 100% match with the DNA profile of Rusiate Rokobulou. Exhibit 3 which was a blood like swab that was uplifted from the control office of the crematorium according to the label written by the crime scene officer on the swab container, tested positive for blood in the preliminary test. A complete DNA profile from a single contributor was extracted from that exhibit and it was a 100% match with the DNA profile of Rusiate Rokobulou. Exhibit 4 which was a blood like swab that was uplifted from the reception area of the crematorium according to the label written by the crime scene officer on the swab container, tested positive for blood in the preliminary test. A mixed DNA profile was obtained from the said sample which meant that there was more than one contributor. This was a normal occurrence and she said it may be due the skin cells of some other person who had used the reception area. She said that there was a major contributor and a minor contributor and the DNA profile of the major contributor was a 100% match with that of Rusiate Rokobulou.*
- g) She said that, according to scientific evidence, Rusiate Rokobulou's DNA profile was found in the corridor to the director's office, exit area, control office and in the reception area of the crematorium.*
- h) Answering the questions posed by the court, she said that two individuals will not have the same DNA profile unless they are identical twins. She said the process and the system in the forensic lab is in line with the international guidelines and every process and machine used in the lab are validated. She said that they are working with the occurrence of the allele frequency of the Fiji population. Some of the samples voluntarily collected have been sent to their overseas counterparts and the results were matched. She said that the results obtained by the overseas counterparts matched with the results obtained by the lab in Fiji and the overseas counterparts also have confirmed*

that no two individuals have the same DNA profile. She said that, in the manner the testing is done in Fiji, it is highly unlikely that two persons in Fiji will have the same DNA profile and that probability is one in a million.

- i) During cross-examination she said that the extraction process of the crime scene samples were carried out by her and was witnessed by PW6, and PW6 carried out the PCR test for the suspect reference samples. She acknowledged that she had mentioned in the police statement that "the quant and PCR analysis were carried out by Nacanieli Gusu on 26/01/19" and she said that it should be 26/01/18.*
- j) In answer to questions posed by the court regarding the inconsistency between the reports PE4 and PE5 where PE4 indicates that both exhibits 2 and 4 presented mixed DNA profiles but PE5 indicates that only exhibit 4 presented a mixed DNA profile, she said that they discovered that the sample that was used to extract DNA initially in relation to exhibit 2 had more than the required concentration of DNA and that was the reason for the machine to produce the initial result noted in PE4. She said that after performing the test again, it was confirmed that exhibit two only had one complete profile.*
- k) During re-examination she said that a maximum of three runs had to be performed to obtain the final results.*

28. The eighth witness for the prosecution was PC 5432 Shanil S. Kumar ("PW8"). He was called by the prosecution at the instance of the accused. He said that;

- a) While he was on duty on 24/01/18, he went to the Dignified Crematorium around 5.00am upon receiving information that a person needs assistance. He saw a security officer lying down on the ground in the compound. When he approached that person he was told that some people broke into the crematorium and that he was assaulted. Then he called for assistance and that person was taken to the hospital. Thereafter he guarded the crime scene. He saw the glasses at the front of the crematorium were broken and the shutters at the back were half open. He saw pieces of wood and stones. Sergeant Sakaria arrived with the crime scene personal after 7.00am.*
- b) During cross-examination being questioned about the investigation diary which he had made certain notes he agreed that he had noted that he uplifted 3x woods, 1 wood covered with blood, 2 stones which were used to brake the glass, 1 short rope and 1 empty can of coke. The relevant investigation diary was tendered as DE1. He said he can't recall when he was asked whether he noted down any brown envelope that was uplifted by Sergeant Kori in that list.*
- c) During re-examination he said that he did not come into contact with any forensic samples or DNA samples from the crime scene. He said that DE1 was filled by him because when he first attended to the scene he thought that he was the investigating*

officer. He said that when he attended the scene the stones were lying in front of the broken glass.

29. The ninth witness for the Prosecution was PC 5174 Pita Moce (“PW9”). He said in his evidence that;

- a) On 24/01/18 upon the instructions he received he assisted forensic officer Mr. Koroi with regard to a case at the Dignified Crematorium at Davuilevu Housing. After that he came back to the Nakasi Police Station and Sergeant Koroi went back to the Nausori Police Station with the blood samples.*
- b) On 25/01/18 he was instructed to take the blood samples from Sergeant Koroi and then to hand them over to the forensic lab. He said that he received the samples from Sergeant Koroi in a brown envelope which was completely sealed. He said that he gave the brown envelope to a female officer at the forensic lab. He identified his name and the badge number on PE3. He said that he did not open the envelope before taking it to the lab.*
- c) During cross examination he denied the suggestion that he was the investigating officer in this case. He said that the investigating officer was one PC Josefa Katonibau.*

30. The 10th Witness for the Prosecution was DC 5145 Josefa Katonibau (“PW10”). He said that;

- a) He was the investigating officer in this case. He said that as the investigating officer one of his roles is to compile the dockets that would be forwarded to the court. He said that the interview and the charges of the accused and the statements of the witnesses will come to the investigating officer. He will not be in charge of writing all the statements.*
- b) He said that he can't recall the exact date the accused was brought in under arrest. He said that the accused was first taken into the Nausori Police Station. Looking at the cell book for the Nausori Police Station he said that according to entry number 116/01/18 the accused was brought in to the police station under arrest by DC Tupoa. Again according to entry number 118/01/18 on 31/01/18 the accused was brought in under arrest by DC Emosi and then released from the cell by DC 5145 Katonibau and escorted to Nakasi Police Station. The copies of the relevant pages of the cell book were tendered as PE6.*
- c) He said that at that time there were only about 4 to 5 crime personnel at Nakasi Police Station but there were more than four suspects in this case and that is why the Nausori Police Station assisted them. He said that in his opinion according to the last census in 2018 the population in Fiji is about 880,000.*
- d) During cross examination he agreed with the suggestion that because there was blood found at the crime scene the nearby health centers and the hospitals were checked.*

When it was suggested to him that at the time of arrest no medical examination was done in respect of the accused because there were no injuries found on them, he said that he can't recall about the accused being medically examined.

31. That was the evidence for the prosecution. The accused opted to give evidence on oath and called one witness.

32. The accused ("DW1") said in his evidence that;
 - a) *On 23/01/18 he was called by a best friend of his, to his house in Kalabu Village to drink homebrew. He went to his friend's house and first they had grog and thereafter they started drinking homebrew where they drank till 6.00am in the following morning. He was really drunk and it was his alibi witness who took him home at Wainiboko. He said that he did not go anywhere else and he was just in Kalabu village.*
 - b) *During cross examination he said that the house he went to at Kalabu village was Mesake Ratabau's house. He said that he had known that person for a couple of years. He said that he arrived at Mr. Ratabau's house in the evening between 7pm to 9pm.*

33. The second witness for the Defence was Mesake Ratabau ("PW2"). He said that;
 - a) *On 23/01/18 he called the accused around 7pm to come to his house to drink homebrew and the accused came to his house around 9pm. He said that they started drinking where first they had grog and later homebrew.*
 - b) *He said that the accused is his best friend for a long time. He had worked with the accused. He said that while he was drinking with the accused the accused did not go anywhere and the homebrew finished around 7.30am. After that he took the accused home at Wainibuku.*
 - c) *During cross examination though admitted giving a police statement on 05/12/18 he denied signing same. When he was asked about the statement in his police statement that the accused was with him from 24/01/18 to 25/01/18; he said that the date is wrong. He agreed that he was very close to the accused and that he would try to protect the accused at any cost.*
 - d) *During re-examination he said that if the accused steals he would tell that to police.*

Analysis

34. To prove the offence of aggravated robbery the prosecution must prove the following elements beyond reasonable doubt;
 - a) the accused;
 - b) committed robbery; and

c) the robbery was committed in the company of one or more other persons.

35. The first element involves the identity of the offender. The prosecution should prove beyond reasonable doubt that the accused committed the offence.
36. A person commits robbery if he immediately before committing theft; or at the time of committing theft; or immediately after committing theft, uses force or threatens to use force on another person with intent to commit theft or to escape from the scene. Robbery when committed in the company of one or more other persons, amounts to aggravated robbery.
37. An offence may be committed by one person acting alone or by more than one person acting together with the same criminal purpose. The offenders' agreement to act together need not have been expressed in words. It may be the result of planning or it may be a tacit understanding reached between them on the spur of the moment. Their agreement can be inferred from the circumstances.
38. Those who commit crime together may play different parts to achieve their purpose. Thus, the prosecution must prove that the accused took some part in committing the crime.
39. Therefore, in this case, if you are sure that the offence of robbery was committed by more than one person and that the accused acted together with the others to commit that offence and took some part in that offence you should find the accused guilty of the offence of aggravated robbery.
40. In this case, the accused did not challenge the fact that the offence of aggravated robbery was committed on 24/01/18 at the Dignified Crematorium. What is essentially challenged is the fact that the accused took part in committing this offence.

41. As you heard from the prosecutor, the prosecution is relying on scientific evidence, more specifically DNA evidence to establish that the accused took part in committing the above offence. It is the prosecution case that the accused's blood was found in the crime scene on four places after it was broken into in the early morning on 24/01/18 and therefore, the accused is one of the four individuals who took part in assaulting PW1 and then stealing from the Dignified crematorium on 24/01/18 after breaking into the said crematorium. According to the prosecution case there were blood stains found inside the said crematorium after it was broken into and the DNA profile obtained from the blood samples collected from the said crematorium is a 100% match with the DNA profile of the accused.
42. The accused says that he did not take part in committing the offence as he was at DW2's place at Kalabu Village from around 9.00pm on 23/01/18 till around 6.00am on 24/01/18. He points out that he could not have committed the offence as he was not there at the crime scene at the material time. DW2 confirmed the accused's claim that the accused was with him. The accused also says that there are inconsistencies in the evidence given by the prosecution witnesses and therefore the said evidence, and in particular, the evidence relating to the DNA analysis cannot be relied upon.
43. When an accused takes up the position that he was not there at the time and the place a particular offence was committed, that is called the defence of *alibi*. If the accused was not there, he could not have committed the offence. Please remember that there is no burden on the accused to prove an *alibi* or that he was not there at the time and the place the offence was committed. An accused simply needs to raise that fact or take up that position in evidence. When an accused does that, it is for the prosecution to prove beyond reasonable doubt that it was the accused who committed the offence and therefore the *alibi* is not true.
44. When you consider the evidence of the accused regarding his *alibi*, if you think that the version of the accused is true or it may be true, then you must find the accused not guilty of the offence. However, you should also bear in mind that you should

not assume that the accused is guilty of the offence merely because you decide not to accept his *alibi*. You should remember that sometimes an accused may invent an *alibi* just because it is easier to do so rather than telling the truth. The main question remains the same. That is, whether you are sure that it was the accused who committed the offence.

45. I have already directed you in relation to inconsistencies. You should deal with any inconsistency you may come across in line with those directions.
46. That brings me to DNA evidence. PW5 and PW7 gave evidence on their findings based on their knowledge in relation to DNA evidence and their experience. You are not bound to accept that evidence including the two reports PE 05 and PE 07. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the evidence given by PW5 and PW7. Evaluating their evidence will therefore include a consideration of their expertise, their findings and the quality of the analysis which supports their findings.
47. As PW7 explained, given the method they are employing in analyzing DNA at the Forensic Biology and DNA Lab, it is very unlikely for two persons in Fiji (who are not twins) to have the same DNA profile in their assessment. She said that the possibility of two persons (who are not twins) having the same DNA profile is one in a million and it is common knowledge that the population in Fiji is less than a million as PW10 said in his evidence. When you consider the evidence of PW5 and PW7, you need to ask yourself whether you are satisfied with the explanation given by PW7 regarding the inconsistency noted in PE4 and PE5 regarding exhibit No. 2 where PE4 reports that the said exhibit presented a mixed profile and according to PE5 it was not a mixed profile but a complete one.

48. If you accept the evidence of PW05 and PW07 that the four crime scene samples presented the same complete DNA profile, then you may conclude that there can be only one person among the population in Fiji who would have the same DNA profile that is so extracted.
49. However, before you come to that conclusion, you need to be satisfied beyond reasonable doubt that the samples that were tested or used to extract the DNA profiles are the same samples that were uplifted from the crime scene by PW3 and nothing else. Accordingly, you have to consider the chain of custody of the said samples (exhibits) from the time they were uplifted until the time they were tested. You heard in this case that various procedures were followed to prevent the contamination of the said exhibits or tampering. From the manner the witnesses explained, the main concern regarding contamination was the possibility of any bodily sample of the police officers who were handling the exhibits to be placed on the said exhibits. According to PW7, the final results confirmed that there was no such contamination because the first three exhibits presented only one complete DNA profile and the fourth exhibit which was the sample obtained from the reception area though presented a mixed profile, the same complete DNA profile was extracted from that sample as well. There was an explanation as to why the said sample could produce a mixed profile. Accordingly, you may find that if there was contamination, it would only make it difficult or impossible to obtain a complete DNA profile of the blood stains found in the crime scene.
50. On the other hand, you may also consider whether there was any possibility of the said samples (exhibits 1 to 4) to be tampered with, where the accused's blood samples could have been introduced and submitted by the police as the samples uplifted from the crime scene. In this regard, you may consider the fact that the samples were uplifted from the crime scene on 24/01/18 and the accused was arrested on 30/01/18. Further, the DNA profiles from the samples from the crime scene were extracted by 27/01/18 as evinced by PE04 dated 27/01/18. It would be relevant for you to consider whether there was a possibility for the police to have

access to the accused's blood by 25/01/18 to introduce it on the swabs handed over to the lab as exhibits on that day, when the accused was arrested a few days after.

51. To summarise the above, you need to bear in mind that even if you accept the evidence of PW07 and the report tendered as PE5, you need to ascertain whether you are satisfied beyond reasonable doubt that the four samples that were used to extract the complete DNA profile were the same samples or exhibits uplifted from the crime scene by PW3 on 24/01/18.
52. Then the next question you need to deal with is, whether you accept the evidence of PW07 that the DNA profile extracted from the said exhibits is a complete match with the DNA profile of the accused. In this regard, you have to consider first, whether it is the same sample of the accused that was obtained by PW4 that was tested in the Forensic Biology and DNA lab to extract the DNA profile which is reflected in PE5 as the accused's DNA profile. Then you have to consider whether you accept the evidence of PW07 that the complete DNA profile extracted from exhibits 1 to 4 was a 100% match with the said DNA profile of the accused, as credible and reliable.
53. If you have any reasonable doubt regarding the process and the procedure followed in extracting the relevant DNA profiles that would tend to question the veracity of the final results in PE5 or with regard to the scientific evidence that the complete DNA profile obtained from the crime scene samples matched 100% with the DNA profile of the accused, then you should find the accused not guilty of the offence.
54. If you are satisfied beyond reasonable doubt that the complete DNA profile obtained from the crime scene samples was a 100% match with the DNA profile of the accused and that given the procedures followed in the Forensic Biology and DNA lab in Fiji, the probability of the DNA profiles extracted in the said lab in relation to two persons to be the same is one in a million where the population in

Fiji is less than a million, then you may conclude that the blood stains that were found inside the Dignified Crematorium on 24/01/18 belongs to the accused.

55. If that is the case, you have the following circumstantial evidence before you among other evidence;

- a) In the early morning on 24/01/18 four individuals were seen by PW1 with their faces covered, at the Dignified Crematorium,
- b) PW1 was assaulted by one or more of those four individuals where one of his legs were broken;
- c) PW1's hands and legs were tied and was then carried to the back of the Dignified Crematorium by more than one of those four individuals;
- d) While one of the four individuals stayed with PW1 the other 3 went towards the front of the building;
- e) Then PW1 heard the sound of breaking glasses and breaking things inside the building like doors;
- f) After that PW1 saw one or more of the three persons who went in front walking with little boxes;
- g) When PW1 crawled to the front of the building after the four individuals left, he saw a lot of broken glasses by the front door;
- h) Later, when PW2 entered the building (Dignified Crematorium), he saw blood dripping from the jagged edge of the window pane which he thought was the point of entry;
- i) PW2 saw that the building was totally ransacked and a significant amount of blood and bloodied foot prints all the way to his office;
- j) PW2 identified that certain items were stolen from that building;
- k) PW3 uplifted samples of the blood stains that were found inside the said building; and
- l) The said blood stains belongs to the accused, based on scientific evidence.

56. Circumstantial evidence is evidence of various circumstances that may lead to the conclusion that an accused committed a particular offence, when taken together. It

must not be mere speculation or guesswork. It is not sufficient that the proved circumstances are merely consistent with the accused person's guilt. To find an accused guilty on circumstantial evidence, you must be satisfied beyond reasonable doubt that the inference of guilt is the only rational conclusion to be drawn from the circumstances you consider as proven when taken together. Before you draw any inference you must first be satisfied beyond reasonable doubt that the evidence given by witnesses relating to the circumstances is credible and truthful. It is important that you examine circumstantial evidence with care as with all evidence and consider whether the evidence upon which the prosecution relies on to prove its case is reliable and whether it does prove the guilt of the accused, or whether on the other hand it reveals any other circumstances which cast doubt upon or destroy the prosecution case.

57. Therefore, based on the above and any other facts and circumstances you consider relevant, you have to determine whether the facts and the circumstances presented in this case leads you to the only rational conclusion or the irresistible inference that the accused in this case was one of the four individuals who confronted PW1 on 24/01/18 and then entered the Dignified Crematorium as revealed in the evidence of PW1 and accordingly that the accused took part in committing the offence of aggravated robbery with more than one other person on 24/01/18. If your conclusion is that you are satisfied beyond reasonable doubt that the accused did take part in committing the offence of aggravated robbery with more than one other person on 24/01/18, then you should find the accused guilty of the offence as charged.

58. Please note that the accused pointed out that there is no medical report of him to show that he had a serious injury that would explain the blood found in the crime scene. His argument is that if he had such an injury at the time he was arrested, the police would have taken steps to send him for a medical examination and therefore the absence of a medical examination suggests that he had no injury that would explain the blood found in the crime scene. That is of course one inference which is

open for you to draw. When you consider this argument, you need to take into account the fact that the incident relevant to this case took place on 24/01/18 and the accused was arrested on 30/01/18. However, if the non-availability of a medical report of the accused casts a doubt in your mind regarding the guilt of the accused in relation to the offence in this case after considering all the evidence, then you should find the accused not guilty.

59. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
60. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
61. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
 - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is a reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, or his witness, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.


If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

62. Any re-directions?

63. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

64. Your opinion should be whether the accused is guilty or not guilty.




Vinsent S. Perera
JUDGE

Solicitors;

Office of the Director of Public Prosecutions for the State

3rd Accused in person