

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 001 OF 2019

STATE

-v-

USAIA DELAI

Counsel : Ms. B. Kantharia for Prosecution
Ms. L. Manulevu with Ms. E. Sowata for Defence

Dates of Trial : 10, 11, 12 February 2019

Date of Summing Up : 13 February 2020

SUMMING UP

Ladies and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.

2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the counsel. You may properly take into account their arguments when evaluating the evidence. It is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law that accused person is innocent until he is proven guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find an accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty. However, the doubt must be reasonable and not be based on mere speculation.

9. Your opinions must be solely and exclusively upon the evidence which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this court room. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial. This summing-up is not evidence. Statements, arguments, questions and comments by the counsel are not evidence either. A thing suggested by a counsel during a witness' cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as being true.

10. Your duty is to find the facts based on the evidence and apply the law to those facts. Use your common sense and approach the evidence with detachment and objectivity. Do not get carried away by emotion.

11. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole.

12. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who have given evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in applying them.

13. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the witnesses' demeanor in the witness-box when answering questions. How did they conduct themselves in court? In general, what was their demeanor in court? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.

14. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are

part of evidence. You should accept those agreed facts as accurate and truth.

15. The agreed facts of this case are that:

1. At the time of the alleged offence, Usaia Delai was 23 years old.
2. The complainant's in this matter are unknown to the accused.
3. Usaia Delai was arrested by the Police on 28/12/18 from Ki Street, Wailoku.
4. Usaia Delai was interviewed under caution at the Samabula Police Station by SGT 3662 Peter Voi for the offence of Aggravated Burglary & Theft.
5. Usaia Delai was then charged on 29 December, 2018 by PC 5504 Isireli for the offence of Aggravated Burglary & Theft.

16. The accused is charged with 3 counts of Aggravated Burglary and 3 counts of Theft. The information is as follows:

COUNT 1

Statement of Offence

AGGRAVATED BURGLARY: Contrary to section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

USAIA DELAI with others between the 15th and 16th day of December, 2018 at Wailoku in Suva in the Central Division, entered into the house of **PENI RATAUKALA**, as trespasser, with intention to commit theft therein.

COUNT 2

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Act 2009.

Particulars of Offence

USAIA DELAI with others between the 15th and 16th day of December, 2018 at Wailoku in Suva in the Central Division, dishonestly appropriated 2 x Bluetooth speakers with charger, black leather cover, 1 x New Balance canvas (pair of shoes) orange and grey in colour, 1 x Adidas canvas (pair of shoes) grey and sky blue in colour, 1 x Puma bag, black and white in colour, 1 x electric fry pan Sunbeam brand, 1 x brown jacket (unbranded), various food items including 15 chickens, 1 kg sausages, peanut butter, potatoes, onions, 5 x pack noodles, 1 x 24 units Rewa UHT milk, Wheatbix, 1 x Cabbage, 5 x Sunbell tuna and clothes including – 3 x trousers hot ocean brand colour brown with Nike symbol and green prints, grey trousers with black prints of hot ocean design, the property of PENI RAITAUKALA of his properties.

COUNT 3

Statement of Offence

AGGRAVATED BURGLARY: Contrary to section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

USAIA DELAI with others between the 15th and 16th day of December, 2018 at Wailoku in Suva in the Central Division, entered into the house of SANJAY REDDY, as trespassers, with intention to commit theft therein.

COUNT 4

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Act 2009.

Particulars of Offence

USAIA DELAI with others between the 15th and 16th day of December, 2018 at Wailoku in Suva in the Central Division, dishonestly appropriated 1 x TCL Television (32 inch), 1 x Philips DVD Player, 1 x 5 piece stainless steel pots and coloured bed sheet with two pillows, the property of SANJAY REDDY with the intention of permanently depriving SANJAY REDDY of his properties.

COUNT 5

Statement of Offence

AGGRAVATED BURGLARY: Contrary to section 313 (1) (a) of the Crimes Act 2009.

Particulars of Offence

USAIA DELAI with others between the 15th and 16th day of December, 2018 at Wailoku in Suva in the Central Division, entered into the house of RUKSHANA BIBI, as trespassers, with intention to commit theft therein.

COUNT 6

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Act 2009.

Particulars of Offence

USAIA DELAI with others between the 15th and 16th day of December, 2018 at Wailoku in Suva in the Central Division, dishonestly appropriated 2 surf shorts (one blue in colour and the other black) and 2 black vests, the property of RUKSHANA BIBI with the intention of permanently depriving RUKSHANA BIBI of her properties.

17. I will now deal with the elements of the offence of Aggravated Burglary.

18. The offence of Burglary is defined in Section 312(1) of the Crimes Act ...A person commits a burglary if he or she enters or remains in a building as a trespasser with intent to commit theft of a particular item of property in the building.
19. A trespasser is a person who enters and remains in a building without the owner's permission. In other words, that person enters and remains in the building without any lawful authority, thus she or he becomes a "trespasser".
21. Aggravated Burglary is an aggravated form of burglary. When a person commits a Burglary in the company of one or more other persons it becomes an Aggravated Burglary. Accordingly, in order to prove the 1st and 3rd and 5th counts, the prosecution must establish that:
 - a. Usaia Delai together with another entered into the houses of Peni Raitaukala, Sanjay Reddy and Rukshana Bibi respectively between 15 and 16 of December 2018 as trespassers.
 - b. When they entered those buildings their intention was to commit theft of particular items of property kept in those houses and that was their common intention.
22. The 2nd and 4th and 6th counts are those of Thefts. A person commits theft if that person;
 - a. dishonestly;
 - b. appropriates the property belonging to another;
 - c. with the intention of permanently depriving the other of that property.
23. The element 'dishonestly' is about the state of mind of the accused. So is the element, 'intention to permanently deprive'. Inferences may be drawn from the conduct of the accused with regard to an accused's state of mind.

24. 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. At law, property belongs to a person if that person has possession or control of the property.
25. Please remember, there are six counts and you are supposed to consider evidence against each count separately.
26. Police interviewing officer Peter Voi read the record of caution statement of the accused. I am now going to direct you as to how you should approach caution statements in evidence in this case. The accused challenges the truthfulness of the caution interviews. He says that he was assaulted, threatened, forced and given a promise to extract a confession. It is for you to assess what weight should be given to the answers given by the accused in his caution interview.
27. It is your duty to consider the caution statements as a whole and other evidence led in trial in deciding where the truth lies. If you are sure, that the accused had given those answers and that he had told the truth to police you may rely on the record of caution interview. If, on the other hand, you are not sure for whatever reason, that the accused had not told the truth, you may reject the caution interview.
28. Proof of the elements of these offences could be established only through evidence. Evidence can be from direct evidence that is the evidence of a person- that is what witnesses saw, heard or perceived by his/her senses, as well as documentary evidence for example the record of caution interview tendered in evidence. You should, in addition, consider circumstantial evidence that is the evidence that is not direct but you can put proved factors together and make some inferences and come to conclusions.
29. There is no direct evidence or eye witness account to prove that the accused was involved in these offences. The Prosecution relies on circumstantial evidence to prove the charges. The law

on circumstantial evidence is that if, on considering a series of pieces of evidence, you are satisfied beyond reasonable doubt that the only reasonable inference to be drawn is the guilt of the accused, and there is no other reasonable explanation for the circumstances which is consistent with the accused's innocence, then you may find the accused guilty of the offence charged.

30. The Prosecution in this case particularly relies on an inference that is generally drawn by courts arising out of unaccounted recent possession of stolen property. The law is that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called upon to account for the possession, that is, to give an explanation of it, which is not unreasonable or improbable.
31. The strength of the inference, which arises from such possession, is in proportion to the shortness of the interval which has elapsed from the time of the offence. If the interval is short, the presumption is so strong, that it almost amounts to proof; because the reasonable inference is that the person must have stolen the property and committed the offence incidental to theft, which is burglary in this case.
32. If an explanation is given which may be true, it is for you to decide on the whole evidence whether the accused is guilty or not; that is to say, if you think that the explanation may reasonably be true, the accused is entitled to an acquittal, because the Prosecution has not discharged the *onus* of proof imposed upon it of satisfying you beyond reasonable doubt. That *onus* never shifts, it always rests on the Prosecution.
33. I will now deal with the summary of evidence in this case. In doing this, I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision in this case.

Case for prosecution

PW1: Peni Emosi Raitaukala

34. Peni is a full time taxi driver. In December 2018, he was residing in Savura, Wailoku in a rented house owned by Sanjay Reddy. On 15th day of December, 2018, he left home at around 8.30 pm and his wife and his 3 daughters left a bit earlier.
35. When his wife returned home with children at around 1.00 am on 16th Day of December, 2018, she saw the main door open. She called Peni to inform about this. She waited outside for Peni to return home immediately. When Peni arrived, he realised that there was a break-in at his house. Upon a check-up, he found out that some items were missing. He straight away went to Wailoku Police Post and filed a report. The matter was then referred to the Samabula Police Station where his statement was recorded.
36. A black leather covered 2 Bluetooth speakers, balance canvas 'adidas' shoes, a black and white 'Nike' bag, a black and white 'Puma' bag, a 'Sunbeam' brand electrical frying pan, a brown jacket, food items (frozen and some groceries) and some of his clothes had gone missing.
37. The Bluetooth speakers, the 'Nike' bag and the 'Puma' bag were later recovered by police. On the 29th day of December, 2018, a police officer Murti asked him to come down to the Samabula Police Station to try and identify his belongings. Peni identified the items that belonged to him. He could easily identify the Bluetooth speaker, the Nike brand bag, and the Puma brand bag. He recorded a statement to that effect. The identified items were retained at the police station.
38. Peni recognised the Bluetooth speaker; the Puma brand bag and the Nike brand bag when they were shown to the witness by the Prosecution.

PW2 – Sanjay Reddy

39. Sanjay Reddy is the owner of the flat Peni was renting in 2018. On the 17th day of December, 2018, Peni called him and informed about a break-in at his flat. He visited the property and checked his mum's flat to find out that it was also broken. The padlock was broken and some items had gone missing. One 32 inch 'TCL' TV, one DVD Player, one set of stainless steel pots, some pillows and bed sheets and pillow cases were among the missing items. He went to Wailoku Police Post with Peni to report the matter. Only TCL TV had been recovered by police. He identified his TV at the Samabula Police Station 3 or 4 weeks after the break-in. Reddy recognised the TV when it was shown to him in Court.

PW3- Rukshana Bibi

40. Rukshana was also renting a flat at the same premises in Wailoku owned by Sanjay Reddy. On 15th day of December, 2018, she washed her and her brother's clothes and pinned them outside the house in the verandah. At around 10 pm she went off to sleep. After some time, she heard her neighbour calling her name. She was told that the tenant's house in front was being broken into. At the same time she noticed that some of her brother's clothes were missing from the line. She gave a statement to the police on the same day.

PW 4 Sgt. Peter Voi and PW5 PC Isireli

41. Sgt. Peter Voi is the team leader of the arresting team that arrested the accused Usaia Delai on 28 December 2018. He also conducted the interview of the accused. PC Isireli was the police officer who participated in the arrest. He also escorted the accused to the crime scene reconstruction in Wailoku and to and from Totogo Police Station.

42. Both officers were based at Samabula Police Station. They conducted an early morning raid in Wailoku on 28th December 2018 to arrest the suspects in a series of break-ins. Two teams led by Detective Sgt. Peter Voi participated in the raid. Upon information received from the community they raided the house of Ruci (Usaia Delai's cousin) in Wailoku where the two suspects were believed to be sleeping. Upon being inquired about the suspects, Ruci went inside the house and woke Usaia Delai and Waisiki up. When they arrived at the door, the officers introduced themselves and informed the reason for the raid which the suspects understood. The suspects cooperated with the officers. PC Isireli cautioned and effected the arrest of Usaia Delai. Sgt. Peter arrested Waisiki. They escorted the suspects to the police vehicle and then to the Samabula Police Station. At the time of arrest or during transportation, Delai was not assaulted or threatened by any police officer.
43. At Samabula Police Station, Detective Sgt. Peter locked Waisiki in the cell, while Usaia Delai was detained in a room close to the Charge Room. This was done to ensure that no communication took place between the suspects.
44. Detective Sgt. Peter started questioning Usaia Delai regarding the allegation wherein information was received about the stolen items that were kept in Ruci's house at Wailoku. Delai agreed to direct them to the place where the stolen items were being kept. Delai was escorted to the house at Wailoku. Delai took out the stolen items from Ruci's house. Sgt. Peter seized the items and made their way back to the Samabula Police Station. Recovered items were recorded in the search list. Delai was detained in the same room.
45. On the 28 December 2018, Sgt. Peter started the interview at 2 pm in English, which was the preferred language for Delai. No witnessing officer or anybody else was present in the room. Delai was cautioned and his constitutional rights explained. Delai was not threatened, forced or given promises to make a confession. Delai was given breaks and meals. Delai was taken to Totogo Police Station as there was no separate room at Samabula Police Station for him to be detained. He was escorted back to Samabula Police Station the following morning (29th) and the interview resumed at 9.30 am. Delai was taken to Wailoku for a crime scene reconstruction by Sgt. Peter

and PC Isireli. They returned to the police station at 10.55 am to resume the interview at 11.05 am. At the conclusion of the interview, Delai signed the record of interview voluntarily.

46. The reconstruction of the crime scene took place on 29th December 2018 at Wailoku during the suspension of the interview. PC Isireli escorted Delai to the scene reconstruction with Sgt. Peter. During the transportation or at the scene reconstruction, Delai was not assaulted or forced to make a confession.
47. PC Isireli was also assigned to be the Charging Officer for Delai. Delai was physically fit when he was first received for charging. No visible injuries were seen on Delai. Delai did not at any time indicate that he wished to be seen by a doctor or that he was assaulted during the time of the interview. No complaint was received by Delai.
48. Under cross-examination, Sgt. Peter and PC Isireli both denied that Sgt. Peter went inside Ruci's house to wake Delai up and that Delai was assaulted by Sgt. Peter with a torch. Officers also denied that they had failed to introduce themselves and to caution the suspect at the time of arrest. Both officers denied slapping, punching, threatening or swearing at Delai at the time of arrest, during transportation or at the Samabula Police Station. They also denied that Delai was punched, assaulted on his abdominal area, on his back and face during the breaks or transportation.
49. Sgt. Peter denied that he was punching the accused during the interview. He also denied that Delai had told him that he (Delai) had bought some items from Waisiki and that he was escorted to Ruci's house on the promise that he will be released if he handed over the items to police.
50. That is the case for Prosecution.

51. At the close of the Prosecution's case you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case they would be cross-examined.
52. The accused elected to give evidence under oath although he is under no obligation to prove his innocence. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains with the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

Case for Defence

Usaia Delai (The Accused)

53. In 2018, Delai was living in Caubati. He is a Carpenter. On 28th December 2018, after attending a funeral he went to sleep in the morning at his cousin Ruci's house in Wailoku. While he was sleeping in the sitting room, the police officers Peter Voi and Iisireli came inside the house. Peter Voi woke him up by banging the torch on his head. Then they dragged him out and asked about Maikeli and Waisiki. He told them that Waisiki had already left and he didn't know anything about Maikeli. Then Peter Voi went inside his sister's room and he found Waisiki sleeping inside the room. They told him that he had lied and dragged him by his collar into the police vehicle.
54. Delai said that he was not cautioned at the arrest. His rights were not given. The reason for arrest was not informed. During transportation, Isireli was punching and asking about Maikeli and Waisiki.

55. At the Samabula Police Station, he was locked up in a room and Peter Voi started questioning about the house break-ins happening in Wailoku. He told Peter that he had bought some items from Waisiki and Maikeli. Peter told him that he should hand those items over to police and then they will send him home. Then they took him to Ruci's house where he handed the items, 1 Bluetooth speaker, flat screen TV, 1 pair of canvas, 2 bags (1 Nike and 1 Puma.) over to Peter and Isireli. He thought that he was going to stay behind as was promised but was taken back to the police station.
56. Delai said that he bought all those items for \$200.00. Waisiki told him that those items were his and he wanted to sell them in order to get money to go to the village. Waisiki is his cousin-sister's boyfriend. Peter and Isireli took him back to a room in Samabula Police Station and started assaulting him. They told him that he was involved in the burglary. These assaults were happening during the interview. During the interview only Peter Voi was with him in the room.
57. Delai said that he requested to be interviewed in i-Taukei but the interview was conducted in English. His rights were not given before and during the interview. Some of the answers in respect of the rights alleged to have been given to him are not his answers.
58. He was assaulted while he was being taken for scene reconstruction and the officers forced him to admit to the offences. Delai admitted having placed all the signatures but he said that he signed only because of the police harassments. He admitted to the offences only because of the harassments.
59. When he and Waisiki first appeared in court he informed the Magistrate that he was assaulted by Voi and Isireli. An order was made for them to be taken to the hospital but only Waisiki was taken. He was not taken because he did not have any blood in his face.

60. Under cross examination, he admitted his signature at all places but denied having signed voluntarily. By looking at the copy record of the Magistrates Court, the Delai admitted that his complaint to the Magistrate and the Order for him to be produced at the hospital do not appear in the Magistrate's minutes. He denied having told police that he was unemployed and doing only part time work by the time of the interview. Waisiki sold all the items to him for \$ 200 because he was dating his cousin. He admitted that he did not have visible injuries on his body despite that he was assaulted and dragged by police officers.
61. That is the case for Defence.

Analysis

62. There are no eye witnesses to these alleged burglaries and thefts. To prove the charges, the Prosecution substantially relies on the confession made to police at the police interview and the circumstantial evidence led in the trial.
63. Please read the record of caution interview carefully. As per the record of interview, the accused at Q 26 has admitted that he committed the alleged offences in the company of two other persons. From answers to Q 47 to Q 53 the accused has described how they entered the flats and removed the items from those flats. The accused during scene reconstruction has allegedly pointed out the flats that were broken into.
64. Prosecution says that the interview was conducted fairly by giving the accused his constitutional rights and the accused gave all the answers voluntarily. They reject the allegations that the accused was assaulted or ill-treated during the course of the interview. The Defence on the other hand says that the admissions were extracted by using police brutality and giving a false promise that he will be released. By considering all the evidence led in the trial, you decide what weight

you should attach to the record of caution interview and if the accused had told the truth to police.

65. Apart from the alleged admissions made to police by the accused, the Prosecution relies on the circumstantial evidence and invites you to draw the inference as to recent possession of stolen property. You heard the police officers say that certain items were recovered on the 28th December, 2018, that was approximately two weeks after the alleged offences were committed. The recoveries had been made on the directions of the accused when those items were in the possession of the accused at his cousin's house. Some of the recovered items were identified by two complainants, Peni and Reddy, as being those stolen from their respective flats.
66. According to the evidence of the two police officers, the accused has shown the houses he and his colleagues had broken into which the Prosecution says is the crimes scene of this case. If you accept their evidence, you may think that the accused knew about this place because he was involved in these crimes.
67. The Defence does not dispute that the property recovered from the possession of the accused is the stolen property of this case. The position of the Defence is that the accused had purchased those items from Waisiki without having any knowledge that they were stolen.
68. The issue is whether the explanation given by the accused is believable and acceptable to you. You observed the demeanour of the accused and heard what he had to say as to how those items came into his possession. The Prosecution says that the accused lied to this court in order to cover up his involvement in these offences. The State Counsel highlighted some inconsistencies between accused's evidence and his answers in the caution interview. It is for you to decide what weight to be attached to the evidence of the accused.

69. Having taken into consideration the evidence as a whole, if you think that the explanation given by the accused may reasonably be true, the accused is entitled to be found not guilty, because the Prosecution has not discharged the *onus* of proof imposed upon it of satisfying you beyond reasonable doubt of accused's guilt. That *onus* never changes; it always rests on the prosecution. If you are satisfied that the explanation the accused have offered is untrue, you may infer guilty knowledge and find the accused guilty on each count.
70. If you accept that the accused made admissions to police and the admissions are true, you may rely upon the caution interview to come to your finding.
71. That concludes my summing up of the law and the evidence in this particular trial. We have now reached the stage where you must deliberate together and form your individual opinions on whether the charges have been proved against the accused. On your return you will be asked to separately state in Court whether the accused is guilty or not guilty on each count.
72. Would you please now retire to consider your opinions? When you have made your decisions would you please advise the Court clerk and the Court will reconvene to receive your opinions?
73. Any redirections?



A handwritten signature in black ink, appearing to read "Aruna Aluthge".

Aruna Aluthge

Judge

At Suva

13 February 2020

**Solicitors: Office of the Director of Public Prosecution for State
Legal Aid Commission for Defence**