

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 225 of 2018

STATE

V

RUPENI LILO

Counsel : Ms. Bhavna Kantharia for the State
Ms. Aarti Prakash with Ms. Manisha Singh for the Accused

Dates of Trial : 27-30 April 2020

Summing Up : 6 May 2020

SUMMING UP

Madam Assessors and Gentleman Assessor,

[1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

[2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box and the documents tendered as prosecution and defence exhibits.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. 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's cross-examination is also not evidence of the fact suggested, unless the witness accepted

the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

- [11] As I already indicated to you, a matter which will be of primary concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may sometimes find Court environment stressful and distracting.
- [14] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to perceive (or know) in any other way the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [15] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This could be in relation to the testimony of the witness given in Court or in comparison to any previous statement made by that witness.
- [16] A statement made to the Police by a witness can only be used during cross-examination to highlight inconsistencies or omissions. That is, to show that the relevant witness on a previous occasion had said something different to what he or she said in Court (which would be an inconsistency) or to show that what the witness said in Court was not stated previously in the statement made to the Police (which would be an omission). You have to bear in mind that a statement made by a witness

out of Court is not evidence. However, if a witness admits that a certain portion in the statement made to the Police is true, then that portion of the statement becomes part of the evidence.

- [17] This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [18] However, if there is no acceptable explanation for the inconsistency or omission which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies and omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency or omission and consider him or her to be reliable as a witness.
- [19] Madam Assessors and Gentleman Assessor, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [20] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [21] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not of the charges. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.

- [22] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.
- [23] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts or is direct evidence.
- [24] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. This is also referred to as circumstantial evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [25] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [26] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [27] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offences charged. It is not required for the accused to prove his innocence.
- [28] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?
- [29] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offences charged. A

reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.

- [30] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [31] You must not let any external factor influence your judgment. You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant in this case or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must also not speculate about what evidence there might have been. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [32] Let us now look at the charges contained in the Information.
- [33] There are two charges preferred by the Director of Public Prosecutions (DPP), against the accused:

COUNT 1

Statement of Offence

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

Particulars of Offence

RUPENI LILO with another, on the 29th day of April 2018, at Nabua, in the Central Division, entered into the dwelling house of **JONE KELO** as trespassers, 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

RUPENI LILO with another, on the 29th day of April 2018, at Nabua, in the Central Division, dishonestly appropriated 1 x Ingeo Circular Saw valued at \$165.00 and 2 x sheets of interior ply boards valued at \$45.14; all to the total value of \$210.14, the property of **JONE KELO** with the intention of permanently depriving **JONE KELO** of his properties.

[34] Section 313 (1) of the Crimes Act No 44 of 2009 (“Crimes Act”) reads as follows:

“A person commits an indictable offence if he or she-

(a) Commits a burglary in company with one or more other persons; or

(b) Commits a burglary, and at the time of the burglary, has an offensive weapon with him or her.”

[35] Section 313 (2) of the Crimes Act provides that an offence against sub-section (1) is to be known as the offence of Aggravated Burglary.

[36] As you would observe, in this case the prosecution has charged that the accused committed Burglary in the company of another person.

[37] The offence of Burglary is defined in Section 312 (1) of the Crimes Act as follows:

“A person commits an indictable offence (which is triable summarily) 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”.

[38] Section 312 (6) states as follows:

“(6) for the purposes of this section, a person is taken not to be a trespasser-

(a) merely because the person is permitted to enter, or remain in, a building for a purpose that is not the person’s intended purpose; or

(b) if the person is permitted to enter, or remain in, a building as a result of fraud, misrepresentation or another person’s mistake.”

[39] Furthermore, Section 312 (7) describes that:

“In this section —

“building” includes —

(a) a part of a building; or

(b) a mobile home or a caravan; or

(c) a structure (whether or not movable), a vehicle, or a vessel, that is used, designed or adapted for residential purposes.”

[40] Therefore, in order for the prosecution to prove the first count of Aggravated Burglary, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 29 April 2018);
- (iii) At Nabua, in the Central Division;
- (iv) With another person;
- (v) Entered into the dwelling house of Jone Kelo as trespassers;
- (vi) With the intention to commit Theft therein.

[41] Let me now elaborate on these elements in respect of the first count.

[42] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[43] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[44] The fourth element is that the accused committed this offence in the company of another person. Please bear in mind that 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. Those who commit crime together may play different parts to achieve their purpose. The prosecution must prove that the accused took some part in committing this offence.

[45] The fifth element the prosecution must prove is that the accused, together with the other person, entered into the dwelling house of Jone Kelo as trespassers. The term *dwelling house* has been defined at Section 4 (1) of the Crimes Act in the following manner:

“dwelling-house” includes—

(a) any building or structure; or

(b) vessel or part of a building or structure or vessel which is for the time being kept by the owner or occupier as a residence (and it is immaterial that it is from time to time uninhabited); or

(c) a building or structure adjacent to or occupied with a dwelling-house is deemed to be part of the dwelling-house if there is a communication between the building or structure and the dwelling-house (either immediate or by means of a covered and enclosed passage leading from the one to the other) but not otherwise;

[46] As stated before, in terms of Section 312 (7) of the Crimes Act, a building includes even a part of a building. It is made clear from these definitions that the ‘compound’ of a house does not come within the definition of a dwelling house or building.

[47] The sixth and final element the prosecution must prove is that the accused, together with the other person, intended to commit Theft at the said dwelling house of Jone Kelo. The law provides that a person is said to have intention with respect to conduct if he or she means to engage in that conduct. Therefore, to prove the sixth element, the prosecution should prove beyond reasonable doubt that the accused intended to commit Theft therein.

[48] You should also remember that no witness can look into an accused’s mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused’s state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.

[49] Let me now explain to you the elements of Theft, with which the accused is charged in Count 2.

[50] In terms of Section 291 (1) of the Crimes Act *“A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property”*.

[51] Section 291 (2) of the Crimes Act provides that an offence against sub-section (1) is to be known as the offence of Theft.

[52] Therefore, in order for the prosecution to prove the second count of Theft, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 29 April 2018);
- (iii) At Nabua, in the Central Division;
- (iv) With another person;

- (v) Dishonestly;
- (v) Appropriated the property of Jone Kelo;
- (vi) With the intention of permanently depriving the said Jone Kelo of his properties.

[53] Let me now elaborate on these elements in respect of the second count.

[54] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[55] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[56] The fourth element is that the accused committed this offence in the company of another person. I reiterate what I stated earlier in this regard. You must bear in mind that 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. Those who commit crime together may play different parts to achieve their purpose. The prosecution must prove that the accused took some part in committing this offence.

[57] The fifth element is the element of dishonesty. You have to consider whether the accused acted dishonestly [and thereby appropriated the property of Jone Kelo]. "Dishonesty" is a state of mind of the accused. In order to determine whether the accused had a dishonest mind, you have to adopt a two-tiered approach as defined in Section 290 of the Crimes Act.

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant (accused) to be dishonest according to the standards of ordinary people.

First, according to the ordinary standards of reasonable and honest people, you have to decide whether what was done by the accused was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. [Dishonest according to the standards of ordinary people-which is an objective test].

If it was dishonest by those standards, then you must consider whether the accused himself has realized that what he was doing was dishonest by those standards. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the accused himself knew that he was acting

dishonestly. It is dishonest for the accused to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting in the manner he did. [Known by the accused to be dishonest according to the standards of ordinary people-which is a subjective test].

Therefore, the prosecution should prove beyond reasonable doubt that the accused acted dishonestly [and thereby appropriated the property of Jone Kelo].

- [58] The sixth element is that the accused, together with the other person, appropriated the property of Jone Kelo. '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.
- [59] The final element the prosecution must prove is that the accused, together with the other person, intended to permanently deprive Jone Kelo of his properties. The law provides that a person is said to have intention with respect to conduct if he or she means to engage in that conduct. Therefore, to prove this element, the prosecution should prove beyond reasonable doubt that the accused intended to permanently deprive Jone Kelo of his properties.
- [60] You should again remember, as I have stated before, that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.
- [61] If you are satisfied beyond any reasonable doubt that the accused, on 29 April 2018, at Nabua, together with another person, entered into the dwelling house of Jone Kelo as trespassers, with the intention to commit Theft therein, then you must find him guilty of the first count of Aggravated Burglary.
- [62] If you find that the prosecution has failed to establish any of these elements in relation to the charge, then you must find the accused not guilty of the first count of Aggravated Burglary.
- [63] If you are satisfied beyond any reasonable doubt that the accused, on 29 April 2018, at Nabua, together with another person, dishonestly appropriated the property of Jone Kelo, with the intention of permanently depriving Jone Kelo of the said properties, then you must find him guilty of the second count of Theft.
- [64] If you find that the prosecution has failed to establish any of these elements in relation to the charge, then you must find the accused not guilty of the second count of Theft.

[65] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

Case for the Prosecution

[66] The prosecution, in support of their case, called the complainant, Jone Kelo, witness John Naibuka Junior and Acting Sergeant Lorini Chan. The Caution Interview Statement made by the accused has been tendered to Court as Prosecution Exhibit PE1.

[67] Evidence of Jone Kelo

- (i) *He is the complainant in this matter. He is a retired telecom officer. He testified that he is currently residing at Lot 36, Kings Road, Nabua. This property in Nabua belongs to him. He had completed the building and moved in around October 2018.*
- (ii) *On 29 April 2018, he was residing at Lot 2 Princess Road, Waila, Nausori. At the time the property at Nabua was under construction. He had asked his neighbour Ruci to take charge of the property or watch over the property, while it was under construction.*
- (iii) *The witness testified that on 29 April 2018 (which was a Sunday), he had received a call from Ruci that someone had burgled into his property. He had requested her to inform the Police and that he will come and check the property on Monday. Ruci is said to have called him around 2.00-2.10 in the afternoon.*
- (iv) *Accordingly, on Monday the complainant had gone to check his property. He had seen that someone had forced the nail at the bottom of the ply board – someone had forcefully taken out the ply board that was nailed to the window. He said that the window that he was referring to was the window at the veranda side. He further explained the ply board was still there (on the window), but the nails that were nailed to the bottom of the ply board had been removed.*
- (v) *Thereafter, the witness had entered his house and checked on all his things inside. He noticed that one chain saw was missing and when he came to the veranda, he noticed two ply boards were missing. He said the chainsaw was inside the room of the house. The witness explained that the veranda was near the roadside of his house and that the veranda was part of his house.*
- (vi) *The complainant said that the approximate value of the property taken was about \$200.00. For both \$214.00.*

- (vii) *When asked whether any of the stolen items were recovered by the Police, the witness said "I am not sure. I have not received any confirmation."*
- (viii) *The witness said that his statement had been recorded by the Police. The statement was recorded on Monday 30 April 2018. He had informed the Police about the items that were missing from his house.*
- (ix) *The witness testified that the two missing ply boards were to be used for the ceiling (of his house) and they were both lying in the veranda.*
- (x) *The complainant was cross-examined at length by the defence.*
- (xi) *In cross examination, the witness stated that he visited his house in Nabua every morning and every afternoon. He doesn't usually visit the house on Sundays.*
- (xii) *It was shown to the witness that the date on which his statement had been recorded, as depicted on his statement, was 30 May 2018. This was one month later.*
- (xiii) *The complainant agreed that his house was being built by people that he knew. It was suggested to the complainant that these people were his relatives. He said: "No my Lord. They are from Raralevu".*
- (xiv) *It was further suggested that one of these people building his house was Vuidole Veiqaravi, who was related to his wife and was residing in his property while it was being built. The witness denied the suggestion. He stated that his house was built by Asakise Toga from Raralevu.*
- (xv) *The following questions were, inter-alia, put to the witness in cross-examination:*
- Q: *While the house was being built, there were some material that was discarded by the builders?*
- A: *Discarded where?*
- Q. *Outside lying in the compound?*
- A. *Those are small pieces of timber which had been used already.*
- Q. *And these items that you are saying includes ply boards as well?*
- A. *No. Those that were in the veranda were useful ones. Those discarded were not useful.*

- Q. *But you would agree that the materials that were discarded included off-cuts of ply boards as well?*
- A. *The ones that are thrown outside, yes. But not the ones in the veranda.*
- Q. *You agree that these items discarded were lying around the compound somewhere?*
- A. *They are stacked underneath my house – not lying around.*
- Q. *Are you aware that Rupeni, my client on the 30 April came to return the ply boards?*
- A. *Yes he returned the ply board.*
- Q. *When Rupeni came to your house, one Veiqaravi was present and he saw him there?*
- A. *No. He came after everyone was building the house. He came last. He was not the one who was building the house. He was the plumber.*
- Q. *Who is this “he” you are referring to?*
- A. *Veiqaravi.*
- Q. *So when my client came and saw Veiqaravi, he told him about the ply boards. Veiqaravi said he will come to his house and see it there?*
- A. *I am not aware.*
- Q. *I suggest to you that Veiqaravi told my client that those were old and damaged ply boards and ones that were thrown away?*
- A. *I am not aware.*
- Q. *I further suggest to you that it was Veiqaravi that told my client that he can use the ply boards?*
- A. *I am not aware.*
- Q. *I suggest to you that Rupeni had put the ply board in his porch and left it there for about a month?*
- A. *I am not aware.*
- Q. *I suggest to you that Rupeni never took the circular saw?*

A. *When I went into the house, I couldn't see the circular saw. Whether he took it or not – all I have been told is that Rupeni took it.*

Q. *I suggest to you that Rupeni did not enter your house on 29 April 2018?*

A. *Because Ruci is the one who called me to inform me that Rupeni is the one who went into the house.*

Q. *I further suggest to you that Rupeni did not at any time pick up the ply boards from your house?*

A. *I don't know. I was in Waila at the time of the incident.*

Q. *I suggest to you that the ply board that Rupeni took were the ply board that was lying outside in the compound?*

A. *If it was outside or inside, it is inside my compound. He shouldn't have taken it.*

(xvi) In re-examination the witness was inter alia asked the following questions:

Q. *In evidence in chief, you said you had given your statement on 30 April 2018 – but on the statement it is stated 30 May 2018. Is this the correct date?*

A. *I gave my statement on 30 April 2018.*

Q. *You were asked that 30 April 2018, that Rupeni had come and returned the ply board and you answered yes. To whom did he return it back to?*

A. *He returned it to me.*

Q. *Were they the same ply board that was taken from the veranda?*

A. *Yes.*

Q. *You had also stated earlier that you had given your statement on 30 April 2018. Given the fact that the ply board was also returned to you on 30 April, can you clarify whether these were returned to you prior to giving your statement or after?*

A. *After. After I came back from the Police.*

- Q. *Given that the ply board was returned to you, did you inform the Police of the same?*
- A. *Yes, I have already informed them.*

[68] Evidence of John Naibuka Junior

- (i) *The witness testified that he resides at Munda Lane, Makila, Nabua. He has been staying in Nabua for approximately 5 years. He is staying with his grandmother, his aunty and cousins.*
- (ii) *In the year 2018, he was schooling. Now he is said to be unemployed.*
- (iii) *He recalled that on 29 April 2018 (which was a Sunday), there was a break in at his neighbour's house on that day. He referred to his neighbour as Jone Kelo. His neighbour's house was not that far from his house. The witness showed the distance between the two houses to be 4 meters.*
- (iv) *He testified that it was in the afternoon around lunch time. He had been at home with his cousins and they were preparing lunch. He had heard a noise from the next door neighbour's house. It was lunch hour – around 1.00 o'clock. At the time 3 of his cousins were with him.*
- (v) *On hearing the noise, he had told one of his cousins to go and check. After that he had peeped out of the window of his house. He saw a man standing on the veranda next door to his neighbours. He was standing at Jone Kelo's house veranda. He had been eating raw noodles. The witness said that he knows this man and his name is Lilo. Lilo used to stay in their community. He said that he is staying close to their house – in the neighbourhood.*
- (vi) *Lilo had greeted his small cousin and then he went back. At the time, the witness was inside his house and peeping out the window. He testified that he personally saw Lilo greeting his cousin. His cousin was standing on the footpath next to Jone Kelo's house. The footpath leading to houses. Lilo had gone up the hill where the witness's uncle's place is. There is a slope opposite Jone Kelo's house. That's where he went.*
- (vii) *Thereafter, Lilo went and he was standing under the coconut tree. The coconut tree is on the slope near the footpath. Then Lilo was seen making a phone call. Then the witness testified that he saw the other guy jump off Jone Kelo's veranda. He did not know who the other person was. At the time, the witness was still inside his house and peeping out the window.*

- (viii) *Thereafter, John had seen the other person run up the slope with two ply boards and a machine. The machine is one which is used to cut timbers. This man was covered with a hood.*
- (ix) *The witness was then asked the following questions in evidence in chief:*
- Q. *What happened then?*
- A. *When he ran up the slope, then Lilo came after and they took the machine and the ply board and went together.*
- Q. *What do you mean Lilo came after?*
- A. *The man was running up the slope, then Lilo came and then they went running up together.*
- Q. *The witness was asked to clarify further?*
- A. *Because Lilo was standing under the coconut tree when the other guy came up the slope. Lilo came from under the coconut tree and they took the machine and ply boards together.*
- (x) *The witness testified that thereafter his grandmother came from church. He had told his grandmother what happened to his neighbour. His grandmother's name is Ruci Qaqanilawa. Then his grandmother had contacted Jone Kelo and told him about what happened.*
- (xi) *John Naibuka said that the day this incident happened, it was a sunny day. He testified that he had clearly seen Lilo standing in Jone Kelo's veranda when he was peeping from his window.*
- (xii) *The witness identified the accused Rupeni Lilo as the person who he has seen on 29 April 2018 in the veranda of Jone Kelo's house, and later under the coconut tree and then who he saw running up the slope with the other person who had the machine and the two ply boards.*
- (xiii) *The witness confirmed that he made a statement regarding this matter to the Police on the 9 May 2018.*
- (xiv) *John Naibuka was cross-examined at length by the defence.*
- (xv) *The witness testified that there were two men whom he observed from his window on 29 April 2018. One was Lilo. The other man was wearing a hood.*

(xvi) *He also said that he observed this man on two separate occasions. One was when he sent his cousin outside to check; the other was when his cousin was not around the man.*

(xvii) *The witness agreed that he had not mentioned in his statement to the Police that he saw a man (Lilo) eating raw noodles in Jone Kelo's house.*

(xvii) *The defence further highlighted several inconsistencies in the testimony given in Court by the witness vis a vis his statement made to the Police:*

i. *In his testimony in Court, the witness had stated that he had seen Lilo in the veranda of Jone Kelo's house and that is when Lilo had greeted John's little cousin.*

However, in his statement made to the Police, it is recorded as follows: "I then sent my cousin, namely Malcolm who is in Class 5 at Levuka Public School just to go and check for that guy. He was covering his head with the hood of a blue pullover."

ii. *In his testimony in Court, the witness had stated that Lilo had greeted his little cousin.*

However, in his statement made to the Police, it is recorded as follows: "As my cousin got near the veranda, the iTaukei guy then turned and greeted him."

iii. *In his testimony in Court, the witness had stated that after Lilo had greeted his little cousin, he went back and was standing under the coconut tree.*

However, in his statement made to the Police, it is recorded as follows: "My cousin then went up the slope which this iTaukei guy came from and as he went up he saw one Lilo standing at the front."

iv. *In his testimony in Court, the witness had stated that on peeping from his window, he had first seen Lilo and thereafter, he had seen the other guy (unknown iTaukei man) jump off Jone Kelo's veranda.*

However, in his statement made to the Police, it is recorded as follows: "At about 1.00 p.m., we were sitting at home and all of a sudden I looked outside and found this same iTaukei guy jumped down from the veranda

carrying with him 2 ply boards and an electrical appliance black in colour.”

- v. *It is further recorded in his statement made to the Police as follows: “The other guy whom I know as Lilo was standing under the coconut tree making a phone call.”*
- vi. *In his testimony in Court, the witness had stated that Lilo and the other guy had both run together with the ply board and the machine.*

However, in his statement made to the Police, it is recorded as follows: “At the same time this iTaukei guy then took the ply boards up Munda Lane whilst Lilo then followed him later.”

- vii. *In his testimony in Court, the witness stated that he did not know the man with the hood and also stated that if he was asked to describe the man, he would not be able to do so.*

However, in his statement made to the Police, it is recorded as follows: “This iTaukei guy who took the marine board was of fair complexion, medium built and has dry big hair with pony tail at the back and side cut”

(xix) The following suggestions were put to the witness in cross-examination:

Q. I put it to you that Lilo at no time entered the veranda of Jone Kelo’s house?

A. No. I saw him went into the veranda before going up the slope.

Q. I suggest to you that Lilo had picked up three pieces of the ply board which were off-cuts, from the compound which was outside Jone Kelo’s house?

A. No.

Q. I further suggest to you that when the other iTaukei man entered the house to get the circular saw, Lilo was not with him?

A. Yes. (Lilo was not with him).

- (xx) *In re-examination, the State Counsel clarified from the witness the answers given by him in cross examination.*
- (xxi) *In re-examination, the witness stated that his cousin had been greeted by both Lilo and the iTaukei man on two separate occasions. He also clarified that the person who he had described in his statement (being of fair complexion, medium built and having dry big hair with pony tail at the back and side cut) was a description he gave of Lilo.*

[69] Evidence of Acting Sergeant Lorini Chan

- (i) *The witness is an Acting Sergeant at the Nabua Police Station. She has been serving in the Fiji Police Force for 14 years.*
- (ii) *In 2018, she was serving at the Nabua Police Station. She was the Investigating Officer in this case. In addition, she was also the Caution Interviewing Officer in the case.*
- (iii) *She testified that on the date of the incident, which was a Sunday, she was on duty at the Nabua Police Station. She had received a report from an iTaukei lady named Ruci Qaqanilawa regarding an aggravated burglary at her neighbour's house. She had attended to the report the same day.*
- (iv) *She had recorded the statements of the witnesses in this case, namely, Jone Kelo, Ruci Qaqanilawa and John Naibuka Junior.*
- (v) *She had also recorded the Caution Interview Statement of the accused on 30 May 2018. The Caution Interview had been recorded at the Crime Office of the Nabua Police Station. The Caution Interview Statement made by the accused has been tendered to Court as Prosecution Exhibit PE1.*
- (vi) *The Caution Interview had been conducted in the English language, in Question and Answer format and recorded on a desktop computer. The interview had commenced at 12.00 hours on 30 May 2018; and concluded at 13.20 hours the same day.*
- (vii) *The witness testified that there was no Witnessing Officer present during the recording of the Caution Interview Statement. She explained that all other officers in the Crime Division were engaged in other duties at the station.*

- (viii) The Caution Interview Statement had been recorded over 4 pages. The witness stated that the accused had signed the Caution Interview in each of those 4 pages. However, she testified that she had not signed the Statement herself. She explained since it was a busy period at the time the accused was brought to the station, she had recorded the accused's Caution Interview and then handed him over to the Charging Officer to be charged. She submits that she thought that she would sign the statement later but forgot to do so as she was busy at that time.*
- (ix) The witness testified that the accused was given all his rights prior to recording of his Statement. She also confirmed that the accused was not forced or threatened to give his answers during the interview nor was he forced or threatened to sign the Statement.*
- (x) In cross examination, it was put to the witness that the Answers to Questions 34, 41, 42 and 46 were fabricated by her. However, the witness denied the suggestion.*
- (xi) The witness was also cross examined on Question and Answers 38, 39 and 40 with particular reference to the person whom the accused had referred to as Soni.*
- (xii) The witness was also questioned on the search conducted at the accused's house on 30 May 2018, during which 1 x piece of (¼ piece) ply board had been recovered from his house. During her cross examination, the Search List was tendered to Court as Defence Exhibit DE1.*

[70] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[71] In this case, the accused opted to remain silent. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent.

[72] During the cross examination of prosecution witness Acting Sergeant Lorini Chan, the defence tendered to Court the Search List (pertaining to the search conducted at the accused's house), as Defence Exhibit **DE1**.

Analysis

- [73] The above is a brief summary of the evidence led at this trial. The prosecution relied on the evidence of the complainant, Jone Kelo, witness John Naibuka Junior and Acting Sergeant Lorini Chan, to prove its case. The accused exercised his right to remain silent.
- [74] As I have informed you earlier, the burden of proving each ingredient of the two charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [75] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [76] During the cross examination of prosecution witness John Naibuka Junior, the defence highlighted several inconsistencies in the testimony given in Court by the witness *vis a vis* his statement made to the Police. I have already explained to you how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation given by the witness for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [77] However, if there is no acceptable explanation given by the witness for the inconsistency or omission which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies and omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his evidence is inaccurate. In the alternative, you may accept the reason he provided for the inconsistency or omission and consider him or her to be reliable as a witness.
- [78] In this case the prosecution is relying on the admissions made by the accused in his Caution Interview Statement. Any admission made by an accused in his caution statement is admissible and sufficient evidence to prove his guilt to a charge.
- [79] However, please bear in mind, there are some applicable principles of law in relation to this evidence. The prosecution must prove that the Caution Interview Statement was made by the accused voluntarily and fairly. The prosecution must establish these facts beyond a reasonable doubt.
- [80] In this case the defence is not challenging the voluntariness or fairness of the statement made. However, the defence states that certain answers in the Caution Interview Statement were fabricated. If you believe that the interview or any part of it

is false, that it was made up or fabricated by the police, you may think that you cannot put any weight on it.

- [81]** The prosecution says that no part of the statement was fabricated. You have heard from the police officer who testified that there were no threats or force or any form of intimidation of any kind made by anyone on the accused and his statement was freely and voluntarily given and that she correctly recorded what the accused said.
- [82]** The question of whether the admissions in the Caution Interview Statement were made by the accused and whether they are true and the question of what weight to attach to the admissions made in the said statement is a matter of fact entirely for you to decide.
- [83]** I must also inform you that it is not mandatory or compulsory to have a Witnessing Officer present during the recording of a Caution Interview Statement of an accused person. Indeed having a Witnessing Officer present during the recording of a Caution Interview Statement is always prudent as it enhances the integrity of the process. However, the absence of a Witnessing Officer by itself does not invalidate the process or does not make that Caution Interview Statement inadmissible.
- [84]** The same would be applicable to instances where the Interviewing Officer has not placed his or her signature on the Caution Interview Statement made by the accused. In this case it is evident that the Interviewing Officer had failed to place her signature on the Caution Interview Statement made by the accused. I must state that it was very irresponsible or careless on the part of the Acting Sergeant, who recorded the Caution Interview Statement, not to place her signature on the statement. During her testimony she endeavoured to explain as to why she had failed to place her signature on the Caution Interview Statement. However, the failure of the Interviewing Officer to place her signature on the Caution Interview Statement made by the accused by itself does not invalidate the process or does not make that Caution Interview Statement inadmissible.
- [85]** During the testimony of the Interviewing Officer, Acting Sergeant Lorini Chan, she made reference to a few other officers of the Nabua Police Station who participated at various stages of the investigation into this case. However, it was not directly put to the witness, by either party, whether the said officers were available during the recording of the Caution Interview Statement of the accused to stand in as a Witnessing Officer.
- [86]** In this case, the accused takes the position that he did not enter the complainant's house on 29 April 2018, nor did he take any ply board from the complainant's house. He also denies that he took the circular saw from the complainant's house. His position is that the ply board he took were the ply board (off-cuts) that were lying outside in the compound. The accused has admitted that on 30 April 2018 he had returned the ply board he had taken to the complainant.

[87] The prosecution denies this position. The prosecution version is that the said ply boards were taken by the accused from the complainant's house – namely the veranda of the house. The complainant while admitting that the accused had returned the ply boards to him clarified that the ply boards returned were those that had been taken from the veranda of his house.

[88] I also wish to refer you to another matter. During her closing address the Learned State Counsel referred to Veiqaravi as being a caretaker in the complainant's house. At no point in time during the course of the evidence did the defence refer to Veiqaravi as being the caretaker of the complainant's house. The suggestion made by the defence to the complainant was that *"one of the people building his house was Vuidole Veiqaravi, who was related to his wife and was residing in his property while it was being built."*

[89] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charges, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offences Aggravated Burglary and Theft, beyond any reasonable doubt.

[90] You must consider each count separately and you must not assume that because the accused is guilty of one count, that he must also be guilty of the other count as well.

[91] In summary and before I conclude my summing up let me repeat some important points in following form:

- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charges of Aggravated Burglary and Theft;*
- ii. *If you find the prosecution evidence is both truthful and reliable, then only you must consider whether the elements of the charges of Aggravated Burglary and Theft have been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

[92] Any re-directions the parties may request?

[93] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the charges separately against the accused. When you have

reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[94] Your possible opinions should be as follows:

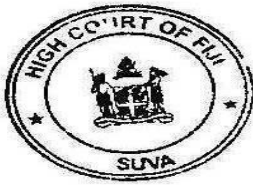
Count 1

Aggravated Burglary- Guilty or Not Guilty.

Count 2

Theft - Guilty or Not Guilty.

[95] I thank you for your patient hearing.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT SUVA

Dated this 06th Day of May 2020

Solicitors for the State : Office of the Director of Public Prosecutions, Suva
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.