

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 228 OF 2019

STATE

-v-

1. ATUNAIASA KOROI JUNIOR
2. ANANAIASA VEISERE KOROI

Counsel: Ms. S. Lodhia for State
Mr. K. Prasad for 1st Accused Mr. K. Cheng for 2nd Accused

Dates of Trial : 13,14,15,16 July 2020
Date of Summing Up : 17 July 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 legal 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.
10. 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.
11. 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.
12. 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.

13. 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 other witnesses who have given evidence.
14. 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.
15. 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.
16. The following facts/documents are agreed/consented to between the Prosecution and Defence under the provisions of Section 136 of the Criminal Procedure Act 2009.
 - I. At the time of the offence Atunaisa Koroi was 38 years old, self-employed, resided at Lot 47 Kelland Street, Narere.
 - II. On 12th June 2019, PC Esava searched Atunaisa Koroi and found his black wallet containing:
 - a. A plastic with two bullets wrapped in foil believed to be marijuana
 - b. 1 x 50 note
 - c. 1 x 10 note
 - d. 1 x \$1 USD
 - e. 3 x 50 cents
 - f. 1 x 20 cents
 - g. 5 x 5 cents
 - h. 1 x 1 cent
 - i. 1 x key
 - j. e-transport, BSP ATM and Salvation Army cards
 - k. piece of paper
 - III. PC Esava further opened Atunaisa Koroi's bag that he was wearing and found:
 - a. 1 x hammer with a black handle

- b. 1 x black trousers
- c. 1 x black head phone
- d. 1 x Panasonic battery charger
- e. 3 x baby mix kava

IV. At the time of the Offence, Ananaiasa Veisere Koroï hereinafter referred to as Mr. Koroï was 32 years old, resided at Lot 42 Kelland Street, Narere.

V. On 12 June 2019 at about 4.45pm, PC Esava was at Suva Carrier stand in civilian attire in an operation vehicle with C Atekini, PC Rusiate and SC Mika.

VI. On 13th June, 2019 Mr. Koroï was interviewed under caution by DC 4321 Asaeli at Totogo Police Station.

VII. On 14th June 2019 Mr. Koroï was charged by WDC 4195 Virisila at Totogo Police Station.

17. The accused are jointly charged with two offences namely Aggravated Burglary and 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

ATUNAIASA KOROI JUNIOR & ANANAIASA VEISERE KOROI on the 12th day of June 2019 at Suva in the Central Division in the company of each other entered into the recording studio of **RATU JOSEFA TABAKAUCORO** as trespassers, with intent to commit theft therein.

Count 2

Statement of Offence

Theft: contrary to section 291(1) of the Crimes Act 2009.

Particulars of Offence

ATUNAIISA KOROI JUNIOR AND ANANAIASA VEISERE KOROI on the 12th day of June 2019 at Suva in the Central Division in the company of each other dishonestly appropriated the 1 x squirer Stratocaster electric guitar with case, 1 x case containing connecting cables, 1 x GT100 effects processor with case, 1 x yellow level, 1 x black bag containing GT 100 effects with cables and guitar straps, 1 x drumstick bag with accessories, 1 x blue HP laptop with charger, 4 x packets of grog, 1 x black Tuscan TH02 Headphone, 2 x amour black hand gloves, 1 x orange multimeter, 2 x soldering iron, assorted screw drivers and pliers, 2 x multi tools, 1 x multi bright light, 4 x cables, 2 x cutters, 3 x long nose pliers, 1 x clamp pliers, 1 x 32 inches grundig TV screen and 1 x gretsch acoustic electric guitar, the properties of **RATU JOSEFA TABAKAUCORO** with the intention of permanently depriving **RATU JOSEFA TABAKAUCORO** of his properties.

18. I will now deal with the elements of Aggravated Burglary. 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.
19. 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.
20. The prosecution must prove beyond reasonable doubt the following elements:
 - (i) the accused
 - (ii) entered or remained in the building
 - (iii) as a trespasser
 - (iv) with intent to commit theft
21. 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. Accordingly, in order to prove the count of Aggravated Burglary, the prosecution must establish that
 - a. the accused entered into the studio at 131 Domain Street on 12 June 2019 as trespassers.
 - b. When they entered that premises their intention was to commit theft of property kept in that premises and that was their common intention.
22. 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. An offence may be committed by one person acting alone or by more than one person acting together with the same criminal purpose. In this case, the Prosecution says that the accused committed the offence in the company of each other. If several people decide to commit an offence together, and all of them participate and assist each other in doing it, each of them is guilty of the crime that is committed. This is so, even though individually, some of them may not actually do the acts that constitute the offence. 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 a crime together may play different parts to achieve their purpose. The Prosecution must prove that the accused took some part in committing the crime.
26. The Prosecution says that the accused were involved with each other in the commission of the crime. In view of this allegation it is convenient to deal with their cases together in one trial. However, they are still entitled to have their charges considered separately. I direct you that you must consider the case against each accused separately. In doing this you must carefully distinguish between the evidence against one accused and the evidence against the other.
27. Proof of the elements of an offence 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. The documentary evidence, for example the photographs tendered in evidence, can also be used to prove the facts if you are satisfied that the photographs are authentic and that they truly reflect the facts in issue.

28. Proof of the elements of an offence can also be proved through circumstantial evidence that is the evidence that is not direct but you can put proved factors together and make some inferences to come to conclusions. The Prosecution in this case solely relies on circumstantial evidence to prove the charges.
29. 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.
30. The Prosecution in this case particularly relies on the inference that is drawn by courts of unaccounted recent possession of stolen property. The law is that if, recently after the commission of the theft, 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. In other words, it is presumed that a person who is found in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. This presumption can be used in respect of other offences that are associated with the theft, for example burglary.
31. In order to draw the presumption of recent possession of stolen property, the Prosecution must establish beyond reasonable doubt
 - a. that the accused was found in possession of the goods;
 - b. that the goods were recently stolen
 - c. that the goods found in the possession are the subject matter of the complaint.
 - d. there is no reasonable explanation by the person found in possession of the goods in regards to his possession of the said goods.
32. Before I conclude the directions on law, I must remind you something very important. The 1st accused admits that he was in possession of some dried leaves believed to be Marijuana. The Prosecution also adduced evidence to that effect. You must not draw an inference that because he was in possession of this illicit material he must have committed these offences.
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 -Ratu Josefa

34. Mr. Ratu Josefa is a businessman and a part-time musician. He had his recording studio at 131 Domain Rd, attached to Mr. Nezbit Hazelman's house. It had band equipments, guitars, speakers, amplifiers, tools etc.
35. On 11 June 2019, after a rehearsal, he padlocked the door and left the studio with band members at around midnight. When he returned on the next day with his assistant, he found the back door of the house and the door of the studio forced open, the studio broken into and the musical instruments and tools stolen. He checked for what was missing. Goods valued at \$ 7000/- had been stolen. There was a square Stratocaster guitar, a case that had connecting cables, a GT 100 guitar effects unit, a yellow level, another bag containing a guitar and connecting cables and a guitar straps, a drumstick bag and accessories inside, a blue HP Laptop, Kava, 3 or 4 bags. A Tuscan headphone, a pair of black working gloves, another guitar strap, assorted tools, screw drivers and pliers, two soldering irons, orange millimeter, multi tools, 1 multi bright light, 4 cables, tool cutters, 3 long nose pliers and a clamp pliers a TV 32 inch and an equisetie guitar.
36. He said that some of the items belonged to him, some of them to Mr. Hazelman and band members. The tools, the GT 100 guitar effects belonged to him.
37. He called the Totogo Police Station and informed about the break-in. On the same evening (12 June 2019), he received a call from the Totogo Police Station and was informed to come down to identify some equipment the police had just seized. He went to the police station and, in the presence of a female officer, he identified the items stolen from the studio. Except for the TV and an equisetie guitar, all the other items were there.
38. He said that, on a request made by him, the seized items were released to him from Totogo Police Station on 12th July, 2019.
39. He described how he was able to confirm that those items belonged to his band. He said some of the items had distinguishable marks. He said he was very familiar with them as he using the equipments almost daily for the past 5-6 years. The recognised the Blue HP laptop as it had Mr. Nezbit's partner- Ashla's name written on it.

40. He was aware that the police had taken photos before the items were released to him. He was shown the photographs at a witness conference held at the DPP's office a week before the trial. He look through around 12 photos of the items he had identified at the police station, except those of the blue HP laptop and the yellow level. He was not present when the photographs were taken. The recovered items were not present at the time the photographs were shown to him. He said he was able to say that the photos that he saw were the photos of the same items that he had identified at the police station.
41. The witness recognised 13 photographs in the booklet as the ones that were shown to him at the DPP's office. By looking at those photographs, the witness pointed out to the court the items that were stolen from his studio.
42. Under Cross-Examination by Mr. Prasad, Ratu Josefa said that one of the GT-100 effects units and one of equisetis guitars belonged to him. He admitted that by looking at the photographs, he was not able to identify which one is his. He said that the black strap on the neck of the guitar is unique to his guitar. He admitted that apart from that, if another identical guitar was placed next to it, he won't be able to tell which one belonged to him.
43. Under cross-examination by Mr. Cheng, Ratu Josefa said the he informed the police over the phone and the police came to the scene on the following day.

PW-2 PC Esava

44. In June 2019, PC Esava was attached to the Totogo Police Station. On 12th of June, 2019, at about 4:45pm, he was engaged in duties at the Suva Carrier Stand monitoring the drug dealers. His team comprising PC Rusiate, PC Atekiní, SC Mika and PC Rabuka and SC Tomawere were in civilian clothes in a Hilux rental car.
45. When they were parked there, he noticed two i-Taukei youths sitting at the waiting area of the carrier stand, passing something onto to each other in a suspicious manner. He and SC Mika approached them. He asked the i-Taukei youth wearing a grey, round neck what that was in there hands. When the youth opened his hand, he saw some loose dried leaves believe to be marijuana.
46. The other youth in a black jersey was sitting just beside him. He did not see any other people around this two youths. After showing his police ID, he conducted a search. He found a black wallet and inside it contained the plastic containing sets of marijuana with some notes. He then proceeded to search the orange back pack the youth was wearing. Inside that bag, it contained a blue HP Laptop, with a black hammer, a headphone and the 3 baby mix kava. Then he asked the youth if he could unlock the laptop. When he typed the password, it failed. Then he suspected that it might have been stolen. He asked the

- youth where did he get that laptop from. The youth replied, since he is a drug dealer, one of his customers had left the laptop with him, just to buy marijuana.
47. PC Esava further said that when they approached the youths there were 5 black travelling bags right in front of them. He saw some items inside the bag, some wires and some drum sticks and a guitar.
 48. He asked the youth- who do all these bags belong to? He replied -he doesn't know. He arrested the iTaukei youth wearing the grey round neck and loaded him and the bags into the vehicle. The other youth was approached by PC Atekini and PC Rusiate and he was searched. Both of them were escorted to the Totogo Police Station.
 49. At the Totogo Police Station, Woman Sergeant Max informed him that there had been a break-in at Domain. He noticed that one of the bags had a tag showing the address of 131 Domain Road. The complainant came to Totogo Police Station and woman Corporal Arieta and Police Constable McDonald were present at that time.
 50. At the Totogo Police Station they came to know that the one wearing the grey round neck was Atunaisa Koro'i and the one wearing the black jersey was Ananaiasa.
 51. At the Totogo Police Station, he prepared a search list of the orange bag and the items inside it which he and Atunaisa signed. He tendered the search list marked as PE1 and handed the items including the blue HP laptop over to the investigating officer. PC Rusiate and PC Atekini searched the 5 black bags.
 52. Under Cross-Examination by Mr. Prasad PC Esava agreed that Atunaisa and Ananaiasa were sitting next to each other at the carrier stand facing Flea Market. He agreed that he didn't mention anything in the search list about dried leaves and the wallet and its contents found in Atunaisa's possession. He said that there is no procedure to be followed in arresting a suspect if a police officer sees something suspicious on the suspect. He did not introduce himself as a police officer when the search was done. After that he showed his Police ID, but did not caution him at the arrest. He said that the suspect was charged for being found in possession of Marijuana. He later said that he was not aware if the suspect was charged for that. He admitted that he did not take down the serial number or any distinguishing features of the blue HP laptop. He said that there was not plenty people at 4:45pm in the area where the suspects were sitting, although it is a public place.
 53. Under Cross-Examination by Mr. Chang, PC Esava said he prepared a search list and wrote everything by hand, listing the items he found in Atunaisa's possession. He admitted that another search list was prepared by Constable Rusiate for Ananaiasa Koro'i. He later agreed that both search lists and also the third one shown to him had been prepared by the same person.

54. He agreed that Ananaiasa did not have any contraband on him although he was arrested. He agreed that the suspects were not holding on to the bags. He agreed that he did not follow the Force Standing Orders.
55. Under re-examination, the witness admitted that he only signed the search list that was prepared by the Investigating Officer Corporal Arieta.

PW3 - PC Rusiate

56. In June 2019, PC Rusiate was based at the Totogo Police Station. On 12 June 2019, at about 4.45 pm, he was at Suva Carrier Stand sitting in a civilian vehicle with his patrolling team comprising PC Atekini, PC Esava and two Special Constables, observing the movement of public around that area. In one of the parking lots, they saw two i-taukei men sitting together on the side pavement and in front of them were 4 to 5 large travelling bags. PC Esava approached them as he had seen one person passing to the other something that he believed to be marijuana.
57. He approached the other person who was wearing a Chief Jersey. Having introduced himself, he enquired where they were going. He saw a guitar bag and he assumed that they work on a band. This man replied that he was just waiting for someone to be picked up. He was concerned of dried leaves that PC Esava had found on the other person. He asked about the bags that were in front of them, he said that the bags didn't belong to them. The cubical space is not even 2 metres wide. The bags were one or even ½ metre away just in front of them. If anyone were to see the bags in front of them, he would think that the bags belonged to them. He just opened the bags and all he saw was a musical instrument, an electric guitar. At the station, the bags were checked thoroughly.
58. This youth was wearing a black Adidas bag. On his back pocket, two black gloves were found. The youth said that he was just coming back from work and was waiting for someone. He introduced himself and informed the reason for the search. PC Atekini searched the black bag. After that they were escorted to the Totogo Police Station with bags for further questioning to verify who the owner of the bags is. He arrested this youth because of the dried leaves found on the other person sitting together.
59. There was a woman sergeant Max at the Station. She informed that there had been a break-in at 131 Domain. One of the big bags had a name tag on it, with a name and an address written on it. It was the same address that was given by Sgt. Max.
60. They then handed over the two men to the charge room with the bags. He said that the name of the man he arrested was Ananaiasa. When they searched the big bags, musical

instruments with screw drivers, drumsticks and some assorted items were found. He prepared a search list for the black gloves that he had uplifted from the pockets of this youth. He signed on the search list. He could not recall if Ananaiasa also signed on this search list. When the search list was shown to the witness, he agreed that it had 1 x black adidas bag containing black Tascam headphone and Black Armour hand gloves. He said that the search list was prepared by DC McDonald, the Crime Standby on that day. He only signed it as he was the team leader in charge of the search. He said that the adidas bag was searched by PC Atekini. The search list was tendered marked as PE2 and read the list of items in it.

61. Another search list was prepared by the same officer for the musical items seized from the bags that were found in front of the two i-taukei males. He signed on that search list. He could not recall if Ananaiasa also signed on that document. It was tendered marked as (PE3). Investigating officer exhibited the items.
62. Under Cross- examination by Mr. Prasad, PC Rusiate agreed that 12 June 2019 was a Wednesday. He said that on that day, 6 officers travelled in the vehicle which had the capacity to 4 passengers and the driver. He denied that the bags were found 4 to 5 metres away from these two men. He said that all 5-6 bags were fitting into the cubicle about 2 metres in length. He said that he read the name tag with the address on one of the bags. Under cross- examination by Mr. Cheng.
63. PC Rusiate agreed that there were many people in the vicinity when the arrest took place at 4.45 pm at the career stand which is located close to the Suva Bus Stand and the market. He agreed that there was no indication on those bags that they belonged either to Atunaisa or Ananaiasa. He agreed that after the search was carried out, he found no contraband on Ananaiasa and that the only thing found was the backpack and a pair of gloves. Still Ananaiasa was arrested on suspicion.
64. He agreed that the search list is supposed to be completed at the time of search by the officer who does the search. He agreed that the search list was not completed either by him or PC Atekinj at the carrier stand where the search took place. He agreed that both the accused persons had not signed the search list. He said Atunaisa refused to sign it.
65. He agreed that when they said the bags did not belong to them, he had taken those bags to the station and tried to find out who the owner was. As the two youths were sitting there with the bags in front of them, they assumed that the bags belonged to the youths. He agreed that not all the procedures of arrest and seizure were followed.

66. Under re-examination, the witness said that after the bags were taken to the station, they suspected that they contained stolen property. They searched the stuff with the IO present, and the search lists were prepared.

PW-4 PC Atekini

67. On 12 June 2019, at about 4.45 pm, he parked the vehicle at the Suva carrier stand whilst PC Rusiate and PC Esava got off to search the two youths who were sitting in a suspicious manner at the bus shelter. He went to assist PC Rusiate in searching the youth wearing a black Chief Jersey and a ¾ pants. He searched the bag the youth was carrying while PC Rusiate searched the youth. It was a black Adidas bag. He found in it a black Tuscan headphone with assorted screw drivers and a plier. There were 5 other bags of different sizes in front of them at that time. The youths denied that the bags belonged to them. No one else came to claim those 5 bags. They were the only ones at the shelter at that time so they took them with the bags to Totogo Police Station for questioning. The name of youth in Chief Jersey was Ananaiasa.
68. There was a report lodged of a break in at 131 Domain where most of the items stolen were musical items. In the 5 bags also consisted of musical instruments. Then the bags and Tuscan headphone were handed over to DC MacDonald.
69. Under Cross examination by Mr. Prasad, PC Atekini, denied that five bags were four to five meters to the left of this two i-Taukei youths.
70. Under cross -examination by Mr. Cheng, Atekini agreed that the Suva bus station which is right next to the carrier stand is a very busy place in the evening. He agreed that pliers and screw drivers and assortment of tools he found are not mentioned in the search list (PE2). He agreed that no exhibit numbers entered by the exhibit writer for each item. He said that all the procedures were followed.
71. Under re- examination, the witness said that screw drivers and the pliers were not listed in the search list PE 2 because it was prepared by PC Rusiate.

PW- 5 W/Corporal Arieta

72. Arieta was the Investigating Officer of this case. On 12th of June, 2019 at about 4pm, whilst on duty at Totogo Police Station, Arieta received a report of a burglary and theft at Domain.

Before attending to this report, Atunaisa Koroi Junior and Ananaiasa Koroi had been arrested and brought to her office by PC Rusiate, PC Esava and PC Atekini because of their suspicious conduct. The arresting officers brought 5 bags with them. She prepared 3 search lists of the items found in each bag and gave them to the arresting officers for their signatures as they were the ones who had recovered those items. The arresting officers were busy writing their statements so she helped them in completing the search lists.

73. When shown to the witness, she recognised PE1, PE2 and PE3 as the search lists she had prepared. All the items were exhibited under Exhibit Number 31/6/19 and kept in the exhibit room. When she prepared the search list, she cross checked that every item identified by Ratu Josefa was accounted for. All the items as per the search lists were identified by the complainant as the property stolen from the studio at 131 Domain on the same day. She read the items listed in the search lists.
74. The properties were later released to the complainant after they were photographed by the police photographer WPC Sabina on 12 July 2019. She said that the goods were released because Ratu Josefa was a member of the band and he needed the items as they were a source of income for the members of the band.
75. The photographer prepared a booklet and was dispatched to her. She said that she could confirm that the photos depict the same items that she had exhibited in the exhibit room. She said she forgot the blue HP Laptop and the yellow level to be photographed.
76. Under cross-examination by Mr. Prasad, Arieta said she did not note down the serial number, of the HP laptop.
77. She agreed that the search lists need to be filled out when the search is going on, simultaneously by the officer who conducts the search. She agreed that when the search was carried out, she was not present. She agreed that the exhibits should have been released on a Court Order. She admitted that prior to the release of the items, she did not go through the photo booklet.
78. She agreed that no exhibit numbers were assigned to each of those items. She agreed that the procedure requires that each of those items were to be photographed individually with that assigned exhibit number with a clear description of the item photographed. She agreed that the proper procedure was not followed.

79. She agreed that she did not make a proper inventory of every single item that was released and checked the ownership before the items were released.

PW 6- WPC Sabina Miriama

80. WPC Sabina said that she took the photographs of exhibits of this matter on 12 July 2019 on Cpl. Arieta's instructions. Cpl. Arieta showed her the exhibits which were placed on a table. She took the photographs and compiled 13 photos and prepared the photo booklet which was dispatched to Cpl. Arieta. When the booklet was shown, she confirmed that it is the same booklet she prepared. She tendered the booklet marked PE 4.
81. Under cross-examination by Mr. Cheng, the witness admitted that the booklet was compiled on 19th October 2019 after 3 months the photos were taken. She agreed that procedure dictates that the items are supposed to be photographed individually with individual exhibit numbers and a description. She admitted that that procedure was not followed. She agreed that some photos are quite blurry and serial numbers and model numbers are not visible.
82. That was the case for the Prosecution. At the close of the Prosecution's case you heard me explain to the accused what their rights were in defence and how they could remain silent and say that the Prosecution had not proved the case against them to the requisite standard or they could give evidence in which case they would be cross-examined.
83. The accused elected to exercise their rights to remain silent. That is their right under the Constitution. You must not hold against the accused for exercising their constitutional right. You must not think that they remained silent because they are guilty. The burden is always on Prosecution.

Analysis

84. In this case, there is no direct evidence or eye witness account to link the accused to those alleged burglaries and thefts. The Prosecution relies on circumstantial evidence to prove the charges. It invites you to draw the inference in respect of recent possession of stolen property and come to the conclusion that the accused, acting together burgled the studio at No. 131 Domain Road and stole the property that were in the possession of Mr. Ratu Josefa.

85. The Defence case is one of complete denial. The position of the Defence is that none of those so called stolen goods were in the possession of the accused or seized from their possession.
86. The Prosecution must prove two important things in this case. It must establish beyond reasonable doubt that the accused were found in possession of the goods and that those goods are the property stolen from complainant's studio which is the subject matter of the complaint.
87. The Prosecution called the complainant Ratu Josefa and 5 police witnesses. Ratu Josefa was called to prove that the goods recovered by the police officers are the stolen property which is the subject matter of the complaint. The arresting officers PC Esava, PC Rusiate and Atekini were called to prove that the goods were in the possession of the accused.
88. If stolen goods were later recovered by police officers, the goods themselves are the best evidence to prove that fact. None of the so called recovered items including the bag containing the name and address of Mr. Hazelman were presented to court either for identification by the witnesses or for the observation of court. The prosecution says that the photo booklet presented in evidence truly reflect the stolen items seized by the police officers.
89. Generally, the best evidence is allowed to be led to prove the facts in issue. When the primary or best evidence is not available or there is a practical difficulty in bringing them to court, secondary evidence can be adduced by proving the fact of non-availability or the difficulty. In this case the Defence had not objected to the photograph evidence being presented at the trial. There is no prohibition in law to present photograph evidence as secondary evidence to prove the existence of certain facts in issue. Everything depends on how much weight you would like to give to the secondary evidence in this case in deciding the important facts in issue.
90. Ratu Josefa said that, except for the TV and the equisetie guitar, he identified all the other goods stolen from his studio in the same evening at the Totogo Police Station. He said that the tools, the GT 100 guitar effects belonged to him. He described how he managed to identify those items. He said they were in his studio for 5-6 years and they were very familiar to him.
91. He has informed the police over the telephone about the break-in and about some of the items that had gone missing from his studio. He has not given a description of missing items or characteristic / distinguishing features of those items in a formal statement so that the police could trace them. He has given the statement when he was called to the police

station to identify the goods after their recovery. According to the Investigating Officer, the goods had been released to the complainant, relying on his identification and believing that they were the subject matter of this case. She has not checked the ownership before the items were released.

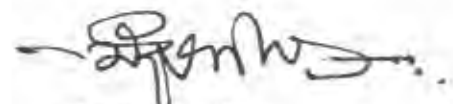
92. The Defence says that the Prosecution has failed to prove that the alleged recovered goods are the stolen property of this case. The Defence is highly contesting the credibility of the Ratu Josefa's evidence in this regard and his ability to confirm in court the identity of the stolen goods by looking at the photographs that were tendered. Mr. Cheng argues that those items are freely available to anyone and the distinguishing features that Mr. Ratu Josefa described in his evidence in respect of certain items cannot be ascertained through the photographs. He says that the photographs are blurry; the blue HP laptop and the yellow level were neither photographed nor tendered. You decide what weight you should attach to Mr. Ratu Josefa's evidence and if it is capable of proving that the recovered items are nothing but the subject matter of this case.
93. You might wonder why those items were released while the case was pending and not brought to court for trial if they are so important to prove the charges level against the accused. The Investigating Officer gave some reasons for that which the defence says are not acceptable. The Prosecution is relying on the photographs and if you are satisfied that Mr. Ratu Josefa's evidence is true and that it established that the goods recovered by police are the property stolen from his studio, you may conclude that this point has been established.
94. The other important point that must be established by the Prosecution is that the alleged stolen items were in the possession of the accused and were seized from their possession. Both the accused deny that those goods were in their possession. According to the arresting officers, the blue HP laptop and some other items were in the possession of the 1st accused, in an orange bag he was wearing. A black Tuscan headphone and some tools had been recovered from an adidas bag that the 2nd accused was wearing. The accused denies that those items were in their possession.
95. The Defence Counsel cross-examined the Arresting Officers and the Investigating Officer to challenge the evidence of the Prosecution in this regard. They highlighted certain non-observance of proper procedures, protocols and guidelines that the police officers admitted in their evidence and you are invited to reject their evidence. Those procedures, protocols and guidelines are meant to ensure the fairness of the arrests and searches and to avoid fabrication of evidence by the police officers. In the absence of the recovered items physically in court, you may find the search lists PE1-PE3 tendered by the Prosecution important evidence in this regard if you believe them to be true statements of the officers. The Defence challenges the truthfulness of those documents. It is up to you to decide what

weight you should give to those documents and to the evidence of the arresting officers as to the seizure and possession of those items.

96. The other bags had been sitting on the floor, according to them, just in front of the accused where they were sitting. The accused deny that they were in their possession.
97. The Prosecution says that the accused were seated so close to the 4-5 bags and therefore the only inference you should draw is that those bags were in the possession of the accused. The Defence on the other hand says that the bags were found in a public place in a busy evening and the denial of possession by the accused should be accepted as being true. If you believe that the police officers have fabricated evidence for whatever reason, you should reject their evidence.
98. If you accept the version of the Defence, you must not find the accused guilty. Even if you reject the version of the Defence still the Prosecution should prove its case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the accused, at any stage of the trial.
99. 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 charge has been proved against the accused. On your return, you will be asked to separately state in Court your opinion whether each accused is guilty or not guilty of each count as charged.
100. 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?
101. Any redirections?



At Suva
17 July 2020


Aruna Muthge
Judge

Counsel: Director of Public Prosecution for State
Legal Aid Commission for Defence