

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 148 of 2019

[CRIMINAL JURISDICTION]

STATE

V

VILIAME GUKISUVA

Counsel : Ms. S. Lodhia for State
Ms. S. Daunivesi for Accused

Hearing on : 28 – 30 July 2020

Summing up on : 30 July 2020

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibit tendered. As I have told you in my opening address, your opinion should be based only on the evidence presented

inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
5. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
6. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this

environment. Sometimes we honestly forget things or make mistakes regarding what we remember.

7. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by different witnesses on the same issue. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. In this regard, 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.
8. However, if there is no acceptable explanation for the inconsistency 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 in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is a matter for you to decide.
9. Therefore, if there is an inconsistency 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 the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
10. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask

yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

11. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proven facts. Moreover, if there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proven facts, then you should not draw the adverse inference.
12. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that the prosecution should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
13. In order to prove that the accused is guilty of a particular offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of even one of those elements, as to whether the prosecution has proved that element beyond reasonable doubt, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.
14. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters

that will enable you to decide whether or not the charges are proved against the accused.

15. In this case there are certain facts which are admitted by both parties. You have those admitted facts before you. The prosecution does not need to prove those facts and you should consider those admitted facts as facts which are already proven beyond reasonable doubt.
16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
17. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

FIRST COUNT

Statement of Offence

Aggravated Burglary: contrary to Section 313 (1)(a) of the Crimes Act, 2009.

Particulars of Offence

VILIAME GUKISUVA on the 16th day of April, 2019 at Tacirua in the Central Division, in the company of another, entered into the dwelling house of **SADHNA DEVI** as trespassers, with intent to commit theft therein.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

VILIAME GUKISUVA on the 16th day of April, 2019 at Tacirua in the Central Division, in the company of another, dishonestly appropriated \$60 cash, 1x Samsung brand S6 mobile phone, 1x RIUO brand tablet, 1x Samsung brand J1 mobile phone, 1x wrist watch and 1x school bag, the properties of **SADHNA DEVI** with intention of permanently depriving **SADHNA DEVI** of her properties.

18. To prove the above first count, the prosecution should prove the following elements beyond reasonable doubt against the accused;
 - (i) the accused;
 - (ii) with the company of one or more other persons;
 - (iii) entered a building as a trespasser;
 - (iv) with intent to commit theft of a particular item of property in the building.

19. To prove the second count, the prosecution should prove beyond reasonable doubt that the accused committed the offence of theft. The elements of the offence of theft are as follows;
 - a) the accused;
 - b) dishonestly;
 - c) appropriated the property belonging to another;
 - d) with the intention of permanently depriving the other of that property.

20. In this case the accused does not dispute the fact that two individuals entered into the first prosecution witness' house on 16/04/19 and that items were stolen from that house. Thus, the accused does not dispute the fact that the offence of aggravated burglary and the offence of theft were committed by more than one person on 16/04/19 at the first prosecution witness' house. However, he disputes the fact that he took part in committing the two offences. He says that it was not him.

21. You should note that the first element of each offence is about the identity of the offender. In relation to each count, the prosecution should prove beyond reasonable doubt that the accused committed the offence.

22. In this case the first prosecution witness ("PW1") claims that she witnessed the two offences being committed.

23. When you consider the evidence on the identification of the accused by PW1 on 16/04/19, please bear in mind that an honest and a convincing witness can still be mistaken. Mistaken recognition can occur even of close relatives and friends. Therefore, you should closely examine the following circumstances among others when you evaluate the evidence given by PW1 on identification of the accused as the person she saw in the morning on 16/04/19 at her house with another;
- a) Duration of the observation;
 - b) The distance within which the observation was made;
 - c) The lighting condition at the time the observation was made;
 - d) Whether there were any impediments to the observation or was something obstructing the view;
 - e) Whether the witness knew the accused and for how long;
 - f) Whether the witness had seen the accused before, how often, any special reason to remember; and
 - g) Duration between original observation and identification.

Evidence

24. The first prosecution witness was Ms. Sadhna Ashni Devi ("PW1"). She said that;
- a) *She has been living in Tacirua Settlement for 10 years. On 16/04/19 she was sleeping in her bedroom with her son and the husband where her daughter and the mother-in-law were sleeping in another room. Around 3.15am she woke up to the sound of her drawers being opened by someone. At that time she was sleeping on the left corner of the bed and her wardrobe and the chest drawers were right opposite to her. The lights were off but there was light coming from the dining room through the door which separated the bedroom and the dining room.*
 - b) *When she woke up she saw two people inside the room where one was looking for something inside her drawers while the other person was shining the torch of a mobile phone. She managed to see the two people because the light from the torch was bright and she kept watching what they were doing for about 5 minutes.*
 - c) *At one point the one who was shining the torch touched the other person and that other person turned to the side she was sleeping. Then she saw that person's face from the light of the torch that was shining on his face. She said that she saw the face for about 10 seconds. She said that the said light was very bright and she saw the entire face. The person was about 2 meters away from where she was sleeping.*

Nothing was obstructing her view when she saw this face. She said that she did not notice what the person was wearing. The person was not that slim and not that built. He was bit taller than her. She said that she managed to recognise this person as 'Billkodi'.

- d) She knew this Billkodi for 2 to 3 months before that date and he lived two houses away from her house. She said that most of the time she had seen him cross her compound through the short cut and she had seen him daily. He is not that fair and he is not that dark. She hasn't spoken with him. She said that she did not see any marks on his body. She said she noticed 'little bit hair' on both sides of his face. She did not see the other person. After she saw the face for about 10 seconds she closed her eyes. By this time her husband was sleeping in front and her son was sleeping in the middle.
- e) She again opened her eyes a little bit and she saw the two of them communicating with each other. This time she only saw the side of Billkodi's face and for about 4 seconds. She closed her eyes again. She opened her eyes again 'a little bit'. Then she saw the person who was looking for something had taken out the drawer from the wardrobe. Thereafter they left her room. Then she pinched her husband and he woke up. She did try to wake him up earlier twice by pinching him, but he did not wake up. After he woke up she told him about what she saw. She was scared and she told the husband to wait for a while before going out of the room.
- f) After that, both of them went and checked her mother-in-law and the daughter. They were sleeping. Then they saw that the door to the sitting room is broken. They called her husband's brothers and then called the police. The police came about half an hour later.
- g) She informed the police about what she saw. Her husband went with the police to show Billkodi's house.
- h) Then she checked the house and found out that \$60 cash, 3 phones, one watch and a school bag are missing. One phone valued about \$2000, one \$199 and the other one which was a tablet was \$199. The value of the watch may have been \$40.
- i) After 5 to 10 minutes the police came back to her house with Billkodi and asked her whether he is the same person. She said 'yes'. Then Billkody warned her saying that "you watch out" in front of the police officers. Once he said that she went straight inside the house. She said that he threatened her again as she entered the police station the same day.
- j) She came to know the name Billkodi because most of the neighbours called him by that name. She did not know anyone else by that name. She pointed out to the accused as the person she saw inside her house on 16/04/19 and the person she referred to as Billkodi. She said two to three days before 16/04/19, she saw that he was looking towards the house while crossing the compound.
- k) During cross-examination she said that she did not notice any marks or any injuries on the accused's body. She said she did not notice the clothes the two individuals she saw that morning were wearing. But she said that the person who was holding the

mobile phone with the torchlight was wearing something on his head which covered his face. She said that she did not make a mistake in recognising the accused. She agreed that she had heard bad stories about the accused from her neighbours. When it was suggested that she picked the accused as a person who was at her house on 16/04/19 because of the bad stories she had heard about the accused, she said that his past does not matter to her and she saw the accused's face.

25. The second prosecution witness was Mr. Rajneel Vishal Chand ("PW2"). He said that;

- a) *PW1 is his wife. On 16/04/19 around 3.30am he woke up as his wife pinched him. She told him that there were two people inside their room. After that he went and checked the room his mother and the daughter were sleeping. They were asleep but the room was scattered. He also noticed that the lock on the sitting room door is broken and the items in the sitting room are scattered.*
- b) *PW1 told him that she recognised one person as Billkodi who stays two houses away from his house. He went to his brother who is his immediate neighbour and then called the police. The police arrived about half an hour later and he went with the police to the accused's house. He said the accused came out from below the house after the police called the accused's name 2 – 3 times. Then the police asked him to go back to his house.*
- c) *Later the police brought the accused to his house and his wife said 'yes, he is the one' when police asked her whether the accused was the person she saw. Then the accused threatened her saying "watch out". Thereafter the police took the accused to their vehicle and informed him and his wife to come to the police station to record their statements.*
- d) *He said that the accused again threatened his wife at the police station saying "watch out".*
- e) *He said that he does not know any other person except the accused who is known as 'Billkodi'.*
- f) *During cross-examination he said 'yes' when it was suggested that the police assisted the accused to come out of the accused's house on 16/04/19. When it was suggested that the accused had a plaster on the right side of the forehead, an arm sling on the left arm, and a bandage on the left knee, he said that he did not notice. When it was suggested that the accused was not able to walk properly, he said that the accused came walking. He denied the suggestion that the accused was assisted by the police because the accused was injured.*

26. The third prosecution witness was Mr. Vikesh Prasad ("PW3"). He said that;
- a) *He has been living in Tacirua Settlement since birth and that he operates a canteen from his house. He said that he knows the accused by the name 'Billkodi' and he does not know anyone else who has that name.*
 - b) *During cross-examination he agreed that he does not know every person in his settlement by name or the nickname.*
27. The fourth prosecution witness was Shivneel Mani Naidu ("PW4"). He said that;
- a) *He was employed as a police officer for 7 ½ years and he was based at the Valelevu Police Station in April 2019. On 16/04/19 he was doing the night shift and that morning he went to PW1's house upon receiving a report between 3.00am and 4.00am that there was a break in.*
 - b) *He was given the name 'Billkodi' by PW1 as one of the persons whom she saw inside her house. He then went with the other police officers and PW2 to the accused's house. It took about 5 minutes for them to walk there. No one responded when he knocked on the door. So he went to the back of the house. That house was built on piles. The area under the house was covered and the accused was living under the house. The accused came out when he knocked. It was around 4.00am then. When the accused was asked where he was during the early hours of the morning, the accused told them that he was at home. He said that the accused had 'a bit of beard' on his face and some visible injuries on the forehead and on the leg. When he asked the accused how the accused got injured, he was told that the accused was assaulted by some youth in that settlement.*
 - c) *The accused was then taken to PW1's house. PW1 then told him that it was the accused who she saw inside her house. He said that while the accused was getting inside their vehicle, the accused threatened the complainant by saying that "you just wait and see". He took the accused to the police station and handed him to the charge room.*
 - d) *He said that the accused had a wound on the forehead and also on the knee and was limping. But the accused walked to PW1's house. The accused was sent for a medical examination during his interview. He said that he conducted a search at the accused's house on 17/04/19 and did not find any stolen items. He said that he found out that the actual name of the accused is Viliame Gukisuva.*
 - e) *He said that he made an attempt to record a statement from the wife of the accused after receiving instructions from the ODPP, but she could not be located.*
 - f) *During cross-examination he said that when he went to the accused's house on 16/04/19, the accused was with his wife but he did not look as if he was sleeping. He agreed with the suggestion that the accused's wife informed him on the same day that the accused was at home at the time of the incident. He said that at that time he was unable to record a statement from the accused's wife because she was angry due*

to the fact that they arrested her husband. He denied the suggestion that he assisted the accused to go to PW1's house. He said the accused was just limping but was walking properly with them. He denied the suggestions that the accused had a plaster on the right forehead, an arm sling supporting the left arm and a bandage over his left knee.

g) The report on the medical examination conducted on the accused on 16/04/19 was tendered as DE1. He denied the suggestion that the injuries noted on the accused were serious and pointed out that it is noted in D11 of the report that the accused was in a stable and a comfortable position.

28. You may have noticed that I have not reproduced the entire evidence that was led. I have only referred to the evidence which I consider necessary to explain the case and the applicable legal principles to you. If I did not refer to any evidence which you consider important, you should still consider that evidence and give it such weight you may think fit. As I have already explained, it is entirely up to you to decide which evidence you accept.

29. At the end of the prosecution case you heard this court explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving the accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent. That is his right. Please remember that you should not draw any adverse inference against the accused due to his decision to exercise that right.

30. The prosecution case is that the offences of aggravated burglary and theft were committed in PW1's house on 16/04/19 by two individuals and that PW1 recognised the accused as one of the two. The defence case is that PW1 is mistaken and the accused was at his home with his wife at the time the relevant offences were committed. The accused claims that he was injured on the previous day as a result of being assaulted.

31. PW4 said in his examination in chief that on 16/04/19 when he went with the other police officers and PW2, the accused told him that he (the accused) was at

home that morning. PW4 also said that he noticed injuries on the accused's body and that the accused was limping. PW4 admitted during cross-examination that the accused's wife informed him that the accused was with her at home during the time the incident relevant to this case had taken place.

32. According to the evidence led, PW4 received this information within about an hour from the time the two offences in this case were committed.
33. This defence that the accused was at a different place at the time of offending is known as the defence of *alibi*. May I now direct you on the defence of *alibi*. As I have pointed out, PW4 in his evidence had stated that the accused had told him that the accused was at home at the time the two offences were committed and had admitted that the accused's wife conformed the same to him. Therefore, even though the accused did not give evidence and did not call his wife as a witness, the accused's *alibi* to the effect that he was not at the place of offence at the material time and that he was at his house was sufficiently raised in this case through the evidence of PW4.
34. First of all, please bear in mind that though an accused raises the defence of *alibi*, there is no burden for the accused to prove that he was elsewhere during the time the offence is alleged to have been committed. The prosecution should still prove that it was the accused that committed the offence and therefore the *alibi* is not true.
35. When you consider the accused's defence of *alibi*, if you think that the version of the accused is true or it may be true, then you must find the accused not guilty of the offence.
36. However, you should also bear in mind that you should not assume that the accused is guilty of the offence merely because you decide not to accept his version. You should remember that sometimes an accused may invent an *alibi*


just because it is easier to do so rather than telling the truth. The main question remains the same. That is, whether you are sure that it was the accused who had taken part in committing each offence.

37. You heard in this case evidence which suggests that the accused has had a bad history before the incident relevant to this case. Firstly, you did not hear evidence that would enable for you to decide yourselves whether the accused in fact had a bad history or not. Secondly, even if the accused had had a bad history, such history is not relevant in establishing any of the elements of the two offences the accused is charged with in this case, especially, the fact that it was the accused who committed the two offences which is the main element in dispute in relation to the two offences. However, it is the position of the defence that, PW1 has implicated the accused simply because PW1 had heard bad things about the accused.
38. When you assess the evidence of PW1 with regard to recognising the accused as one of the two individuals who broke into her house on 16/04/19 based on the criteria I have already explained, you may also take note of the following.
39. PW1 said that she clearly saw the entire face of the accused at the time the two offences were being committed, with the light emanated from the mobile phone (torch) the other person was holding. But she did not notice any injury on the accused's face. She said she did not notice any injury when the accused was brought to her house by the police. According to her evidence, it appears that she did not properly look at the accused when the police brought the accused to her house because, after saying 'yes' when the police asked her whether it was the accused whom she saw inside her room, the accused threatened her and she immediately went inside the house.

40. However, PW4 said that he clearly saw injuries on the accused's body that morning, including one on his forehead. This evidence on the injuries the accused had at the time of his arrest was supported by the medical report tendered as DE1. The accused had told PW4 that he sustained those injuries on the previous day and no evidence was led by the prosecution to counter that. In fact the prosecution admits that the accused had those injuries, but says that he did not have any bandages or an arm sling. Accordingly, you have to ask yourselves, is it possible for PW1 not to have noticed the injury on the accused's forehead given her claim that she clearly saw his entire face?
41. PW4 also said that the accused was limping. So another question that may be relevant for you to consider is, with those injuries and given the fact that the accused had been limping, would it still be possible for the accused to have committed the two offences he is charged with in this case.
42. You also heard the evidence of PW4 that none of the stolen items were recovered in this case though the accused was arrested within around one hour from the time the two offences were committed. Would this support the accused's version that he did not commit the two offences and that he was at home with his wife at the material time?
43. Remember, the main issue you have to decide in this case is whether you are satisfied beyond reasonable doubt that PW1 was not mistaken when she claimed that she recognised one of the two individuals she saw committing the two offences in her house on 16/04/19 as the accused and accordingly the accused had committed the two offences he is charged with.
44. Any re-directions?

45. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. You may peruse the exhibit if you wish to do so. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
46. Your opinion should be as follows;
- 1st count (aggravated burglary) - guilty or not guilty
 - 2nd count (theft) - guilty or not guilty




Vincent S. Perera
JUDGE

Solicitors;

**Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused.**