

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 005 OF 2019S

STATE

Vs

MALAKAI SELEBULA

Counsels : Mr. E. Samisoni for State
Ms. L. David for Accused

Hearings : 5, 6 and 7 October, 2020.

Summing Up : 8 October, 2020.

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made their submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of

fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you. I will now read the same to you:

“... [read from the information]....

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:
- (i) Did the accused, in the company of others, on 12 January 2019, at Suva in the Central Division, violently rob the complainant (PW1) of his properties, as itemized in the information?

E. THE OFFENCE AND IT'S ELEMENTS

9. The accused was charged with “aggravated robbery”, contrary to section 311 (1) (a) of the Crimes Act 2009. It was alleged that, he with others, on 12 January 2019 at about 1.30 am, in Suva in the Central Division, violently robbed the complainant (PW1) of his properties, as itemized in the charge. For the accused to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused,
 - (ii) in company with one or more persons,
 - (iii) steals
 - (iv) the complainant’s property or properties, and
 - (v) before the theft,
 - (vi) uses force or threatens to use force,
 - (vii) on another person,
 - (viii) with intent to commit theft.
10. Stealing” is the act of taking away someone’s property or properties without his permission, and with an intention to permanently deprive him of the ownership of that property or properties. “Force” means “any type of force, whether or not done physically or verbally, for example, beating someone with a stick or threatening to do the same”.
11. Before stealing the complainant’s properties, the accused, in company with one or more persons, must use force or threaten to use force to subdue the complainant or others’

resistance, and at the time, had the intention to steal. For example, I and my friend saw you withdrawing \$1,000 cash from an ANZ Bank ATM machine. I and my friend immediately came to you, told you to hand over the \$1,000 cash to me or I will punch you in the face. You refused, I punched you in the face and stole your \$1,000 cash. That was “aggravated robbery”.

12. You will notice in the information that the prosecution, in their particulars of the offence, began with the phrase, “...MALAKAI SELEBULA, with others, on 12 January 2019, at Suva in the Central Division, in the company of each other, robbed AMIT PRASAD of [the items mentioned in the charge], the property of AMIT PRASAD...” The prosecution is alleging that the accused and others committed the offence as a group. It is immaterial that the others were not named in the information. To make them jointly liable, the prosecution is relying on the concept of “joint enterprise”.
13. “Joint enterprise” is “when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence” (Section 46, Crimes Act 2009). In considering each accused, you will have to ask yourselves the following questions. Did each of them form a common intention with each other, to violently rob the complainant (PW1) of the properties mentioned in the charge? If so, did each of them acted together in violently robbing PW1? When PW1 was violently robbed, were these episodes a probable consequence of them assaulting the complainant? If your answer to a particular accused was yes, and you are sure that the elements of the offence described in paragraphs 9 to 11 hereof are satisfied, the particular accused was guilty as charged. If it was otherwise, he was not guilty as charged.

14. If you find the elements of aggravated robbery proven by the prosecution beyond reasonable doubt against the accused, you must find him guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.

F. THE PROSECUTION'S CASE

15. The prosecution's case were as follows. The complainant, Mr. Amit Prasad (PW1), was about 36 years old, on 12 January, 2019, the date of the alleged incident. The accused, Mr. Malakai Selebula appears to be 26 years old, at the date of the alleged incident. According to the prosecution, the complainant and 4 friends went to the Shenanigan Nightclub at about 11.30 pm on Friday 11 January 2019, for a night out. They stayed there until 1.30 am on 12 January 2019, a Saturday.
16. According to the prosecution, the complainant and his friends left the Shenanigan Nightclub and crossed the street towards the Temptation Nightclub. In front of the Temptation Nightclub, according to the prosecution, the complainant was allegedly confronted by a group of 8 i-taukei youths, who allegedly shoved him around. A scuffle suddenly erupted between the youths, the complainant and his friends. According to prosecution, the complainant's mobile phone, gold necklace and \$36 cash was allegedly snatched from him by the youths.
17. According to the prosecution, the complainant allegedly saw the accused trying to take his wallet from him, during the commotion. They had a fist fight. He also allegedly saw him steal his \$36 from his pocket. When the police arrived at the crime scene, according to the prosecution, the complainant pointed the accused out to police. He was the only one standing around, while the others had allegedly fled. The police arrested the accused and he was escorted to Totogo Police Station.
18. At the Totogo Police Station, police allegedly searched the accused at about 3 am on 12 January 2019. Thirty six dollars were found on him, with a \$20 note and \$10 note hidden in

his socks and six dollars in coins in his pocket. The complainant also arrived at Totogo Police Station and identified the accused to police as the person who stole his \$36. On 14 January 2019, the accused was taken to Suva Magistrate Court charged with violently robbing the complainant. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

19. On 5 October 2020, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the aggravated robbery allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he chose to remain silent and called no witness. That was his constitutional right.

20. Nothing negative whatsoever should be imputed to the accused when he chose to exercise his right to remain silent. This is because the burden to prove his guilt beyond reasonable doubt, remains with the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. Remember what I told you in paragraph 4 hereof, and I repeat the same here. There is no burden on the accused to prove his innocence, or prove anything at all. He is presumed innocent until he is proven guilty beyond a reasonable doubt. He is entitled, as he had done here, to fold his arms, sit there in the dock, and demand the prosecution prove his guilt beyond a reasonable doubt.

21. So, in this case, you will have to carefully examine the prosecution's case and decide whether or not the accused was guilty as charged. The prosecution's case was based fundamentally on the verbal evidence of the complainant, and you will have to decide whether what he alleged against the accused had made you sure of the accused's guilt. If you are sure of his guilt, you must find him guilty as charged. If otherwise, you will have to find him not guilty as charged. It is a matter entirely for you.

22. Because he pleaded not guilty to the charge, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

23. In analyzing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the State's case against the accused. Then, we will discuss the Accused's case. Then we will consider the need to look at all the evidence.

(b) The State's Case Against the Accused:

24. The State's case against the accused was fundamentally based on two types of evidence. First, the State relied on the complainant's visual identification of the accused at the crime scene, while he was allegedly stealing \$36 from his pocket and trying to steal his wallet, at the material time. Second, the State is relying on a multitude of evidence, which they said when considered together, points at the accused, as the person who allegedly committed the crime, at the material time. This evidence is often called "circumstantial evidence". We will now discuss the above evidence in turn.
25. The complainant's visual identification evidence. The complainant said, as he crossed the street, and came towards the Temptation Nightclub, he and his friends were attacked by a group of eight i-taukei youths. They surrounded the complainant, and there was a lot of shoving and fending off between the alleged attackers and the victim. According to the complainant, the commotion was fast moving and it was after 1.30 am in the early morning of 12 January 2019. The complainant said, during the above commotion, his mobile phone, his gold chain and \$36 in his pocket were snatched away and stolen.

26. The complainant said he saw the accused snatch \$36 from his pocket and he was also trying to steal his wallet. As a result, they had a fist fight. According to the complainant, he observed the accused's face for about 25 to 30 seconds, at an arm's length distance, and there was moderate lights in front of the Temptation Nightclub. He said, there were also other surrounding lights from the renovation site at Sukuna House and the nearby traffic lights. The complainant said, he saw the accused's face clearly, and thereafter they had a fist fight. During the fist fight, the police arrived, that is, SC 916 Mosese Sova (PW2). The complainant said his observing the accused's face was not impeded and that was the first time he saw him.
27. According to the complainant, he is a dentist by profession, and studied forensic dentistry as part of his work, in identifying people's teeth and facial bone structures. Because of his professional background and what happened to him at the material time, he could not forget the accused's face. When police officer SC 916 Mosese Sova (PW2) first appeared at the crime scene, he identified the accused to PW2 as the person who robbed him. PW2 then arrested the accused and had him escorted to Totogo Police Station by other police officers. The complainant identified the accused in court as the person who stole his \$36 at the material time. He said, soon after the incident, he also went to the Totogo Police Station. At Totogo Police Station, he identified the accused to the police as the person who robbed him a few hours ago. He admitted in court, that he did not identify the accused in a properly held police identification parade.
28. When considering the complainant's visual identification evidence, I must direct you as follows, as a matter of law. Firstly, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleged to be mistaken, I am warning you of the special need for caution before convicting in reliance on the correctness of the identification, because an honest and convincing witness or witnesses may be mistaken. Secondly, you must examine carefully the circumstances in which the complainant made the identification. How long did the

complainant had the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the complainant ever seen the accused before? How often? Had he any special reasons for remembering the accused? Was there any police identification parade held? Thirdly, are there any specific weaknesses in the complainant's identification evidence? The answers to the above questions will determine the quality of the complainant's identification evidence? If the quality of the identification is good, you may rely on it. If otherwise, you must reject it. It is a matter entirely for you.

29. You have heard the complainant give evidence in the courtroom and you had observed his demeanor. He gave evidence on the 5th and 6th October 2020, and he gave you in detail the facts surrounding his visual identification evidence. I am sure his evidence is still fresh in your mind and I do not wish to bore you with the details. If you think the complainant's identification evidence of the accused at the material time was of a high quality, you may rely on it, and find the accused guilty as charged. If otherwise, you may reject it and find the accused not guilty as charged. It is a matter entirely for you.

30. The other type of evidence the State is relying on to connect the accused to the crime is often called "circumstantial evidence". Reference has been made to the type of evidence which you have received in this case. Sometimes an assessor is asked to find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw an accused commit a crime; if there is a video recording of the incident which plainly demonstrates his guilt; or if there is reliable evidence of the accused himself having admitted it, these would be all good examples of direct evidence against him. On the other hand, it is often the case that direct evidence of a crime is not available, and the prosecution relies upon circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case

indeed in which an assessor can say “We now know everything there is to know about this case”. But the evidence must lead you to the sure conclusion that the charge which the accused faces is proved against him. Circumstantial evidence can be powerful evidence, but it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution’s case. Finally, you should be careful to distinguish between arriving at conclusion based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.

31. Now, we will consider the type of evidence the prosecution is relying upon of the various circumstances relating to the crime and the accused which they say when taken together will lead to the sure conclusion that it was the accused who committed the crime. First, you will have to look at the complainant’s visual identification of the accused, at the material time, as discussed in paragraphs 25, 26, 27, 28 and 29 hereof. Second, you will have to consider the complainant identifying the accused to police officer SC 916 Mosese Sova (PW2) when he arrived at the crime scene so soon after the alleged attack. Third, you will have to consider PW2’s evidence that when he arrived at the crime scene, the complainant complained to him that some youths had robbed him and he pointed the accused out to him, as the person who robbed him. PW2 said he then arrested the accused and called for a police vehicle to escort the accused to the Totogo Police Station. Fourth, PC 5476 Moshin Ali (PW3) escorted the accused to Totogo Police Station soon after the alleged incident. He said, when he arrived at the crime scene in a police vehicle, he saw PW2 holding the accused and another, and PW2 told him they were involved in the robbery. He later escorted them to Totogo Police Station.

32. Fifth, PC 2122 Setareki Raisuni (PW4) searched the accused at Totogo Police Station at about 3 am on 12 January 2019, one and a half hour after the alleged incident. PW4 said, he found \$36 on the accused, one \$20 note and \$10 note hidden in his socks, and \$6 in coins in his pocket. This \$36 was returned to the complainant by the police on 22 January 2019, 10 days after the alleged incident. Sixth, the complainant, soon after the alleged incident, visited Totogo Police Station and pointed out the accused as the person who robbed him a few hours or minutes ago. What do the above circumstantial evidence tell you? How you answer the above is entirely a matter for you.
33. If you accept the prosecution's version of events, you must find the accused guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.

(c) The Accused's Case:

34. I had summarized the accused's case to you from paragraphs 19 to 22 hereof. I repeat the same here. You will have to assess the strength of the prosecution's case. If you do not accept it, you must find the accused not guilty as charged. It is a matter entirely for you.

(d) The Need To Consider All the Evidence:

35. Four witnesses gave evidence for the prosecution:
- (i) Mr. Amit Prasad (PW1);
 - (ii) SC 916 Mosese Sova (PW2);
 - (iii) PC 5476 Moshin Ali (PW3); and
 - (iv) PC 2122 Setareki Raisuni (PW4).
36. You will have to consider the above evidence together. Compare them and analyze them together. If I haven't mentioned a piece of evidence you consider important, please take it on board in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his evidence in your deliberation. If you find a witness not credible, you

are entitled to reject the whole or some of his evidence in your deliberation. You are the judges of fact.

I. SUMMARY

37. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.

38. Your possible opinions are as follows:

(i) Aggravated Robbery: Accused: Guilty or Not Guilty

39. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.




Salesi Temo
JUDGE

Solicitor for the State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for the Accused : **Legal Aid Commission, Suva.**