

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 224 of 2018

BETWEEN : STATE

AND : MELI KENAWAI

Counsel : Mr Z Zunaid for the State
Ms L Ratidara and N Cobana for the Accused

Dates of Hearing : 4 and 5 February 2020

Closing speeches : 6 February 2020

Date of Summing up: 6 February 2020

Judgment : 10 February 2020

JUDGMENT

1. The accused is indicted for one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act. The particulars of offence are as follows;

Meli Kenawai and others on the 25th day of May, 2018 at Laqere, in the Central Division in the company of each other robbed Vikash Nand of

1 x Samsung J1 mobile phone, 1 x E-Ticketing card, 1 x BSP ATM card and \$ 50.00 cash; the properties of Vikash Nand.

2. The prosecution called six witnesses at the trial. After the prosecution case was closed, the Accused decided to remain silent. This trial was conducted only with two assessors as one of the assessors had to be discharged due to her non-appearance in court after the morning session on the first day.
3. The two assessors were given direction on identification, recent possession, caution statements and other general considerations in the summing up. After a short deliberation the two assessors returned with a unanimous opinion of not guilty.
4. Having directed myself in accordance with the summing up I will now pronounce my judgment.
5. Section 311(1)(a) of the Crimes Act stipulates that a person commits an indictable offence if he or she commits a robbery in company with one or more other persons.
6. According to section 310 of the Crimes Act a person commits robbery if he immediately before committing theft; or at the time of committing theft; or immediately after committing theft, uses force or threatens to use force on another person with intent to commit theft or to escape from the scene.
7. Theft is dishonest appropriation of the property belonging to another with the intention of permanently depriving the other of that property as per section 291(1) of the Crimes Act.
8. In view of the above definitions I will now consider whether the Prosecution proved the offence of aggravated robbery against the accused.

9. The complainant, Vikash Nand had known the accused for 10-15 years according to his evidence. Further it is an admitted fact that the complainant and the accused were well known to each other. Vikash Nand gave evidence that on 25 May 2018 at around 10 pm the accused came with three other persons and grabbed him. The complainant said that the accused took \$ 50 cash, his mobile phone, a BSP ATM card and an e-ticketing card from his pocket. He also said that he was assaulted by them.
10. According to the evidence of the complainant there had been streetlights at the place where the alleged incident took place. He further confirmed that he properly saw the accused from a distance of 20 meters, and he observed the accused's face for about 2-4 minutes. The Defence at no point challenged the issue of identity. Given the circumstances I am satisfied that the complainant had no difficulty in identifying the accused. I am convinced that his evidence on identity is compelling and credible.
11. The complainant gave evidence that the accused was in the company of others. He said that there were four persons and one of them was the accused. The evidence of the complainant that the four persons grabbed him and punched him on his face, neck and on ribs was not challenged by the Defence. The defence position was that the accused was not part of those who robbed the complainant.
12. When the complainant was cross examined by the Defence, it was suggested that the accused came to help the complainant when he was robbed by two other persons. Further it was suggested that the accused ran after them to retrieve the stolen items. However, the complainant denied those suggestions. It was also put to the complainant at one point, that the complainant was drunk, and he jokingly swore at the accused which was again denied by the complainant.

13. The Prosecution tendered the complainant's medical report through Dr Goundar. She confirmed that she observed tenderness upon palpation on left temporal region and over the mandibular region. The witness said that the injuries are due to blunt force. Therefore, it appears that the medical evidence corroborates the complainant's evidence where he said that he was punched on his face and neck. The medical evidence was not challenged by the defence.
14. The Prosecution witness, PC 6051 Anish Vineet Chand gave evidence that he arrested the accused on 26 May 2018. He said that he recovered a BSP Atm card which was in the accused's pocket. The prosecution adduced evidence to establish that the ATM card which was recovered from the accused belongs to the complainant. The evidence on the recovery of one of the stolen items, namely the BSP ATM card was not challenged by the Defence. Further the evidence on recovery of the ATM card was corroborated by the complainant as well as by DC 4499 Shairon Kumar.
15. According to the Prosecution evidence the ATM card had been recovered from the accused within the lapse of a very short period. In *Timo v State* [2019] FJSC 1; CAV0022.2018 (25 April 2018) the Supreme Court discussed the principle of recent possession in paragraph 17 as follows;

“In cases where a defendant is found to have been in possession of property which has been stolen very recently, so that it can be said that he was in recent possession of it such that it plainly calls for an explanation from him about how he came to be in possession of it, and either no explanation is given, or such explanation as is given is untrue, the court is entitled to infer, looking at all the relevant circumstances, that the defendant stole the property in question or was a party to its theft. And if the property had been stolen in a burglary or a robbery, the court is entitled to infer, again looking at all the relevant circumstances, that the defendant took part in the burglary or the

robbery in which the property was stolen: see, for example, *Blackstone's Criminal Practice 2016*, paras F.63-F.64, and applied in Fiji in *Wainiqolo v The State* [2006] FJCA 49 and *Rokodreu v The State* [2018] FJCA 209."

16. In *State v Cakau* [2011] FJHC 249; HAC 143.2007 (6 May 2011) it was stated that the following ingredients must be proved beyond reasonable doubt for the application of the principle of recent possession;

- i) The accused possessed the goods;
- ii) The goods possessed by the accused were the subject matter of the offence, as complained to by the complainant; and,
- iii) There is no explanation from the accused in regard to his possession of the suspected goods.

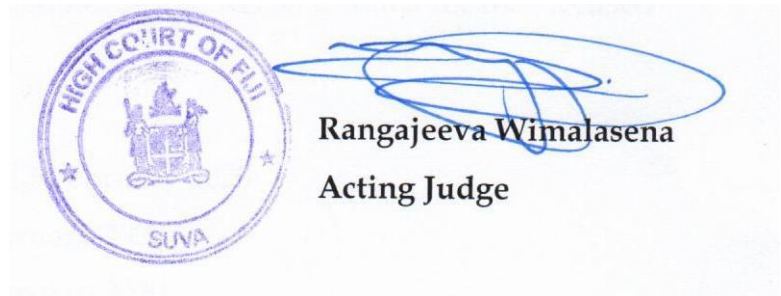
17. The Prosecution adduced evidence that the stolen ATM card was in the pocket of the Accused. The complainant too gave evidence that the ATM card which was taken by the Accused on the previous night was found by the Police from the possession of the accused. The Defence merely suggested to the complainant during the cross examination that the accused ran after those who robbed to retrieve the stolen items and came back on the following day to return the card. The complainant denied the suggestions.

18. In any event a vague suggestion cannot be considered as a reasonable explanation to counter the inference which can be drawn by recent possession. Not only the evidence on recent possession was not challenged, no reasonable explanation was also afforded by the defence as to how the item came to be in the accused's possession. In absence of a reasonable explanation as to how the ATM card came to be in the possession of the accused, an inference can be drawn that the accused took part in the robbery.

19. I will now consider the evidential value of the caution statements tendered by the Prosecution. The caution interview and the charge statement were held admissible in evidence at the voir dire hearing. I have considered the line of cross examination by the Defence in this regard. The Defence primarily challenged the truthfulness of the caution statements tendered by the Prosecution. It was suggested that the accused could not read the caution interview statements due to his poor language proficiency. However, this suggestion was repeatedly denied by the interviewing officer and the charging officer. They confirmed that the accused was given the opportunity to choose the language of his own choice and his right to read the statements were not denied. Although it was argued that the accused could not read what was recorded in the caution statements, it was not clearly argued that the recorded contents are not the answers given by the accused.
20. Nevertheless, I have considered the evidence adduced by the Prosecution in this regard. I am satisfied that the Prosecution proved that it was the accused who made the admissions in the caution statements and the contents of the statements are truthful and those admissions corroborate the other evidence adduced by the Prosecution.
21. All in all, I conclude that the complainant and the other Prosecution witnesses are truthful and credible witnesses. Their evidence remained unchallenged throughout the trial. The Defence could not create any doubt in the Prosecution case. I accept the evidence adduced by the Prosecution.
22. I decide that the Prosecution proved beyond reasonable doubt that the accused with others dishonestly appropriated the items belonging to the complainant with the intention of permanently depriving them and used force on the complainant at the time of stealing the items.
23. In the circumstances I am not inclined to concur with the unanimous opinion of the two assessors. I am of the view that their opinions are not founded on

the directions given in the summing up and the evidence adduced in this case.

24. In view of the foregoing reasons I find the accused guilty and convict him for the offence of aggravated robbery as charged.



At Suva

10 February 2020

Solicitors

Office of the Director of Public Prosecutions for the Prosecution

Office of the Legal Aid Commission for the Accused