

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

High Court Criminal Case No. HAC 311 of 2020

BETWEEN : STATE

AND : SAVENACA BATIBAWA

Counsel : Ms. B Kantharia for the State  
Ms. M. Chand for the Accused

Dates of Hearing : 02 February 2021

Closing speeches : 02 February 2021

Date of Summing up: 02 February 2021

**SUMMING UP**

Madam and gentlemen assessors,

1. I must now sum up the case to you. You must then retire to consider your opinions. I will direct you on the law that applies. You must accept those

directions I give you on matters of law. You are to decide the facts of the case, based on the evidence that has been led before this court. You will then apply those directions to the facts and give me your opinions as to whether the Accused is guilty or not guilty.

2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed while going through evidence. If you do not agree with that opinion you will ignore it and form your own opinions with that evidence.
3. You must base your opinions only on evidence adduced before this court. In this case only one witness gave evidence. But a few things that you heard in this court are not evidence. Opening submission, closing submissions, statements, arguments and comments made by the counsel and this summing up are not evidence. But you may consider those as a guidance when you evaluate evidence and the extent to which you do so is entirely a matter for you. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinions. You will also not let any sympathy or prejudice sway your opinions.
4. I will give you only a summary of evidence. I will not go through every word uttered by the Complainant in this case, and if I leave out something that seems to be important, nothing stops you from taking that into account. Because you decide the facts.
5. After this summing up, you may give your individual opinion as the representatives of the community. Your opinions need not be unanimous. And you need not give reasons for your opinions.

6. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

Madam and gentlemen assessors,

7. I will now mention some considerations that may assist you in evaluating evidence. As I said before you may reject the whole evidence of the complainant, accept the entirety or even accept only a part of her evidence and may reject the rest. You have to decide whether the Complainant has spoken the truth or correctly recalled the facts and narrated it.
8. You have seen the demeanour of the only witness who gave evidence in this case and how she gave evidence in court. You have seen whether she was forthright or evasive in giving evidence. You have to use your common sense in assessing the reliability and credibility of the witness.
9. When you evaluate evidence, you should see whether the version of the witness is probable or improbable. You must see whether the witness has relayed a consistent story.
10. Another consideration may be; has the witness said something different at an earlier time or whether she is consistent in her evidence? In assessing the credibility of the witness, it may be relevant to consider whether there are inconsistencies in her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue.
11. This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are

considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate them. A witness may be honest enough but have a poor memory or otherwise be mistaken. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.

12. As a matter of law, I must direct you that what a witness said on oath is only considered as evidence. What a witness said in her or his statement to police, that is out of Court and therefore is not evidence. However, previous statements are often used to challenge a particular witness's credibility and reliability because a previous inconsistent statement may indicate that a witness said a different story then, and as a result her evidence might not be reliable. It is for you to decide the extent and importance of this inconsistency.

13. According to the law the Prosecution must prove its case beyond reasonable doubt. For the Prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that the Accused is guilty of the offence. The burden of proof remains on the Prosecution throughout the trial. For this purpose, the Prosecution must prove every element of the offence, beyond reasonable doubt.

14. The Accused need not prove his innocence. You must not draw any adverse inference from the fact that the Accused chose to remain silent in this case. There is no burden upon him to prove his innocence. The burden is on the Prosecution to prove the guilt of the Accused. That means you must be satisfied that the Prosecution has proved every element of the offence beyond reasonable doubt. When you say a reasonable doubt, a mere imaginary doubt

is not a reasonable doubt. The doubt should be a reasonable one and if you are left with a reasonable doubt you must find the Accused not guilty. If you are not left with any such doubt and if you are sure that the Prosecution proved every element of the offence, you must find the Accused guilty.

15. Now let us look at the charge contained in the amended Information filed by the Director of Public Prosecutions.

Count one

Attempted Aggravated burglary: contrary to Section 44 and 313(1)(a) of the Crimes Act 2009.

Particulars of offence

Savenaca Batibawa with another on 01<sup>st</sup> day of October 2020 at Wailea Settlement, Vatuwaqa in the Central Division, attempted to break and enter into the dwelling house of Lalita Wati as a trespasser with intent to steal from therein.

16. To prove the offence of attempted aggravated burglary the Prosecution must prove the following elements beyond reasonable doubt;

- (i) the Accused with another person
- (ii) Attempted to enter the building
- (iii) as trespassers
- (iv) with intent to commit theft

17. Firstly, the Prosecution must prove the identity of the Accused. The Prosecution must prove that it was the Accused and no one else was present. Secondly the Prosecution must prove that the Accused was with one or more other persons. The offence of burglary becomes aggravated burglary only when a person commits burglary in the company of one or more other persons.

Therefore, the Prosecution must prove that the offence was committed by more than one person. In this case the Prosecution submits that the Accused was with another unknown person.

18. 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".

19. The Prosecution must prove that the Accused has done something to execute his intention of entering the house and stealing from therein to prove "attempt". Attempt must be something more than mere preparatory to the commission the offence.

20. The intention of the Accused is the next element. No one can look inside the mind of the Accused. So, you are supposed to examine the evidence in relation to his conduct and ask yourselves whether you are sure beyond reasonable doubt that the Accused with another person attempted to enter the house with the intent to commit theft.

21. I will now give you a brief outline of the evidence adduced in this case. However, you should consider the entirety of the evidence adduced in this case when forming your opinions.

22. The Complainant gave evidence that on 01 October 2020 at around 2 pm she heard a noise from the kitchen when she was alone at home. She had then run to the kitchen to check and she had seen through the window that two persons were outside the window. The Complainant said that she identified one person as 'Save', who lives about two houses away from where she lives. The Complainant said that he always used to come to her place to sell coconuts.

23. The Complainant further testified that when she saw that person, he tried to cover his face with his T Shirt. She had then told him in *iTaukei* language that

no use of covering the face as she had already seen him. According to the Complainant they were holding a pinch bar, a knife to cut the tin and a hammer. She stated that they broke the shutters. The Complainant said that she does not know the other person who came with 'Save'. She said she was scared and when she started yelling, they left her house.

24. The Complainant said that although she informed the Police, the officers did not come on that day. Two days later she had gone to the Police Station again to report the matter. The Complainant identified the Accused in this case as the person who she referred to as 'Save' that came to her house.

25. During the cross examination the Complainant said that she saw the Accused clearly and when she went to the kitchen one of them was holding the pinch bar and it was still on her window. The Complainant reiterated during the cross examination that the Accused was there, and she saw him. It was suggested to the Complainant that she made a mistake when she said that the Accused was outside her kitchen window. However, the Complainant confirmed that she did not make a mistake and she said, "*I saw him, and I know the person.*"

26. The Complainant was asked during the cross examination as to why her statement was given on 07 October if she went to the Police station on 03<sup>rd</sup>. The Complainant said that although she went to the Police on the 03<sup>rd</sup> her statement was taken only when they came to her place on 07<sup>th</sup>. She was also asked as to why it is not recorded in her statement that the two persons who came to her place damaged the shutters and that she yelled. The Complainant said that she informed the Police about everything that happened on that day.

27. That is the case for the Prosecution. After the closure of the Prosecution case the Accused was explained his rights. You must bear in mind that although those options were given, still the burden is on the Prosecution to prove the guilt of the Accused and he need not prove his innocence. The Accused opted

to remain silent. I must remind you that you must not draw any adverse inference from the fact that the Accused remained silent. It is his right.

28. This was a very short trial and only the Complainant gave evidence. The Prosecution case is that on 01 October 2020 the Accused with another person attempted to break into the house of the Complainant with intent to steal. The Complainant said that when she went to the kitchen, she saw the Accused outside the kitchen window through the opened louvre blades. She had known the Accused before the incident as a person who lived two houses away from her house in the same settlement. Also, the Complainant said that the Accused used to come to her place to sell coconuts. According to her evidence she had known the Accused by the name 'Save'. Also, the Prosecution led evidence that the incident happened during the daytime and there was nothing to obstruct the complainant's vision when she saw the Accused. You have to carefully analyze the evidence and it is for you to decide whether you believe the evidence given by the Complainant regarding the identification of the Accused.

29. From the line of the cross examination, it appears that the Defence denies the allegation.

30. Remember, it is for the Prosecution to prove the charges against the Accused beyond reasonable doubt. I have now given you the directions of law and summarized the evidence adduced in this case. It is a matter for you to decide whether the Prosecution proved all the ingredients of the offence beyond reasonable doubt.

31. You may now retire and consider your opinions. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?



32. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



At Suva

02 February 2021

**Solicitors**

Office of the Director of Public Prosecutions for the State

Office of Legal Aid Commission for Accused