

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 97 of 2021

STATE

vs.

PENI SUIQA

Counsel: Ms. B. Kantharia & Ms. A. Devi for the State
Ms. L. David for the Accused

Date of Hearing: 5th October 2022

Date of Closing Submission: 6th October 2022

Date of Judgment: 18th October 2022

JUDGMENT

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 13th May 2021:

COUNT ONE

Statement of Offence

AGGRAVATED ROBBERY: contrary to Section 311 (1) (a) of the Crimes Act, 2009.

Particulars of Offence

PENI SUIQA with another, on the 15th day of March, 2021 at Nasinu, in the Southern Division, in the company of each other, stole 1 x pink coloured handbag containing 1 x Samsung J2 mobile phone, \$520.00 cash, wallet with cards and 1kg grog from **KAMNI KAJAL REDDY** and immediately before stealing from **KAMNI KAJAL REDDY**, used force on her.

2. Upon entering a plea of not guilty by the Accused, the matter heard on the 5th of October 2022. The Prosecution presented the evidence of three witnesses. Upon the closing of the case for the prosecution the defence was called for and the Accused opted to remain silent and called no evidence. Subsequently, the Court heard the oral submissions of both the learned Counsel and the Prosecution tendered written submissions too. Having carefully considered the evidence presented during the hearing and the respective submissions of the parties, I now proceed to pronounce the judgment.

Elements of the offence

3. The constituent elements of the offence of the Aggravated Robbery as charged are that:
 - (i) the accused Peni Suiqa did
 - (ii) in the company of another person,
 - (iii) commit robbery on Kamni Kajal Reddy and stole 1 x Samsung J2 mobile phone, \$520.00 cash, wallet with cards and 1kg grog.

4. Robbery is an aggravated form of theft. Theft is committed if that person dishonestly appropriates the property belonging to another with the intention of permanently depriving the other of that property. The elements of 'dishonestly' and "the intention of permanently depriving the other of the property" is the state of mind of the accused at the time of committing the offence which could be drawn from the conduct of the accused. 'Appropriation of property' is taking possession or control of the property without the consent of the person who has possession or control of the property. Theft becomes robbery if the accused, immediately before, or at the time of, or immediately after, committing theft use force or threaten to use force on another person with the intent to

commit theft or to escape from the scene. If more persons than one are involved in committing robbery it is Aggravated Robbery.

5. Accordingly, the Prosecution has to prove beyond a reasonable doubt that:
 - (i) the accused,
 - (ii) with other persons,
 - (iii) dishonestly appropriated 1 x Samsung J2 mobile phone, \$520.00 cash, wallet with cards and 1kg grog.
 - (iv) with the intention of permanently deprive it,
 - (v) and used force on Kamni Kajal Reddy immediately before or after stealing the said items.

6. The first element requires the proof of the identity of the offender and to prove beyond reasonable doubt that Peni Suiqa with others committed this offence in the company and together with another. Where two or more persons commit a criminal offence, whatever the participation each person may be if they are acting together as part of a joint plan or agreement to commit the offence, each one of them will be guilty. However no formal plan and agreement is not required as an agreement to commit an offence may arise on the spur of the moment. The essence of joint responsibility for a criminal offence is that each accused shared a common intention to commit the offence and played his part in it, of any degree to achieve that aim.

Presumption of innocence

7. The accused is presumed to be innocent until he is proved guilty. 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 or burden on the accused to prove his innocence. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the accused's guilt, or if there be any hesitation in my mind on any of the ingredient or on the of evidence or led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted.

Prosecution case

8. The prosecution called 3 witnesses namely the complainant Ms. Kamni Kajal Reddy, Esther Susana Kamicanaivalu and PC 3056 Joeli. Upon the close of the prosecution's case, the defence was called for however the accused opted to remain silent and did not call any witnesses.
9. The complainant Kamni testified that she was living in Valelevu with her husband on the date of the incident. On 15/03/2021, she had come to Suva City and withdrawn some money sent by a cousin living in United States. She had withdrawn \$520.75 from the MoneyGram Center at MHCC. As she was running for slice fish and grog shop she had bought a kilo of powdered grog that day. Apart from the money she withdrew that day she had another \$90 with her. She had boarded a bus and come to Valelevu. According to her she had boarded the bus around 12.45pm and come to Nasole and got off near the Nasole Mosque at Valelevu.
10. She had been carrying a handbag in which she had \$520 in cash, some change, Samsung mobile phone, wallet with cards and 1 Kilo of grog. According to her this handbag was pink with black in colour with two handles. She had been having the handbag tucked between her arm and the side of the body and with the hand going through the two handles. From the point she got off the bus she had to walk up to her house and there was a footpath a short cut about 3 minutes and the normal road which was 7 minutes' walk.
11. There had been a slight drizzle and she had opted to walk along the road for the reason that there had been a snatch and run incident along the shortcut a few days ago. As she was walking she had felt someone pulling her handbag. However, as the arm was put through the handles she had held onto the bags and turned back and seeing a boy pulling her handbag. Just as she had felt a push from a rear and fallen face downwards with her fall the bag had got loose and the boy had taken the bag and run-away.
12. She had also observed another boy standing a short distance away apparently helping and looking out in support of this accused. After snatching the handbag the first boy run in I-Taukei. Both of them had run together. The victim had got up and given chase and followed him towards the settlement up to the by-road. However, they have run away. She had been

crying and shouting for help and as she was walking back she had spotted a police mobile patrol car. She had stopped them and informed as to what happened. The said police officer had then called out if anyone has seen those who ran away. Just as then a small girl had come up and told that she saw two boys known to her running down with a pink handbag. She had given the names of these two and informed the police where they lived. The girl had also given the names of the two boys. The police have taken both the girl and the victim gone to a house shown by the girl but they found the person was not in the house at that time.

13. The girl and the complainant had been brought back to the Valelevu Police Station where she had given a statement. She identified the accused as being the boy who pulled the handbag and then who took it and ran away. She had seen this accused on previous occasions coming to her shop to buy grog. In cross examination it was elicited that no description of the boy had been given. In prove of which the defence marked the statement as DE1 which the complainant admitted as being the statement made by her. Her explanation was that she told the police officer and gave the description but it has not been written down. However there is an omission in this respect which I will consider later. The defence suggested that the identity of the accused is a mistaken identity as there are other similar looking boys in that area. The victim was certain that she saw the accused and she identified him as close range and clearly.
14. Witness number 2 Esther Susana testified that on the 15th march 2021 around 4.22pm she was on her way to a shop called Ganesh to get something. She had been walking along the road when she had seen two boys namely Peni and Joey running towards her from the opposite direction. This was a road about 3 meters in width. She had identified both of them and seen Peni having a pink handbag of 1 to ½ feet in length in his hand. The accused had been trying to cover it with a checked shirt. However, she had seen this handbag and says that it was pink in colour. She had observed them running down.
15. According to her Joey was running ahead followed by Peni, they were running together. She had known Peni about 5 years. Peni had been wearing a black trousers and a white T-Shirt and Joey a blue T-Shirt and black pants.
16. Esther had gone up to the shop as she was walking back she had seen an Indian lady crying

and shouting, just as when a police car had arrived and stopped there and the policeman had asked what it was. Then the policeman had asked this witness if she saw two boys running she had said yes and given their names and she knows where they lived. She had gone with the police to Penis house and pointed it out. However, Peni was not in the house. She had identified the accused as being Peni as she referred to and saw that day.

17. She was cross examined extensively in the course of which she admitted that she was going to school during that time. However she denied there were other people on the road that day. Further she said that it was drizzling that day but has seized shortly before that incident. Defence suggested her identity was mistaken, she was absolutely certain that she saw Peni that day and she did identify him correctly. She had made the statement to the police that day. There were no contradictions marked or omissions raised in cross examination.
18. Witness number 3, PC 3056 Joeli was summoned and he testified that he witnessed the caution interview of the accused namely Peni Suiqa being recorded. However, it was typed by another officer and as it was typed on a computer this witness did not appear to have seen the contents. The defence objected to this evidence being led through this witness. The objection was upheld. Thus the prosecution did not mark and produce the caution interview through this witness.

Evaluation

19. Though the accused remained silent no adverse inference can be drawn nor will it in anyway prove the charges. The prosecution is required to prove the charges beyond the reasonable doubt. As to the identity of the accused in court it was not challenged and Esther identified the accused as the person she saw on 15th March 2021. Esther says that he is Peni and the Police witness says that his full name is Peni Suiqa. This evidence was un-assailed and unchallenged to that extent.
20. I would first consider the evidence of complainant soon after the incident almost immediately she had made a complaint to the police in fact the defence in cross-examination marked and produced her statement as DE1. This was for the purpose of showing that her statement was inconsistent with her evidence. Firstly to prove the omission of the description of the boy. It is

correct that the fact she had previously seen him near her shop and the description are not in the statement. Her explanation is that she had told these to the police officer. On the perusal of which I observe that it is a brief of summarized description of the events which is just 10 typed lines. The statement had been made at 1800 hours. There is a brief narration of the incident and no recorded of any recognition and of the details as to the identity of the perpetrator.

21. Subject to the omission the complainant did in court identify the accused as being the person who grabbed her handbag. This incident had taken place in March 2021 almost 1½ years ago. There had not been any identification parade. The victim had not known the accused personally but she had happened to see them in the vicinity of her house and at her shop. That being so no formal ID parade was necessary. The defence did challenge the recognition and suggested that it was a mistaken identity.
22. Apart from the complainant Esther positively identifies as being the person whom she saw running with a pink handbag. She is from that area and Peni the accused as well as Joey were known to her. She had known the accused for at least 5 years. She had seen the accused running towards her and she had the opportunity of clearly seeing and identifying the accused. She had almost immediately told the police officer in the presence of the victim that it was Peni and Joey she had even taken them to Peni's house. There is no contradiction nor is there any omission on this evidence. She was absolutely clear and certain on this issue of recognition and identity of Peni. The suggestion of the mistaken identity is totally baseless. Therefore, this court is satisfied that the evidence of Esther on the recognition of the accused is extremely credible and reliable.
23. The defence did not make any other allegation of any false implication. The only ground was that it was a mistaken identity. The complainant's evidence of recognition is unreliable and not credible due to the omissions. However the evidence of the complainant together with Esther will thus prove that the accused did grab the pink bag with another boy and that it was he who was seen running away in the vicinity. However, when you consider the evidence of the victim and that of the Esther there is a contradiction and a serious difference as regards the time of the incident and sighting. According to the victim she had boarded the bus around

12.45pm and it takes no more than ½ an hour to reach the destination. Thus according to her she should have got off the bus around 1.15pm. The snatching of the purse would be shortly thereafter may be around 1.30pm. However according to Esther she had seen the accused running around 4.22pm. If these times are so the two could not be narrating parts of the same incident.

Identity of the Accused by the Complainant

24. As stated above the complainant did point out and identify the Accused in open court as being the person who snatched her hand bag on that day. According to her she had seen the Accused on several occasions prior to this incident as he used to visit her grog and fish shop at her home. Hence though she may have not known the name and not been a personal acquaintance or friend in that sense she has seen and known him by sight as a person living in the vicinity and visiting her shop. Thus, Ms. Reddy has at the time of the incident recognized the Accuse as opposed to identifying him.
25. However, Ms. Reddy's statement does not contain the fact that she recognized nor does it contain any description of the perpetrator either. The combined effect of those two omissions seriously affects the credibility of Ms. Reddy's recognition of the Accused. Her explanation is that she did tell all that to the officer who recorded the statement but he had not written the same. In the normal course of events a police man even of average intelligence will know the importance of the identity of a perpetrator and it is very unusual for such officer to omit the recording of such an important item. The officer who recorded the statement was not called to give evidence. Thus the explanation to my mind is not plausible.
26. That being so there is also a serious discrepancy between the times of events between the two witnesses. According to Ms. Reddy the robbery takes place around 2.00pm the latest, but Esther had seen the Accused running with a pink handbag around 4.22pm. There is a time lag of 2 hours and 22 minutes. Esther saw the Accused running with another when she was on her way to the shop and when she returned she sees a woman crying and the police there who inquired from her.
27. According to Ms. Reddy she has given chase and came back and then met policeman about

20 minutes after the incident. Thus, it may be that either Ms. Reddy or Esther is mistaken as to the time. According to the statement marked and produced as defence exhibit DE1, the time Ms. Reddy has given on her statement is 4.00pm. Under the common law a previous statement of a witness may be used to contradict or in certain instances to establish consistency but certainly it cannot be used as substantive evidence. This was reiterated by Prematilaka J.A., in the case of *Heinrich v State* [2019] FJCA 41; AAU0029.2017 (7 March 2019) in which His Lordship held thus;

“[50] Two issues arise when a witness is shown to have made a previous statement inconsistent with the evidence given at the trial. The first is as to the use to which the statement previously made out of court may be put, and the second is as to the effect of the previous statement on the value of the testimony given by the witness in court.

[51] ***Driscoll v The Queen*** [1977] HCA 43; (1977) 137 CLR 517: 10 August 1977, in my view has stated the relevant law correctly as follows.

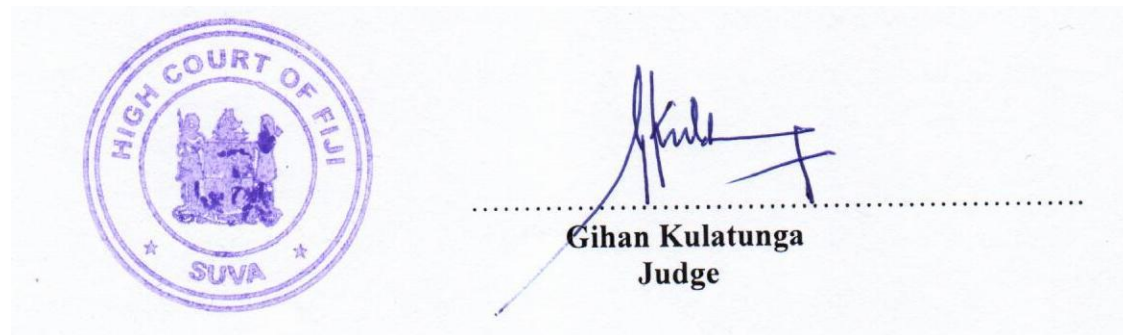
‘As to the first of these questions it is clearly settled that the previous statement is admitted merely on the issue of credibility, and is not evidence of the truth of the matters stated in it: Taylor v. The King [1918] HCA 68; (1918) 25 CLR 573 ; Deacon v. The King (1947) 3 DLR 772 ; and Reg. v. Pearson (1964) Qd R 471.’”

28. Thus there is a contradiction on this issue in Ms. Reddy’s evidence. As the evidence of Ms. Reddy on the recognition of the Accused is not credible due to the omissions the prosecution will have to rely on Esther’s evidence for the identity. To that end it is necessary that the evidence of Reddy and Esther synchronize as to times and events to prove that it was the continuation of the same incident. Thus, the prosecution should establish that Esther saw the Accused running immediately after the handbag was snatched from the victim.
29. Certainly Esther’s evidence is credible and reliable as such the fact that she saw the Accused running with a pink handbag at 4.22pm is acceptable and reliable. However, if the handbag was snatched from Ms. Reddy at 2.00pm what Esther saw at 4.22pm cannot be connected directly to Reddy’s incident. Prosecution’s evidence is that few days prior to this there was a snatch and run incident in the visiting. Thus snatch and run street mugging type robberies are

not uncommon in this area. Hence what Esther saw at 4.22pm may even be that the Accused was running after a different incident. Thus the failure of the prosecution to clarify and rectify this discrepancy of times considered in conjunction with the infirmity of the recognition evidence of Reddy creates a serious doubt as to the identity of the Accused and the proof of the charge in this case. This necessarily creates a serious doubt as to the proof if the Accused was the thief. Hence the prosecution has failed to prove the charge beyond reasonable doubt.

30. Further there is no other evidence of any sort such as recovery and also for reasons unexplained the 2nd person Joey known to Esther and recognized by her has not been arrested nor pursued with for reasons unexplained. In these circumstances I hold that the prosecution had failed to prove the charge beyond reasonable doubt and accordingly I acquit the Accused of the said charge.

31. Accused is accordingly acquitted.



At Suva

18th October, 2022.

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused