

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

High Court Criminal Case No. HAC 118 of 2015

BETWEEN : STATE

AND : AISEA TURUVA

Counsel : Mr Seruvatu for the State
Ms N Sharma for the Accused as duty Solicitor

Dates of Hearing : 13 and 14 June 2019

Closing speeches : 14 June 2019

Date of Summing up: 17 June 2019

SUMMING UP

Ladies and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinion. 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 person is guilty or not guilty to the counts he is charged with.

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 opinion with that evidence.
3. You must base your opinion only on evidence given by the witnesses before this court. 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 opinion. 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 witnesses 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. You may reject or accept any evidence in forming your opinion. 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.

Ladies and gentleman 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 a witness, accept the entirety or even accept only a part of a witness's evidence and may reject the rest. You have to decide whether a witness has spoken the truth or correctly recalled the facts and narrated it.
8. You have seen the demeanour of the witnesses and how they gave evidence in court. You have seen whether they were forthright or evasive in giving evidence. But you may also bear in mind that some witnesses have good memory, some may not remember every detail and it is also likely that some may perceive the same incident differently and narrate differently. You have to use your common sense in assessing the reliability and credibility of witnesses. Remember, that many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety and get distracted in this environment.
9. When you evaluate evidence, you should see whether the version of a witness is probable or improbable. You must see whether the witness has relayed a consistent story and whether it tallies with his or her previous statements or the evidence of other witnesses.
10. A previous statement made by a witness to the Police is not evidence. But those statements can be used to test the consistency and credibility of the witness if you are satisfied that such a statement was made. The statement to Police could only be used to ascertain whether the witness has said something different to what he or she said in Court. These portions only assist to decide whether the witness was consistent in that particular issue.
11. 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 he is guilty. The burden of proof remains on the prosecution throughout the trial. For this purpose, the prosecution must prove every element of the offences, beyond reasonable doubt.

12. The Accused need not prove his innocence. The fact that the Accused did not give evidence in this case does not imply any burden upon him to prove his innocence. It is not his task 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 state has proved every element of the offence beyond 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 offences, you must find him guilty to those offences.

13. In this case the Accused is indicted for two counts. You must consider each count separately. If you find the Accused guilty to one count it does not automatically make him guilty to the other count. You must consider whether the prosecution has proved the elements of each count beyond reasonable doubt.

14. Now let us look at the counts contained in the amended information.

First Count

Aggravated robbery: contrary to Section 311(1)(b) of the Crimes Act 2009.

Particulars of offence

Aisea Turuva with others on the 13th day of July, 2015 at Nadi, in the Western Division robbed Lales Service Station of \$ 41,429.00 cash and at the time of the robbery used force and offensive weapons namely, cane knife and pinch bar.

Second Count

Resisting arrest: contrary to Section 277(a) of the Crimes Act 2009.

Particulars of offence

Aisea Turuva with others on the 13th day of July, 2015 at Nadi, in the Western Division, resisted arrest of Corporal 3015 Opeti Lolo whilst effecting arrest in the due execution of his duty.

15. For the offence of aggravated robbery, the Prosecution must prove the following elements beyond reasonable doubt;
 - a) The Accused
 - b) Committed robbery
 - c) In the company of one or more other persons; or
 - d) Had an offensive weapon with him at the time of robbery

16. The first element is the identity of the Accused. The Prosecution must prove beyond reasonable doubt that the Accused committed the offence.

17. 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.

18. Theft is dishonest appropriation of the property belonging to another with the intention of permanently depriving the other of that property. 'Dishonesty' and 'intention to deprive permanently' are about the state of mind of the Accused. Inferences may be drawn from the conduct of the Accused, with regard to the Accused's state of the mind. 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. In law, property belongs to a person if that person has possession or control of the property.

19. The offence of robbery becomes aggravated robbery, if it is committed in the company with one or more other persons, or if at the time of robbery, the Accused had an offensive weapon with him. Offensive weapon includes any article, made or adapted for use for causing injury to or incapacitating a person for example, a cane knife, pinch bar, gun, iron rod, piece of stick, etc.
20. The second count is resisting arrest. The Prosecution must prove the following elements beyond reasonable doubt to prove resisting arrest;
- a) The Accused
 - b) Assaults any person
 - c) with intent to commit an indictable offence, or to resist or prevent the lawful apprehension or detention of himself, herself or of any other person for any offence
21. The first element is regarding the identity of the Accused. The Prosecution must prove that the Accused committed the offence. 'Assaulting a person' is intentionally or recklessly applying unlawful force to another person. For the third element the Prosecution must prove that the Accused assaulted a police officer to resist lawful arrest of himself.

Ladies and gentleman assessors

22. I will now briefly outline the evidence presented in this case. However, you should consider the entirety of the evidence adduced in this case when forming your opinions.
23. The first Prosecution witness, Mohammed Aiyaz Munif gave evidence that he is the CEO of Lale's Millennium Group of Companies and on 13 July 2015 Lale's Service station was robbed. He said that the cashier, Mr Tiko informed him about the incident over the phone around 3.30 am and he immediately called the Police. He said that the Police arrived within 3 - 5 minutes. The witness said that around \$ 41000 cash was stolen.

24. During the cross examination the witness said that he has not seen the Accused before. Further he admitted that he does not have any document to show how much cash was stolen.

25. Ratu Epeli Naliva was the next witness for the Prosecution. He said that he was employed at Lale's Service Station in Nadi and on 13 July 2015 at around 3.00 am two persons entered the shop. The witness said that one person was holding a pinch bar and the other was holding a cane knife. According to the witness both the men were wearing pompoms and the one with the pinch bar had entered the counter. The one with the cane knife had been standing in front of the counter and that person had threatened to chop him if he does not keep still.

26. The witness said that the man with the cane knife was about 1-1/2 meters away from him. He said that about four times he was told to keep still. The witness said that the man with the cane knife was wearing black trousers and a sky-blue long sleeve shirt. His face had been covered with a pompom mask and there had been holes only for the eyes.

27. According to the witness some Police officers had arrived soon after the incident. The witness said that the Police officers left the scene after a while, and they again came back in about 30 minutes. The witness said that they took his statement while the police vehicle was parked outside. Then the witness had seen the Accused inside the Police vehicle. He said that the vehicle was parked about 50 meters away from where he was. He had gone beside the vehicle and had seen the Accused sitting inside the Police vehicle. He said he identified the person sitting inside the Police vehicle as Aisea Turuva. He said that Aisea Turuva was living with his previous wife during that time. He also said that he had met Aisea for more than once and he was not in a good relationship with Aisea Turuva. The witness also said that when they meet they

will talk and after that they will have an argument. The witness further said that Aisea Turuva sometimes used to call him and threaten him.

28. Ratu Epeli Naliva further gave evidence that Aisea Turuva was wearing clothes similar to the person who came to rob with a cane knife. He said that Aisea Turuva was wearing a sky-blue shirt. He also said the following regarding the voice;

“The tone of his voice is like when he calls me on the phone when he threatens me is the same tone he used on that night of the robbery.”

29. The witness identified the Accused as Aisea Turuva in Court.

30. During the cross examination the witness said that he made a statement to the Police and everything was fresh when he gave the statement to the Police. The Accused asked the witness whether he told the Police that the man was wearing a black hood. The witness said that what he meant was a black pompom. Again, the witness was asked whether he has stated in the statement that the person was wearing a dark blue shirt and not a sky-blue shirt. The witness admitted that he said it was a dark blue shirt. But again, the witness said that he did not inform the Police that it was a dark blue shirt. He was further cross examined by the Accused as follows;

Q: I put it to you that your wife left you to come and stay with me, that's the reason you mentioned my name in this robbery?

A: I didn't know it was Aisea Turuva who was holding to the cane knife during the robbery. I only came to know when the Police brought him and the cloth he was wearing and his built and his voice.

31. Further under cross examination the witness admitted that he assumed that the voice he heard could be Aisea Turuva's voice after he saw Aisea in the Police vehicle. The witness confirmed during cross examination that he assumed that it was the Accused's voice as follows;

Q: Now Mr Naliva, I will tell you what happened on that day. You went outside, you saw Aisea sitting at the back seat of the Police vehicle, you assumed that it was the same person holding the cane knife and that's when you mentioned his name to the Police?

A: Yes

32. At this juncture I must caution you regarding the identification of an Accused person. In this case the Defence disputes identity of the Accused. A wrong identification can cause a miscarriage of justice. The danger of wrong identification would not be about a witness being untruthful, but there are chances for a witness to mistakenly believe that the person seen at the crime scene was the Accused. You must decide whether the evidence of identification is reliable and should be accepted or whether the evidence on identification is unsatisfactory and should be rejected. To do this you must examine all the circumstances and determine the strength or quality of the identification.

33. The witness, Naliva said that he assumed that it was the Accused who came to rob with a cane knife after he saw the Accused in the Police vehicle. You must remember that the witness related to the similarities only after he saw the Accused in the Police vehicle. He said that his assumption was based on the similarity of the shirt, built and the voice. It is a very important question of fact for you to decide whether the witness made a positive identification of the Accused by his voice, shirt and built. The witness said that the voice of the person who came with the cane knife was similar to the voice of the Accused when the Accused used to threaten him over the phone. The witness did not say that it was similar to the voice of the Accused when he met and spoke with him during other times. Therefore, you must use your common sense to assess what weight you would attach to the evidence on identification by voice.

34. Further you must assess the reliability of evidence on identification by clothes and by built. I must warn you that there is a big difference in identifying a

person by face and by clothes or by built. Therefore, you must carefully decide whether such identification is correct and not mistaken. To do this you must closely examine the circumstances in which the identification came to be made. Generally, this will include such matters as; How long did the witness have the person under observation? Was it a significant period or just a fleeting glimpse? At what distance? In what light? Was the view impeded or obstructed in any way? Was the Accused a person known to the witness? Had the witness ever seen the Accused before and, if so, how often? How long elapsed between the original observation and any subsequent identification of the Accused as that person? How was the subsequent identification made?

35. Such matters as these go to the quality of the identification evidence. If after consideration of all that evidence the quality of the identification remains satisfactory the danger of mistaken identification is lessened. But you must not forget that the poorer the quality, the greater the danger of mistaken identity.

36. The next Prosecution witness was Tiko Luva. He said that he was the cashier at the Lale's Service Station. He said on 13 July 2015 at about 3 am he was stacking some ice cream when a person in a pompom mask threatened him with a cane knife to keep still. According to the witness the man with the cane knife was wearing a long sleeve blue shirt and a black long pants. The witness said then a second person entered the counter and took the money.

37. During the cross examination the witness said that he has never met the Accused before. The witness admitted that at the time he gave the statement to the police everything was still fresh in his mind. It was put to the witness that he has stated in his statement to the Police that the person with the cane knife was wearing an overall with black shoes. The witness said that he was scared, and he thought it was an overall as it looked joined together. Further he said that from where he was standing he could not properly make out whether it was a shirt or an overall. The witness again said that all what he knows is that the person with the cane knife was wearing a shirt and it was blue.

38. The last Prosecution witness was Inspector Opeti Lolo. He said that on 12 July 2015 he received information of a possible robbery at a service station in Nadi. He said that he went with a team to warn the service stations. The witness said at around 3 am he received a call about a robbery at Lale's service station. They had reached the crime scene within about ten minutes. The witness said that later they went to Akuila Settlement as the name Aisea Turuva was also received with the information he received that night.
39. The witness said that when they reached near the house of the Accused they saw fresh tyre marks on the grass and noticed someone moving at the back of the house. He said that a person started running and after giving a chase they arrested Aisea Turuva. The witness said that when they tried to arrest the Accused, he pushed them, and they overpowered the Accused. The witness said that they pinned the Accused to the ground. According to the witness the Accused had been wearing a long sleeve blue shirt and long dark trousers.
40. He said that on their way to Namaka Police Station they stopped at Lale's Service Station and one of the security officers said that the Accused looks similar to the one who was standing near the door at the counter holding a cane knife. The witness further said that the security officer told them that the Accused was still wearing the same long sleeve blue shirt. The witness said that it was Ratu Epeli who recognized the Accused.
41. During the cross examination the witness admitted that no money or any other thing was recovered from the Accused although the Accused was arrested soon after the robbery. The witness said that they did not focus on searching the house as they were involved in chasing the Accused. Further he admitted that he did not enquire from the neighbours of the Accused whether a vehicle came during that time or about the tyre marks.

42. During the re-examination the witness said that the Accused was arrested based on the information he received and the description of the light blue shirt by the workers.
43. I must caution you that although the witness said that the Accused was arrested on information received by the Police prior to the alleged offence, there should be other independent evidence to link the Accused to the robbery. It is for you to decide whether the Prosecution presented reliable evidence to link the Accused to the offence of robbery as no witness has identified the Accused person during the alleged incident.
44. That was the case for the prosecution.
45. 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.
46. You heard the evidence given by all the Prosecution witnesses. The main issue in this case is the identity of the Accused person. You heard that the colour of the shirt worn by the person who was holding a cane knife was described as sky-blue, dark blue and light blue. Further the Defence highlighted that a witness has described the clothes of the person who was holding the cane knife as an overall in his statement to the Police.
47. The position of the Prosecution regarding the first count was that the Accused was arrested by the Police on some information they received prior to the incident and a witness in this case later recognized the similarity of the Accused and one of the persons came for the robbery based on the shirt, voice and the built. As far as the second count is concerned the Prosecution submits that the Accused pushed the Police officers when they tried to arrest him.

48. The Accused totally denied his involvement with the alleged incident and claimed that the main witness, Ratu Epeli Naliva gave false evidence to take revenge from him as he was living with Ratu Epeli Naliva's wife at that time. Further the Accused contends that recoveries should have been made if he was arrested soon after the alleged incident. In respect of the second count the Accused denies that he resisted arrest.
49. 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 offences beyond reasonable doubt.
50. You must find him guilty if you decide that the Prosecution has proved the offences beyond reasonable doubt.
51. Finding the Accused guilty to one count does not automatically make him guilty to the other count. You must consider relevant evidence separately for each count when arriving at your opinions. If you have a reasonable doubt in respect of any count, then you must find the Accused not guilty to that count or counts.
52. 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?
53. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.




Rangajeeva Wimalasena
Acting Judge

Solicitors

Solicitors for the State: Office of the Director of Public Prosecutions
Office of Legal Aid Commission for the Accused (Duty Solicitor)