

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 264 of 2019

[CRIMINAL JURISDICTION]

STATE

V

TAITUSI TAWAKE

Counsel : Mr. E. Samisoni for the State
Ms. A. Singh for the Accused

Hearing on : 22 July 2020

Summing up on : 23 July 2020

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room and the exhibits tendered. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court

room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
5. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
6. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes we honestly forget things or make mistakes regarding what we remember.

7. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by different witnesses on the same issue. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. In this regard, you may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
8. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.

Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.

9. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

10. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proven facts. Moreover, if there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proven facts, then you should not draw the adverse inference.
11. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that the prosecution should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
12. In order to prove that the accused is guilty of a particular offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of even one of those elements, as to whether the prosecution has proved that element beyond reasonable doubt, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.
13. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the charges are proved against the accused.
14. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.

15. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

[COUNT 1]

Statement of Offence

Aggravated Burglary: contrary to Section 313 (1)(a) of the Crimes Act, 2009.

Particulars of Offence

TAITUSI TAWAKE and another, on the 9th day of July, 2019 at Kinoya, Nasinu in the Central Division, in the company of each other, entered as trespassers into the dwelling house of **CATHERINE NISHA**, with the intent to commit theft.

[COUNT 2]

Statement of Offence

Theft: contrary to Section 291 (1) of the Crimes Act, 2009.

Particulars of Offence

TAITUSI TAWAKE and another, on the 9th day of July, 2019 at Kinoya, Nasinu in the Central Division, in the company of each other, dishonestly appropriated (stole) 1x Simmons television with a remote and 1x radio subwoofer the property of **CATHERINE NISHA**, with the intention of permanently depriving **CATHERINE NISHA** of the said property.

16. To prove the above first count, the prosecution should prove the following elements beyond reasonable doubt against the accused;

- (i) the accused;
- (ii) with the company of one or more other persons;
- (iii) entered a building as a trespasser;
- (iv) with intent to commit theft of a particular item of property in the building.

17. To prove the second count, the prosecution should prove beyond reasonable doubt that the accused committed the offence of theft. The elements of the offence of theft are as follows;

- a) the accused;
- b) dishonestly;
- c) appropriated the property belonging to another;
- d) with the intention of permanently depriving the other of that property.

18. In each count it is alleged that the accused committed the offence with others who are not known to the prosecution. Please remember that an offence may be committed by one person acting alone or by more than one person acting together with the same criminal purpose. The offenders' agreement to act together need not have been expressed in words. It may be the result of planning or it may be a tacit understanding reached between them on the spur of the moment. Their agreement can be inferred from the circumstances. Those who commit crime together may play different parts to achieve their purpose. The prosecution must prove that the particular offence was committed by more than one person who were acting together with each other with the same criminal purpose and the accused being one of them, took some part in it.

Evidence

19. The first prosecution witness was Ms. Catherine Nisha ("PW1"). She said that;
- a) *She lives in Kinoya. On 09/07/19 around 10.00am she went to the Valelevu Police Station to lodge a complaint against her neighbour. She was asked to go to the Kinoya Police Station. She then went there and lodged her report. On her way home, in front of 'Yees Bakery' which was a shop situated opposite her house, she saw the accused with few other boys. The accused was standing there with a black bag and was holding a 32" TV. She said that there were 3 – 4 boys with the accused. She said that she 'did not say much' when she saw the accused holding the items because she thought that those items belongs to them.*
 - b) *After that when she reached home, she saw her door broken and louver blades missing. When she entered the house she noticed that her 'Simmons' brand 32" flat screen TV, her 'Alliance' radio, remote and three of the speakers are missing.*
 - c) *She immediately called the Valelevu Police Station and also her friend Maraiwai who was a police officer. She said Maraiwai came first in his private car with one Aisake and they went looking for the items. This was around 11.00 am to 12.40 pm. After 15 minutes, Maraiwai came with her items, the 32" flat screen 'Simmons' TV, the TV remote and the 'Alliance' radio. She identified those items in court as*

the ones went missing from her house and they were tendered as PE1, PE2 and PE3 respectively.

- d) She said that she knew the accused for about a year and she would see the accused 2 – 3 times a week in front of the shop. She said that the accused would hang around the shop with other boys, regularly. She said that the accused would ask her for money when she meets him at the shop and he had also requested her to give him a job.*
- e) When she saw the accused on 09/07/19, she saw him at a distance between 2 to 8 meters. The time was around 11.00am and she saw him for about 15 minutes. She said that the accused has a tattoo with 3-4 stars on the side of his neck. She referred to him in her evidence as 'Taitusi' and she said that the boys call him by the name 'Tawake'. She identified the accused in court as the person she was referring to as Taitusi.*
- f) During cross-examination when it was suggested to her that according to her evidence because she saw the accused on 09/07/19 with the TV for about 15 minutes, she would have been able to recognize her TV, she admitted that suggestion. However, she said that she thought that it was theirs. Questioned regarding the tattoo the accused was having on the neck, she said that it is in the right side. When it was suggested to her that she had never met the accused until she gave her evidence, she said that they know each other very well.*

20. The second prosecution witness was Constable Esawa Maraiwai ("PW2"). He said that;

- a) On 09/07/19, around 12.30pm, while he was on duty at Caubati Police Post, PW1 called him and informed him that her house had been broken in to. Then he left with PC Namata and Constable Suli to attend to that complaint. They went in PC Namata's private vehicle and it takes about 10 minutes to drive from the police post to PW1's house. After they reached her house they were informed that PW1's TV and the radio have been stolen. They were also informed by PW1 that while she was on her way to her house, she saw one 'Taitusi' holding a TV with one carton.*
- b) Then they went in PC Namata's private vehicle to check around the Kinoya area. He said that he knew Taitusi because he would always meet Taitusi at Kinoya during 7 years he served at the Valelevu Police Station.*
- c) When they entered Velou Drive, close to the church, PC Namata told them that he saw the accused and another 'Fijian guy' standing opposite the church and that the accused was holding a TV that was wrapped with a Sulu. They had to turn the vehicle from the nearby (Tiri) junction and then came back and parked the vehicle where PC Namata had seen the accused and the other person were standing.*
- d) But when they got off the vehicle the two ran towards a shortcut opposite the church. He with Constable Suli then ran after the two. They found a TV and a radio beside*

a banana tree, but did not see the two. They took those items to PW1 and she identified the items.

e) He said that he was unable to see the faces of the two men they chased. He said that he ran after the two men with Constable Suli while PC Namata stayed in the vehicle.

21. The third prosecution witness was PC 4322 Vinaya Namata ("PW3"). He said that;

a) On 09/07/19, while he was serving at Caubati Police Post, he received a phone call from PW1 saying that her house was broken in to. He left with Constable Maraiwai and Constable Suli and went to PW1's house. PW1 then told him that while she was on her way home from Valelevu, she saw Taitusi standing at the shop with a flat screen wrapped in an old cloth and when she came home she found out that her TV and the speakers that were on the table and a remote control are missing, and her bedroom window and the louver blades have been removed.

b) With that information he went with Constable Maraiwai and Constable Suli to Kinoya road and Velou drive. As they reached the Kinoya Methodist Church, he saw the accused and the other person standing in the cassava patch. He said the accused was holding a flat screen TV and the other person was holding one carton.

c) He said that he had known the accused for 9 years while he was serving in Valelevu. He said that when he saw the accused in the cassava patch, the distance between the accused and him was about 20 meters. Nothing was blocking his view when he saw the accused. He said that the accused was wearing a yellow vest and three-quarter black jeans. Before 09/07/19, he had seen the accused near the Chinese Shop in Kinoya.

d) He said that he stopped the vehicle when he saw the accused and informed Constable Maraiwai and Constable Suli to run after them. He then turned his vehicle and went near the secondary school where the short cut the two police officers followed leads to and waited for them. Then Constable Maraiwai ran towards him and informed him that the stolen items were found. Constable Maraiwai had a flat screen TV and a box that contained a speaker and a remote control in it. He said that the accused and the other person had run away.

e) Those items were then taken to PW1 where she identified them as items that belongs to her. Thereafter those items were taken to the Valalevu Police Station and were

handed over to the charge room. He identified the accused in court as the person he was referring to as Taitusi.

- f) During cross-examination he agreed that he would only have seen the person standing in the cassava patch for few seconds.*
- g) During re-examination he said that he saw the accused for 5 seconds.*

22. The fourth prosecution witness was PC 098 Suliano Surumi ("PW4"). He said that;

- a) He had been with the police for 1 ½ years and on 09/07/19 he was on duty at Caubati Police Post. That day SC Maraiwai received a call where it was informed that there was a break in at PW1's house in Kinoya. He went with PC Namata and SC Maraiwai to PW1's house in PC Namata's private vehicle.*
- b) At PW1's house they were informed that a flat screen TV and a radio are missing and that one Taitusi is the suspect. He said that he came to know who Taitusi is after he joined the police and while he was at the Valelevu Police Station.*
- c) Thereafter they travelled down to Velou Road. They saw a group of youth standing on the opposite side of the Kinoya Church. He said that PC Namata and SC Maraiwai confirmed that the suspect who is Taitusi and some other boys are there. Then he said that he saw the accused and the accused was holding a flat screen. He does not know how many of them were there in the group. He said that after he saw the accused they proceeded further and turned around at the Tivi junction and came to the place where the accused was seen standing. Then they started to run and PC Namata told him and SC Maraiwai to chase them.*
- d) He said that the suspect was a bit far from them. They received information on their way that the TV was thrown next to a banana tree. He then ran back to the relevant banana plantation which was pointed out. At that banana plantation they saw the flat screen TV and the carton with the radio and the remote. By that time they had lost those whom they were chasing. Then they went to PC Namata's vehicle and then to PW1.*
- e) He said that when he saw the accused near the church they were 'a bit far apart' and the distance would be from where he was giving evidence to the Juvenile Office. He said that he was able to see the accused's face from that distance when they had gone*

to make a turn at Tivi Junction and for about 15 seconds. Nothing was blocking his view. He said that he would usually meet the accused in Kinoya area. He identified the accused in court as the person he was referring to as Taitusi.

f) During cross-examination he said that they were chasing all the boys in the group he saw opposite the church at the same time. When he was asked would there have been 5 to 10 boys in the group, he said 'yes'. He agreed with the suggestion that, he would not be able to properly identify them given that there were 5 to 10 in the group and that he had seen them for only 15 seconds.

g) During re-examination he said that they were just chasing the person who was holding onto the item and that was Taitusi.

23. That was the case for the prosecution. At the end of the prosecution case you heard this court explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving the accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent. That is his right. Please remember that you should not draw any adverse inference against the accused due to his decision to exercise that right.

24. You may have noticed that I have not reproduced the entire evidence that was led. I have only referred to the evidence which I consider necessary to explain the case and the applicable legal principles to you. If I did not refer to any evidence which you consider important, you should still consider that evidence and give it such weight you may think fit. As I have already explained, it is entirely up to you to decide which evidence you accept.

25. The prosecution case is that the accused was seen with the stolen TV with others shortly after the break-in at PW1's house. Based on that the prosecution claims that the accused had committed the two offences he is charged with. Accordingly, you should give your mind mainly to two important legal

principles. First is on identification and the second is on the doctrine of recent possession.

26. PW1, PW3 and PW4 claimed that they had known the accused before and on 09/07/19 they saw a person holding onto a TV and that they recognised that person as the accused. The accused denies this.

27. When you consider the evidence on the identification of the accused by the said witnesses on 09/07/19, please bear in mind that an honest and a convincing witness can still be mistaken. Mistaken recognition can occur even of close relatives and friends. Therefore, you should closely examine the following circumstances among others when you evaluate the evidence given by PW1, PW3 and PW4 on identification of the accused as the person they saw who was holding on to the TV PE1 according to their evidence;
 - a) Duration of the observation;
 - b) The distance within which the observation was made;
 - c) The lighting condition at the time the observation was made;
 - d) Whether there were any impediments to the observation or was something obstructing the view;
 - e) Whether the witness knew the accused and for how long;
 - f) Whether the witness had seen the accused before, how often, any special reason to remember; and
 - g) Duration between original observation and identification.

28. Needless to say, you have to first decide whether you would accept the version given by each of those witnesses to the effect that on 09/07/19 they saw someone holding the TV (PE1) as probable and reliable before you turn to decide whether their evidence that they recognised the said person as the accused is probable and reliable according to above guidelines.

29. In this regard, it may be relevant for you to consider the inconsistencies in the evidence given by the prosecution witnesses on what they saw in relation to the accused.
30. You would note that PW1 said that she saw the accused standing near the shop opposite her house, holding onto a 32" TV and a black bag. PW3 said that he saw the accused in the cassava patch near the church holding onto a TV and the other person was holding a carton. According to PW3, PW1 told him that the TV was wrapped in a Sulu when she saw the accused holding same. PW4 said he saw the accused holding a TV opposite the church and then he found a TV and a carton containing a radio and a remote at the banana plantation. PW2 did not claim that he saw the accused. According to him only a TV and a radio was found besides a banana tree.
31. PW1 said that the accused was with 3 to 4 boys when she saw him. PW2 said that he chased only two men. PW3 said that he saw the accused with only one other person. PW4 said that there was a group of 5 to 10 individuals when he saw the accused.
32. PW1 said that she saw the accused for 15 minutes. Do you find it probable for a person who stole an item like a 32" TV to be in a public place with that item in his hand? What was the accused doing with the TV in front of the shop for 15 minutes? According to PW1, the accused and PW1 knew each other. So would it be probable for the accused to be standing near the shop which was opposite PW1's house for 15 minutes in the presence of PW1 with the TV stolen from PW1's house?
33. Though it was not clarified, it appears that that both PW3 and PW4 had seen the person holding the TV, while they were inside PW3's vehicle. PW3 said that he saw the person holding the TV for 5 seconds within a distance of 20 meters and

PW4 said that he saw that person for 15 seconds and according to his evidence that was at a distance of way more than 20 meters.

34. Considering the above and any other relevant evidence, you have to decide whether you accept the version of each witness that they saw a person holding a TV and that they properly recognised that the said person was the accused. When you deal with the inconsistencies noted above and any other relevant inconsistency, please follow the directions I have given you earlier on how to deal with inconsistencies.
35. If you accept the evidence of the relevant witnesses that the accused was seen with the TV stolen from PW1's house, then you should give your mind to the doctrine of recent possession.
36. With regard to recent possession, the law is that if, recently after the commission of the alleged offence, a person is found in possession of the stolen goods, that person is called upon to give an explanation for the possession, an explanation which is not unreasonable or improbable. The reason is that, from the fact that a person is found in possession of stolen items soon after the offence of theft is committed, an inference can be drawn that the said person must have stolen the property. The strength of the inference, which arises from such possession, is in proportion to the shortness of the interval which has elapsed from the time of the offence. If the interval is short, the presumption is so strong, that it almost amounts to proof; because the reasonable inference is that the person must have stolen the property and committed the offence. If an explanation is given which may be true, it is for you to decide on the whole of the evidence whether the accused is guilty or not. That is to say, if you think that the explanation may reasonably be true, the accused is entitled to an acquittal, because the prosecution has not discharged the burden of proof imposed upon it of satisfying you beyond reasonable doubt. That burden never changes and it always rests on the prosecution.

37. PW3 in his evidence said that he had known the accused for 9 years and sometimes he had arrested him. Please remember that this evidence about the accused being arrested by PW3 is not relevant to this case as far as the elements of the offences the prosecution is required to prove in this case are concerned. The fact that the accused had been arrested by the police previously does not prove any of the elements of the two offences the accused is charged with in this case. Therefore, you should not draw any adverse inference against the accused based on that evidence. If you believe that evidence, it may only be relevant for you to decide whether or not PW3 knew the accused before the incident relevant to this case and therefore to decide what weight to be given to his evidence that he identified the accused standing in the cassava patch near the Kinoya Methodist Church.
38. The next point you have to consider is this. You would note that the accused is charged with the offence of aggravated burglary which is constituted when the offence of burglary is committed by more than one person. Now, in the event you believe the evidence that the accused was seen with the stolen TV soon after the break in at PW1's house and thereafter by applying the doctrine of recent possession come to the conclusion that the accused must have stolen the items from PW1's house, you may arrive at the conclusion that the accused had committed the offence of theft and also the offence of burglary. That is, because the items were at PW1's house, to steal those items, the accused should enter that house as a trespasser with the intention of committing theft. But that itself does not prove the offence the accused is charged with on the first count.
39. Just because the accused was seen with others after the items were stolen, would it prove beyond reasonable doubt that the accused committed the offence with one or more other persons? Given all the evidence led in this case you have to consider whether you are satisfied beyond reasonable doubt that the accused committed the offence of burglary in the company of one or more others in order for you to find him guilty of the first count. If you are satisfied beyond reasonable

doubt that the accused committed the offence of burglary, but not satisfied beyond reasonable doubt that the said offence was committed with at least one other, you should find the accused not guilty of the first count, but find him guilty of the lesser offence of burglary.

40. Any re-directions?

41. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. You may peruse the exhibits if you wish to do so. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

42. Your opinion should be as follows;

1st count (aggravated burglary) - guilty or not guilty

If not guilty

Lesser offence of burglary - guilty or not guilty

2nd count (theft) - guilty or not guilty




Vincent S. Perera
JUDGE

Solicitors;

**Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused**