

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 188 OF 2019S

STATE
Vs
VANI VATUBULI

Counsels : Mr. N. Sharma and Ms. W. Elo for State
Mr. K. Prasad for Accused

Hearings : 23, 24 and 27 July 2020.

Summing Up : 28 July, 2020.

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made their submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of

fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. 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 on the accused to prove her innocence. Under our system of criminal justice, an accused person is presumed to be innocent until she is proved guilty.

5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that she is guilty. If you have any reasonable doubt so that you are not sure about her guilt, then you must express an opinion, that she is not guilty.

6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you. I will now read the same to you:

“... [read from the information]....”

You must ignore Accused No. 1, as she had already pleaded guilty to the offence. This summing up only involves Accused No. 2.

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:

- (i) Did the accused, with another, on 4 May 2019, at Raiwaqa in the Central Division, violently rob the complainant (PW1), of her properties, as itemized in the information?

E. THE OFFENCE AND IT'S ELEMENTS

9. The accused was charged with “aggravated robbery”, contrary to section 311 (1) (a) of the Crimes Act 2009. It was alleged that, she with another, on 4 May 2019, violently robbed the complainant (PW1) of her properties, as itemized in the charge. For the accused to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused,
 - (ii) in company with one or more persons,
 - (iii) steals
 - (iv) the complainant’s property or properties, and
 - (v) before the theft,
 - (vi) uses force or threatens to use force,
 - (vii) on another person,
 - (viii) with intent to commit theft.
10. “Stealing” is the act of taking away someone’s property or properties without his permission, and with an intention to permanently deprive him of the ownership of that property or properties. “Force” means “any type of force, whether or not done physically or verbally, for example, beating someone with a stick or threatening to do the same”.

11. Before stealing the complainant's properties, the accused, in company with one or more persons, must use force or threaten to use force to subdue the complainant or others' resistance, and at the time, had the intention to steal. For example, I and my friend saw you withdrawing \$1,000 cash from an ANZ Bank ATM machine. I and my friend immediately came to you, told you to hand over the \$1,000 cash to me or I will punch you in the face. You refused, I punched you in the face and stole your \$1,000 cash. That was "aggravated robbery".

12. You will notice in the information that the prosecution, in their particulars of the offence, began with the phrase, "...IVAMERE LIKUIVALU TAMANIVALU and VANI VATUBULI on the 4th day of May 2019 at Raiwaqa in the Central Division, in the company of each other..." The prosecution is alleging that the accused and DW2 committed the offence as a group. To make them jointly liable, the prosecution is relying on the concept of "joint enterprise." IVAMERE TAMANIVALU (DW2) had already pleaded guilty to the offence prior to the trial, and also gave evidence for the accused in this case as Defence Witness No. 2 (DW2); she admitted snatching the complainant's bag from her, at the material time.

13. "Joint enterprise" is "when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence" (Section 46, Crimes Act 2009). In considering each accused, you will have to ask yourselves the following questions. Did each of them form a common intention with each other, to violently rob the complainant (PW1) of the properties mentioned in the charge? If so, did each of them acted together in violently robbing PW1? When PW1 was violently robbed, were these episodes a probable consequence of them assaulting the complainant? If your answer to a particular accused was yes, and you are sure that the elements of the

offences described in paragraphs 9 to 11 hereof are satisfied, the particular accused was guilty as charged. If it was otherwise, she was not guilty as charged.

14. If you find the elements of aggravated robbery proven by the prosecution beyond reasonable doubt against the accused, you must find her guilty as charged. If otherwise, you must find her not guilty as charged. It is a matter entirely for you.

F. THE PROSECUTION'S CASE

15. The prosecution's case were as follows. The complainant (PW1) was 41 years old. She resided in Kuku, Bau, Tailevu. She reached Form 6 level education and is a hairdresser by profession. The accused (DW1) was 27 years old, and she resided at Jittu Estate, Raiwaqa. She reached Form 5 level education. She resided at home doing domestic work.
16. According to the prosecution, the complainant and the accused were known to each other. On 4 May 2019 (Saturday), they allegedly met each other at the Birdland Nightclub in Suva. According to the prosecution, the two including some of their friends consumed alcohol. When the nightclub closed, they went in a taxi to the accused's house in Jittu Estate to continue drinking. They were doing so between 6 am and 8 am on Saturday morning.
17. According to the prosecution, the complainant, the accused and Ms. Ivamere Tamanivalu (DW2) later left the accused's house to buy some more alcohol. They reached Grantham Road opposite the Rups Big Bear shop. They were allegedly 20 footsteps away from the accused's house. According to the prosecution, the accused suddenly allegedly held the complainant from the back and forcefully pushed her to the ground. DW2 then grabbed the complainant's handbag and later the two fled the crime scene. In the bag were the items mentioned in the charge. The items were never recovered.

18. The matter was later reported to police. An investigation was carried out. The accused and DW2 were later brought to the Suva Magistrate Court on 20 May 2019 charged with violently robbing the complainant. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

19. On 23 July 2020, the information was put to the accused in the presence of her counsel. She pleaded not guilty to the charge. In other words, she denied the allegation against her. When a prima facie case was found against her, at the end of the prosecution's case, wherein she was called upon to make her defence, she chose to give sworn evidence and called her co-accused (DW2), as her witness. That was her right.
20. The accused's case was very simple. On oath she denied the allegation against her. She said, at the material time, she was at her residence at Jittu Estate. DW2, on oath confirmed the above. DW2 said, it was Sera (PW2), not the accused, who punched the complainant, at the material time. DW2 said, the accused was at home, at the time.
21. Because of the above, the accused is asking you as assessors and judges of fact, to find her not guilty as charged. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

22. In analyzing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the Agreed Facts; then the State's case against the accused; then the accused's case and lastly the need to look at all the evidence.

(b) **The Agreed Facts:**

23. The parties submitted an “Agreed Facts”, dated 21 July 2020. It contained 6 paragraphs of Agreed Facts. Because the “Agreed Facts” are not disputed by the parties, you may take it that the prosecution had proven those facts beyond reasonable doubt, and treat the same as established facts.

(c) **The State’s Case Against the Accused:**

24. The State’s case against the accused was based fundamentally on the identification evidence of the complainant (PW1). You had heard her and watched her give evidence in court on 23, 24 and 27 July 2020. You had observed her demeanor and how she reacted to the questions thrown at her by the prosecution and defence counsels. I am sure her evidence are still fresh in your minds and I do not wish to bore you with the details of the same. However, I will concentrate on the salient points in the evidence, and on the issue of whether or not the prosecution had made you sure that the elements of aggravated robbery had been proven beyond reasonable doubt against the accused.
25. According to the prosecution, there were only three people at the crime scene, when the complainant (PW1) was allegedly robbed of her properties. The first is the complainant (PW1) herself. The second is the accused (DW1). The third is Ivamere Tamanivalu (DW2). Both DW1 and DW2 had given sworn evidence that the accused was not at the crime scene at the material time. Only the complainant said the accused was at the crime scene at the material time. The complainant said, she saw the accused hold her from behind, pushed her to the ground and Ivamere grabbing her bag, and the two fleeing the scene thereafter. She said the items mentioned in the charge were in her bag. So the prosecution’s case stands or falls on whether or not you accept the complainant’s identification evidence of the accused, at the material time.

26. Before we discuss the complainant's identification evidence of the accused, at the material time, I must direct you as follows. Firstly, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleged to be mistaken, I am warning you of the special need for caution before convicting in reliance on the correctness of the identification, because an honest and convincing witness or witnesses may be mistaken. Secondly, you must examine carefully the circumstances in which the complainant made the identification. How long did the complainant had the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the complainant ever seen the accused before? How often? Had she any special reasons for remembering the accused? Was there any police identification parade held? Thirdly, are there any specific weaknesses in the complainant's identification evidence? The answers to the above questions will determine the quality of the complainant's identification evidence? If the quality of the identification is good, you may rely on it. If otherwise, you must reject it. It is a matter entirely for you.
27. In this case, the accused (DW1) and the complainant (PW1) had been drinking at a nightclub in Suva since the early morning of 4 May 2019, a Saturday. Ivamere (DW2) was also drinking with the two. They stayed in the nightclub until it was closed, and later they came to the accused's house in Jittu Estate to continue drinking from 6 am to 8 am. So, PW1, DW1 and DW2 had been together since early morning of 4 May 2019. It was obviously not a case of a fleeting glance. PW1, DW1 and DW2 knew each other well. When PW1 was allegedly robbed, DW1 allegedly held PW1 from the back and forced her down to the ground. DW2 then grabbed PW1's bag containing the items mentioned in the charge. DW1 and DW2 then fled the crime scene. PW1, DW1 and DW2 were very close to each other, when the alleged robbery occurred. The alleged robbery was done in broad daylight, that is, between 6 am and 8 am. There was no impediment when PW1 saw DW1 and DW2's faces. The complainant knew the accused for the previous 2 years. A special reason for remembering the accused's face, was what they did to her that morning. In

paragraph 6 of the Agreed Facts, the accused refused to take part in a police identification parade. In any event, this is a case of recognition, and police identification parade may be prejudicial to the accused. Thirdly, a potential weakness in the identification evidence was that PW1, DW1 and DW2 had been drinking since early morning on 4 May 2019.

28. If you think the complainant's identification evidence of the accused at the material time was of a high quality, you may rely on it, and find the accused guilty as charged. If otherwise, you may reject it and find the accused not guilty as charged. It is a matter entirely for you.

(d) **The Accused's Case:**

29. I had summarized the accused's case to you from paragraphs 19 to 21 hereof. I repeat the same here. If you accept the accused's sworn denials, you must find her not guilty as charged. If you reject the same, you must still assess the strength of the prosecution's case and decide accordingly. It is a matter entirely for you.

(e) **The Need To Consider All The Evidence:**

30. The prosecution called two witnesses:

- (i) Maca Tuinasigana (PW1); and
- (ii) Sera Bulimaibau (PW2).

The defence called two witnesses:

- (i) Vani Vatubuli (DW1) and
- (ii) Ivamere Tamanivalu (DW2).

31. You have to analyze and compare the above evidence together. Also consider the Agreed Facts submitted by the parties. If I haven't mentioned a piece of evidence you consider important, please take it on board, in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his/her evidence in your deliberation. If you find

a witness not credible, you are entitled to reject the whole or some of his/her evidence in your deliberation. You are the judges of fact.

I. SUMMARY

32. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove her innocence, or prove anything at all. In fact, she is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find her guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find her not guilty as charged.

33. Your possible opinions are as follows:

(i) Aggravated Robbery: Accused: - Guilty or Not Guilty

34. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive your decisions.



Solicitor for the State
Solicitor for the Accused

: Office of the Director of Public Prosecution, Suva.
: Legal Aid Commission, Suva.



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JUDGE