

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 86 of 2022

STATE

vs.

JOSEFA SOTIA VULI

Counsel: Ms. A. Devi & Mr. T. Naimila for the State
Ms. N. Ali & Ms. S. Narayan for the Accused

Date of Hearing: 06th March 2023

Date of Closing Submission: 06th March 2023

Date of Judgment: 08th March 2023

JUDGMENT

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 30th March, 2022:

COUNT ONE

(Representative Count)

Statement of Offence

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

Particulars of Offence

JOSEFA SOTIA VULI with others on the 4th day of March, 2022 at Cunningham Stage 1, in the Southern Division, in the company of each other, stole 2 kg grog from **VILIKESA QIAQIA**, and immediately before stealing, threatened to use force on **VILIKESA QIAQIA**.

2. The charges were read and the Accused pleaded not guilty and the matter was taken up for trial and heard from 06th March 2023. The Prosecution presented the evidence of 2 witnesses. Upon the closing of the case for the prosecution the defence was called for and the Accused remained silent. Subsequently, the Court heard the oral submissions of both the learned Counsel and they 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. 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" are the states 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.
4. Accordingly, the Prosecution has to prove beyond reasonable doubt that:
 - (i) The accused person with others,
 - (ii) dishonestly appropriated, \$500.00 cash,
 - (iii) with the intention of permanently depriving it, and
 - (v) threatened to use force on Vilikesa Qiaqia immediately before stealing the said items.

5. The first element requires the proof of the identity of the offender and to prove beyond reasonable doubt that accused committed this offence in the company and together with others. Where two or more persons commit a criminal offence, whatever the participation of 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 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

6. 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 ingredients or on the of evidence or led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted.

7. Admitted Facts

1. Josefa Sotia Vuli's date of birth is 16/05/2000 and he is currently 21 years old.
2. Josefa Sotia Vuli resides at Cunningham, Stage 1, Wainitarawau.

It is Not Disputed That:

3. Josefa Sotia Vuli on 4th day of March, 2022 was at the 'Kava Stall' at Cunningham Stage 1 which was looked after by Vilikesa Qiaqia.
 4. That Josefa Sotia Vuli is a well-known customer at the 'Kava Shop situated at Cunningham Stage 1 where the incident of Robbery took place.
 5. That Josefa Sotia Vuli was wearing a ¾ blue Lee with no shirt and was carrying a blue bag (knapsack) on the day of the alleged incident on 4/3/22.
8. The trial commenced on 06th March on which day. The prosecution called the complainant Vilikesa Qiaqia and the arresting officer PW2 PC 6449 William Nitz. At

the end of the prosecution case the defence was called for however the Accused opted to remain silent and did not call any witnesses.

Summary of Evidence

9. According to Vilikesa on the 04th march, 2022 he was in Cunningham Stage 1. He was a kava/yagona cultivator and his plantation was in Kadavu. He brings his produce to his market (shop) at Cunningham Stage 1. He was selling kava for about 3 months when this incident is alleged to have happened.
10. Between 6 and 7pm he had been in the market (shop) when he suddenly heard someone shouting from outside then banged and forcibly broken the door open. There had been sufficient light in the shop from which Vilikesa claims to have identified three persons. According to him they were the Accused Josefa, Savai and another person who was Josefa's friend whom the witness claims to have seen before but had not known his name. However, he claims to have positively recognized all three of them.
11. As they came in the victim has apprehended some harm and immediately has run out of the shop and gone to his sister-in-law's house which was about 100 meters away. From there he had called his brother and informed of this incident. He refers to his brother as the owner of the shop. Within a short time the brother appears to have gone to the shop and the witness himself had come back to the shop within about 10 minutes. His brother has informed the police who arrived shortly thereafter. The police appears to have brought the Accused Josefa with them. Vilikesa's brother had assaulted the Accused and the police have then taken the Accused to the police station.
12. Vilikesa did say that those who came in with the Accused took 2 kilograms of yagona which he valued at \$160. However, he admitted that he did not see the Accused or any other taking the yagona but said that there was only 2 kilograms and it was missing when he came back.
13. In cross-examination he admitted that Josefa owed money to his brother and that Josefa used to call the witness as well as his brother "father". He also admitted the suggestion that Josefa came around 6pm that day. It was suggested that Josefa came with another

and purchased marijuana from the shop and that they were selling cigarettes and marijuana in addition to grog. The witness denied all these suggestions.

14. The witness admitted that in his police statement he has said it was 8.15pm when Joe came and that he had not seen the two others who came with Josefa and did not know them. It was suggested that the complainant and his brother had a grudge against the Accused which he denied.
15. **PW2 PC 6449 William Nitz** was attached to the Nabua Police Station and on night duty on the 4th march, 2022. He had received instructions from the IC to assist the complainant. This witness with PC Netani has proceeded to Cunningham in a police vehicle and gone up to the shop. Then they have been patrolling on foot when they spotted the Accused Josefa at a canteen about 50 meters away from the shop. The witness had been provided with the description of the clothing of the perpetrator. He had been informed by the complainant that it was a blue $\frac{3}{4}$ Lee and a cap and he was bear bodied. PC Nitz also said that his own brother Solomone Raikile who was living in Cunningham too has provided him with the description of the wanted person. However, the witness admits that apart from the description of the clothing he was not given any name or other detail of the identity of the person.
16. PC Nitz said that he apprehended the Accused around 2300 hours about 20 to 30 minutes after getting the information. The accused was brought down to the shop where the complainant identified the Accused, and then taken to the Nabua Police and handed over to the IC.
17. It was suggested that the Accused was drunk but the witness said he cannot remember and said that the complainant did not assault the suspect. He admitted that the Accused was alone when he was arrested and nothing was found on him.

Evaluation

18. The fact that the Accused remained silent will not in any way prove the prosecution allegations nor can an adverse inference be drawn from the same. The burden of proof lies with the prosecution. In the first instance, the evidence should be evaluated and the testimonial trustworthiness and credibility should be considered. Witness Vilikesa has

no doubt very promptly informed his brother and also the police of some incident. To that extent his complaint is prompt and have been spontaneous.

19. However, there were certain contradictions elicited. Vilikesa did say that he was able to and he did identify and recognized the Accused as well as the two others who came with him. However, in his statement he contradicts and says he did not know the two others. Further, he did say that the Accused came between 6 and 7pm. However, in his statement he states that it was around 8.15pm. These contradictions were elicited during cross-examination. Let me now evaluate the effect of these contradictions. The witness claimed that Josefa and the two others were regular visitors to his Kava shop during the past three months. Therefore, he had known them and were able to identify when he saw them that night. If this was so, why did he tell the police that *he could identify only one of them Joe, and that other two he has not seen them?* This was said immediately after the incident when the incident was fresh in his mind. If he had seen the other two before, it is not probable for him to have said so. Does this mean that Vilikesa did not identify the other two but with the lapse of time he had had got to know who the other two were? Was this the reason for him to say in evidence that he recognized them? The inference from this contradiction is that Vilikesa may have seen two others but had not recognized them at that time.

20. The recognition of the Accused Josefa may not *per se* be affected by this infirmity. However according to PC Nitz the information he was given was only of the description of the clothing worn by the perpetrator and not the name or other form of identity. PC Nitz clearly says that the information was given to him by Vilikesa the complainant. If Vilikesa recognized the intruder as Josefa whom he knew, why did he not inform the police or PC Nitz the name of Josefa? A possible inference is that Vilikesa may not have been able to recognize the intruder at the time of the incident due to poor light or the circumstances. It is possible that since the police apprehended Josefa who was found in the vicinity and when he was brought Vilikesa may have believed that it was Josefa who came in. This is further compounded in view of the contradiction that has arisen in respect of the identity of the other two persons alleged to have come with the Accused. This certainly creates an uncertainty as to the evidence of recognition and identity.

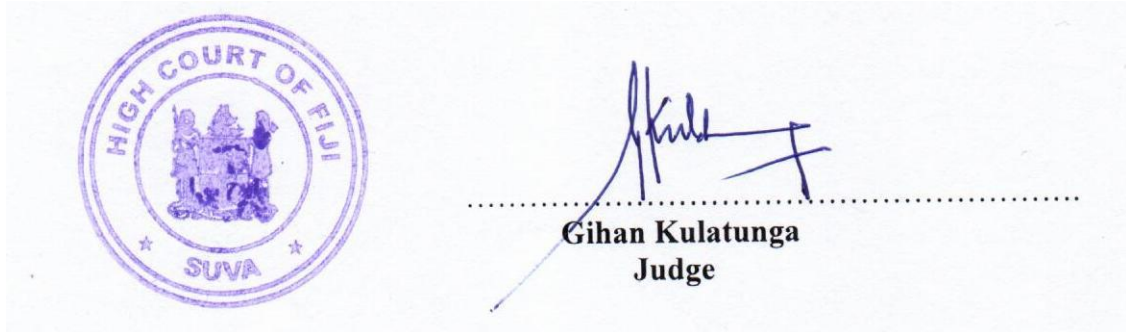
21. The defence suggested that Josefa was drunk when the police apprehended him. The defence also suggested that Josefa came to the shop around 6pm. Vilikesa admitted that there was some issue between Josefa and Vilikesa's brother due to money being owed. There is an uncertainty as to the time of the incident. If it was between 6 and 7 or if it was at 8.15pm. When suggested, Vilikesa did admit that Josefa came around 6 and said that he was then *going around*. When this evidence is considered in its totality the inference that Vilikesa may have seen Josefa around 6.00pm in the said clothing but may have not positively recognized the persons who broke into the shop around 7 and assumed that Josefa was one of them.
22. This was certainly after night fall. There may have been light in the shop as claimed by Vilikesa. However, in the circumstances where of persons shouting in an unfriendly manner and suddenly breaking in, would certainly cause great alarm, excitement and apprehension of immediate harm. It appears to have been so as Vilikesa admitted immediately leaving the shop in fear and running away to his sister-in-law's house. This opens out the possibility that Vilikesa may not have had sufficient opportunity to make a clear recognition and identification of those who came in. This is further buttressed by the fact that Vilikesa had not given PC Nitz the name or the identity of Josefa before he was apprehended.
23. No doubt the defence did suggest that the Accused Josefa came to the shop around 6pm. However, this will not necessarily prove that Josefa came with two others around 7pm. There is a contradiction as to whether it was at 8.15pm. According to PC Nitz the Accused was apprehended around 11pm after about 20 to 30 minutes upon getting the information. This leads to the inference that the police have been informed around 10.30pm that day. Vilikesa says that within 10 minutes of the incident he returned to the shop and shortly thereafter the police arrived with the Accused Josefa. Therefore, the actual time of incident should have been later than 8.15pm.
24. It is also not probable in the normal course of event for a person to be hanging around in the vicinity of an incident if he had broken in to a shop and stolen 2 kilos of kava as alleged. Nothing was found in his possession when arrested nor was any other found with him. Vilikesa had not seen the Accused Josefa taking the 2 kilos of kava. In these circumstances even if it is accepted that the Accused Josefa did come with two others

the inference that two others who came with Josefa may have acted on their own and taken the 2 kilos of kava that went missing from the shop, is possible.

25. The Prosecution is attempting to establish the fact that the Accused with two others took away 2 kilograms of kava on circumstantial evidence. There is no direct evidence of this fact. Further, the fact that at the point of taking kava they were acting together as part of a joint plan or agreement to commit robbery sharing the common intention to commit the offence in advance of the common enterprise is also based on circumstantial evidence. In a criminal case of this nature the prosecution in the first instance is required to prove the identity of the Accused and that he stole the grog beyond reasonable doubt. When such proof is based on circumstantial evidence there should not be any other reasonable hypothesis or other reasonable inferences that may be consistent with the innocence of the Accused. As evaluated above there are several other possible reasonable inferences arising from the facts proved in this case. Especially if the Accused Josefa acted with a common intention at the point of taking a kava, if the kava was in fact taken by the Accused or any other who came with him or was it by a third party when the shop was left unattended with the door open.
26. In these circumstances the principles of criminal liability require the Accused be afforded the benefit of the possible inferences which may be in his favour. Accordingly, I am of the view that there is a reasonable doubt as to whether it was the Accused who came that night; was he sharing a common intention to steal the kava; and if it was some other who took the kava.
27. Thus the failure of the prosecution to clarify and rectify these discrepancies on times, and exclude the other inferences considered in conjunction with the infirmity of the recognition evidence of Josefa 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 or if he was sharing the common intention to commit robbery with others.
28. Further there is no other evidence of any sort such as a recovery and the two other persons Vilikesa claims to have known and recognized have 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.

29. Accused is accordingly acquitted.



At Suva

08th March 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused