Solicitor General.

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IN THE SUPREME COURT OF TONGA **AM 01 of 2016**
APPELLANT JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN: **R E X** - **Appellant**

AND: **TONGA NAEATA** - **Respondent**

BEFORE THE HON. JUSTICE CATO

CROWN APPEAL AGAINST DISMISSAL OF CHARGES

[1] The Crown appealed against the dismissal of charges against the respondent who did not appear on the appeal. He had been charged with housebreaking and theft. Senior Magistrate Mafi had dismissed the charges on the ground that the Crown had not convinced him beyond a reasonable doubt that the respondent was the person responsible for the offending.

[2] I gave an oral judgment on the 14th March, 2016 having heard Mr Aho for the appellant who was also the prosecutor at trial. I summarise my reasons here for dismissing the appeal because the Chief Magistrate has asked that Magistrates would welcome written judgments. I do not intend to do that on every occasion, but on this appeal issues of principle are involved.

[3] The evidence put before me reveals that at approximately 6.00am on the 25th August, 2013, Melisa Tefalo saw a car swerving past near where it seems she was parked by Narottams' building on the Bypass Road. It crashed into a fence behind them. Her husband at the time was working as a Security

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man and was nearby. She woke him up. He said that this was at the breaking of dawn. He said he went to the crashed vehicle and saw the respondent was in the passenger seat and there was nobody in the driver's seat. He said his vehicle was parked about 3 meters away from the crashed car. He said he did not see anyone go away from the vehicle. Melisa said that the person in the passenger seat was in great pain and he was the only one in the car. The complainant said that his house had been broken into and had been awoken by his car being reversed. He resided at the 'Apifo'ou College in Bypass Road. He searched for his keys and found they had gone. He identified his car as the one involved in the crash. The respondent gave evidence that he and a friend had been drinking in the early hours it seems of the morning near a Chinese shop. They had gone to buy cigarettes and had noticed a vehicle that was parked near the Chinese store facing the waterfront. He said that his friend had told him someone from the car was calling him. He said the driver knew me but I did not know him. He said the driver invited him to have a drink and he got in the car but his friend did not join them. He said he recalled driving along the waterfront but could not recall the time when the accident happened. He was very drunk but said he did not steal the van. He said he had been knocked unconscious and severely injured. He said his friend, with whom he had been earlier, was overseas and was not returning to Tonga.

[4] The Crown, Mr Aho at trial had contended that there was only a short time between the theft and break and enter and the crash. He mentioned times as being 6 am for the break and enter and 6.15am for the crash although these times do not appear in the evidence. The principal submission of the Crown was that if anybody else had been present the witnesses would have seen them. The Crown submitted that the location of the vehicle and the keys and stolen property in the car shortly after the burglary

were sufficient to convict the accused. Later, the Crown explained this on appeal as recent possession.

[5] Senior Magistrate Mafi dismissed the charges on the ground that the prosecution had not established before him that the respondent had committed the offences. There was no evidence given as to the lighting at the time. He considered it would be difficult for a person, said to be highly intoxicated, to move seats before the police arrived. He was it seems unconvinced another person could not have escaped from the car. He was also critical of the Police for not carrying out fingerprint tests at the house and was also concerned that a statement taken from the accused had not been produced. Mr Aho later confirmed the respondent had told police that he denied the offending

[6] Mr Aho acknowledged, in a comprehensive memorandum filed in this Court, that, on an appeal against conviction, a Court of Appeal could interfere with a verdict convicting an appellant only if a jury acting reasonably must have entertained a doubt as to the guilt of the appellant. *R v Ramage* [1985] 1 NZLR 392(CA). Likewise, it could only be in a clear case where a Magistrate had acted unreasonably or plainly misdirected himself so that his verdict was clearly wrong that a Magistrates' verdict acquitting an accused should be the subject of a successful appeal to this Court by the Crown under section 74 of the Magistrate's Court Act. Where the finding depends on credibility of witnesses, it is even more difficult for an appellate Court to intervene and quash a verdict of acquittal.

[7] Mr Aho based his case on recent possession. He argued that the location of the driver in the passenger seat with stolen goods and indeed the car so shortly after it had been stolen, was sufficient for conviction beyond a reasonable doubt. He cited Archbold (2004) edition at para 21-125, and *R v Smythe* 72 Cr App R 8

(CA) citing Cross on Evidence 5th ed, p 49 (now 9th ed, p 38) to this effect;

> "If someone is found in possession of goods soon after they have been missed and he fails to give a credible explanation of the manner in which he came by them, the jury are justified in inferring, that he was either the thief or else guilty of dishonestly handling the goods, knowing or believing them to be stolen."

He also submitted that there was no time for the driver to escape and witnesses did not see anyone escape from the car.

[8] In this case, however, the respondent did give an innocent explanation for his presence in the car, denied he had been the driver and also denied he was responsible for the theft. Senior Magistrate Mafi had heard the respondent and had not dismissed his explanation as unworthy of belief. Moreover, he had not felt that it had been established clearly that there had been no opportunity for the driver to have escaped the car. In these circumstances, the doctrine of recent possession, which is no more than an application of a rule of common sense as Archbold states, has been displaced. I am not able to say that the Magistrate, in arriving at his verdict dismissing the charges acted unreasonably or misdirected himself, or is plainly wrong. Accordingly, I dismiss the appeal. I do not think it an appropriate case for him to have considered alternative charges a further submission Mr Aho made.

SUPREME COURT SIERRA LEONE

C. B. Cato

DATED: 18 MARCH 2016 **J U D G E**