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IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AM 6 of 2020

BETWEEN:

POLICE Appellant

-and-

VILIAMI LALAKAI MOHENOA TONGA Respondent

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN
Counsel: Mr. T. 'Aho for the Appellant
Mr S. Tu'utafaiva for the Respondent
Date of hearing: 25 June 2020
Date of judgment: 25 June 2020

1. In this appeal, the police seek to have the ruling of Senior Magistrate Pahulu-Kuli on 13 March 2020, where she acquitted the respondent of one count of theft, quashed and for this court to enter a conviction and sentence the Respondent.

2. On 13 March 2020, the Respondent stood trial on the count of theft in the Magistrates Court. The particulars of the theft charge were that as a serving police officer in the Tonga Police, the Respondent stole $1700 a from the complainant.

3. Section 143 of the *Criminal Offences Act* defines theft as:

> the dishonest taking without any colour of right of anything (which by section 144 is declared capable of being stolen) with intent either –
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> (a) to deprive the owner permanently of such thing; or
> (b) to deprive any other person permanently of any lawful interest possessed by him in such thing,
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> and with the intention of converting such thing to the use of any other person without the consent of the owner or person possessing such interest therein as aforesaid; "theft" and "steal" shall be construed accordingly.

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4. The prosecution called four witnesses. For the purposes of this appeal, the relevant evidence is that of the complainant.

5. He was asked about the events of 26 February 2019 on which day he was arrested and taken into police custody. He spoke to the Respondent at that time. The Respondent and another female officer conducted a search of the complainant and a number of valuables or possessions were seized, recorded and placed into secure storage. Either at that point or at some point shortly thereafter whilst he was being searched the Respondent found cash on him totalling $1700. The cash was taken from the complainant's back pocket of his trousers. Later in his evidence he said that his keys and his wallet were taken together but the money was taken at a different time. He said when his other valuables were taken, the female officer recorded them, but he said the money was not recorded in the list of valuables that were confiscated during the search. He said that he told the Respondent to take the the money and put it together with his other valuables and that the Respondent said he took the money.

6. When the police prosecutor asked the complainant about the dates on which the complainant was arrested and kept in custody, the complainant said it was 8 February 2019. That does not seem to accord with the other police evidence about the relevant dates, but for present purposes little turns on it.

7. In any event, the complainant said that two days later he recalled having a conversation with the Respondent outside about the money. However said the Respondent told him to pick up the money from the Respondent's resident, and that if the police asked him if the Respondent had his money, he was to say 'no' and just to go to the Respondent's home and pick it up.

8. After he was released, the Respondent went to the complainant's home and gave him $500 and said that he would bring the rest later. The next day, the Respondent went again to the complainant's home and gave him the balance of $1200 and thanked him. The complainant's sister was present at that time.

9. The complainant was not cross-examined by Mr. Tu'utafaiva who appeared for the Respondent below and on this appeal.

10. The evidence of the other Crown witnesses does not touch in any material way on the issues for decision on this appeal and was, in any event, uncontentious.

11. The Learned Magistrate gave an ex-tempore decision at the conclusion of the evidence and submissions. Relevantly, after recounting the evidence and the elements to be proved by the Prosecution, the Learned Magistrate held:

"...This court is then left with doubt upon the dishonest taking. Summing this up the court understands what prosecution has mentioned, regarding the defendant's behavior towards the matter. That the victim wanted his money to be registered on the day that he was being searched yet after two days, Wednesday going to Friday, the sum of $1700 was still with the defendant. The court then concludes that prosecution and HAS PROVED BEYOND REASONABLE DOUBT THAT THE DEFENDANT DISHONESTLY AND WITHOUT ANY RIGHT DEPRIVE THE SUM OF $1700. Continuing to the third element which is the depriving of $1700 from the victim, according to section 143 if you could refer to it, it states, if the article which the defendant is charged with stealing is taken by him either by mistake or in the honest belief that he had a right to it or with the full intention of returning it to the owner the defendant cannot be convicted of theft.

This court then concludes that even though it was taken dishonestly yet it was clear from what the defendant had done on Friday that it was not his intention to deprive this money permanently. The $1700 was said that he will be taking it and that he can get it from him since his release, therefore this court believes that prosecution has not proved beyond reasonable doubt that the defendant had intention to permanently deprive this money from the victim because the victim was informed that the money will be returned to him the day of his release and even though payments were made in two different days, but the victim's money was released to him in the two days since his release. With the last element the intention to converting such things to the use of any other person without the consent of the owner, as the defendant submission stated, the Crown has not given evidence that this money was used of any other person and since this money was first given an amount of $500 and then the next day an amount of $1500 (that should be $1200) prosecution has not proved the fourth element according to the amendment made before the proceedings commenced. Therefore prosecution has not proven all the elements of the charges made against the defendant beyond reasonable doubt so the defendant is released and is found not guilty within this court."

12. By its Notice of Appeal filed on 14 April 2020, the Crown contends that the Learned Magistrate erred in law when she:

    (a) held that the prosecution failed to prove beyond reasonable doubt that the Accused did not intend to deprive the $1700 permanently from the complainant;

    (b) held that the Crown failed to prove beyond reasonable doubt that the Accused intended to convert the $1700 to the use of another person without the consent of the complainant;

(c) based her findings on:

(i) the Accused returning the property to the complainant after seven days of taking it and keeping it; and

(ii) the Accused telling the complainant on 22 February 2020 that if the police asked for the property, the complainant should tell them that there is no property and that the Accused has it and will return it to the complainant when he is released from custody

(d) failed to recognize that the intent of the Accused must be considered at the time he took the $1700; and

(e) ruled contrary to the uncontested evidence before the court.

13. In its submissions on this appeal, the Crown submits, in summary, that:

(a) the Magistrate erred in failing to recognize that the Respondent's intention to permanently deprive the complainant of the $1700 and his intention to convert the $1700 to the use of another person without the consent of the complainant must be considered at the time the Respondent took the money, dishonestly and without any color of right;

(b) on the first limb, it was illogical for the Magistrate to rule that the Respondent dishonestly and without any right took the $1700 but still find that he did not intend to deprive the complainant of it permanently;

(c) on the second limb, the Crown does not have to prove that the money was actually used by any other person, but rather that the Respondent intended to convert the money to the use of any person including himself;

(d) the learned Magistrate ought to have reasonably inferred from the complainant's uncontested evidence that the Respondent did intend to convert the money to the use of another without the prior consent of the complainant;

(e) inference was supported by the complainant's evidence that the money was returned to him in two tranches on two consecutive days. Mr. 'Aho also pointed to the evidence that the Respondent thanked the complainant when he returned the second tranche of the money;

14. The Crown relied on the decision of *Police v Kaliopasi Tonga Vaikona* (AM 26/2018) where Justice Cato accepted the appellant's submission in relation to the permanent loss element that the Accused's intention to permanently deprive must be considered at the time he entered the building and took the meat in that case. On that finding, His Honour ruled there was no other reasonable

inference available other than the accused removed the meat dishonestly and intended to deprive the owner permanently of it albeit he thought better of it and returned the meat the next morning.

15. It may be immediately observed that the facts of the instant case are distinguishable from those in *Vaikona*. In that case, there was no evidence that at or shortly after the time the Appellant there took the meat he indicated to the owner of it that it would be returned to him at some point in the near future.

16. For that reason alone, this case is an unusual one. It is also distinguishable from other cases in which defendants who had a change of heart and returned stolen goods sometime after taking them were nonetheless still convicted of theft.

17. It must clearly be accepted that the Accused's intention must be determined as at the time he took the money. In this case, it is uncontentious that according to usual police procedure, the Respondent ought to have placed, recorded and stored in safe custody, the complainant's money with his other valuables when he was searched. Those valuables and cash would have then remained in police custody during the period the complainant remained in custody and would have been returned to him upon his release from custody subject to any other applications permitted by law.

18. Here, whilst the complainant remained in custody, he did not have access to his valuables or the cash. The cash was being held by the Respondent. The evidence is sufficiently clear that within a couple of days of taking the money the complainant and Respondent had a conversation the effect of which was that the Respondent told the complainant that when the complainant was released from custody the money would be returned to him. It is also uncontentious that that is precisely what did happen.

19. That was the evidence and the issue the Learned Magistrate had to consider in determining whether the Respondent, at the time of taking the money, did so with the intention to permanently deprive the complainant of the money.

20. Mr. 'Aho pointed to the part of the Magistrate's ruling in which she considered that what the Respondent had done 'on the Friday' (which I infer was the conversation in which he told the complainant that the money would be returned when the complainant was released from custody), was sufficient to found a finding that the Respondent did not intend to permanently deprive the complainant of the money.

21. As a matter of pure timing, as it were, that approach was incorrect. As the Crown correctly submitted, the intention must be ascertained at the time of the

taking. What then was the evidence available to the Magistrate to ascertain that intention at that relevant time?

22. It would appear from what was before the court below and what has been referred to on this appeal, that the only evidence was that the Respondent did not follow the usual police procedure of having the money placed and recorded with the complainant's other valuables at the time of his search. There is no other evidence to indicate whether at that point in time the Respondent intended to permanently deprive the complainant of the cash. Further, the evidence of the conversation some two days later weighs against the inference the Crown now seeks to draw.

23. That evidence and that of the events approximately a week later, when the Respondent did exactly what he told the complainant he would, by returning the money, places this case, in my view, into a special category known in the common law theft authorities as a case of either 'unauthorized borrowing' or 'temporary use'.

24. The Tongan *Criminal Offences Act* does not provide for either such cases.

25. In 2004, in the decisions of *Mataele v Police* [2004] TOSC 15, and *R v Napa'a* [2004] Tonga Law Reports 19, and *R v Koniseti* [2004] Tonga Law Reports 32, Justice Ford observed:

> "Theft is defined in s.143 of the *Criminal Offences Act*. There are four elements which the Crown must prove. First, a taking, that is a physical moving of the item for however short a distance so long as the Accused had the intention to steal the item at the time it was moved. Secondly, the taking must be deliberate and dishonest. Thirdly, the taking must be without colour or right that is without any honest but mistaken belief in a right to take it and finally there must be an intention to deprive the owner permanently of that item. **A mere borrowing will not be sufficient.**"
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> [emphasis added]

26. In England, prior to legislative amendments addressing this issue, it was a feature of the law that unless there is an intention to deprive permanently of possession, temporary deprivation of an owner of his property is in general no offence: *R v Peart* (1970) 2 All ER 823.

27. That position was reflected and discussed in *McGuiness v Police* [2016] SASC 133 where Doyle J of the South Australian Supreme Court observed:

> "[27] At common law, it was an element of the offence of larceny that the defendant intended permanently to deprive the owner of the property in question. It followed that taking property with an intention that it be

returned to the owner was generally not sufficient. But there was significant uncertainty in the application of this element of intention, not only in cases of unauthorised borrowing and temporary use (including where the use resulted in the property being altered in some manner), but also where the defendant had a conditional intention or was simply reckless or indifferent as to the owner's rights.

[28] The common law developed principles to address some of the situations in which establishing this element of the offence had proven problematic. As Charles JA explained in *R v Dardovska*:[1]

> Before the 1968 legislation was enacted in the United Kingdom, an "intention permanently to deprive" as an element in the crime of larceny had troubled the courts on many occasions, particularly in circumstances where the accused could only be shown to have had what might be called a conditional or reckless intention to appropriate. There were three situations in which courts had found an intention permanently to deprive in such circumstances: first, where a person took property from the owner intending to return the property only if the owner paid for it, referred to as the "ransom principle"; secondly, where the intention was to return the property only after it had undergone some fundamental change of character, the "essential quality principle"; and thirdly, where a person pawned another's property without his consent, hoping to be able to redeem the pledge, but without being certain of his ability to do so, the "pawning principle".

[29] However, there remained uncertainty surrounding, and difficulty in establishing, the requisite intention in cases of not only conditional or reckless intention to appropriate property, but also unauthorised borrowing and temporary use. A particular illustration of this uncertainty and difficulty in establishing intention existed in the case of the unauthorised taking of a vehicle for a temporary purpose, with a view to its subsequent abandonment.

[30] There have been legislative responses both to the general uncertainty and difficulties mentioned above, as well as the specific issue in relation to the unauthorised use of motor vehicles.

[31] In the United Kingdom, the general problem was addressed through the introduction of s 6(1) of the *Theft Act 1968* (UK). That section provides:

> A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so

[1] (2003) 6 VR 628

> treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.
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> [32] In Victoria, the legislative response came through the introduction in 1973 of provisions including ss 73(12) and (14) of the *Crimes Act* 1958 (Vic). The former is a general provision in the same terms as s 6(1) of the *Theft Act*. The latter deals specifically with motor vehicles and aircraft and provides that "proof that the person charged took or in any manner used the motor vehicle or aircraft without the consent of the owner ... shall be conclusive evidence that the person charged intended to permanently deprive the owner of it".
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> ...
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> [37] In South Australia, Parliament initially addressed the particular difficulty that arose in relation to the case of unauthorised temporary use of motor vehicles through the enactment of s 86A. It subsequently addressed the more general uncertainty and difficulty in relation to the element of intention for the purposes of larceny through the redrafted provisions of Part 5 of the CLCA that were introduced in 2002. These amendments, while extending the offence to circumstances involving an intention by the defendant "to treat the property as his or her own to dispose of regardless of the owner's rights", did so through a different legislative technique to that adopted in the United Kingdom and Victorian legislation. Rather than providing that this state of mind suffices to establish an intention by the defendant to permanently deprive, the South Australian legislation included it as a separate but sufficient form of intention (namely, an intention to make a serious encroachment on the owner's proprietary rights)."

28. A different legislative approach to this issue has been taken in the Australian Capital Territory where s.306(2) of the Criminal Code deems "borrowing" "for a period", as equivalent to an outright taking or disposal. As to the meaning of "for a period", in *Glanville v Harris*[2] the question was considered by reference to the remarks of Chief Justice Murrell in *R v Mazaydeh (No. 2)*[3] who seemed to suggest (somewhat circularly) that it required a degree of permanence.

29. The common law position was discussed in the New Zealand decision of *R v Morunga* [2000] NZCA 15. Section s.220 of the New Zealand *Crimes Act* is in similar terms to s.143 of the Tonga *Criminal Offences Act*. The Court of Appeal held at [15] that:[4]

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[2] [2017] ACTSC 110
[3] [2014] ACTSC 291 at [8]
[4] See also *Go Bus Transport Ltd v Hellyer* [2016] NZEMPC177 where the New Zealand Employment Court reiterated that temporary removal of money but intending to return it is in law not the offence of theft or stealing as it lacks the essential ingredient to deprive the owner permanently of the money.

> "It necessarily follows from the requirement of s.220(1)(a) that there must be an intent to permanently deprive the owner of the property and that appropriating the property of another with the intent to deprive any owner only temporarily of it is not stealing." (authorities omitted)

30. At this point then, having identified what is arguably a lacuna within s.143 of the *Criminal Offences Act*, other provisions in that Act such as s.53 - fraudulent conversion by a government servant - or s.162 - fraudulent conversion of property – may well accommodate the temporary use or unauthorized borrowing of property of another in circumstances similar to what has occurred in this case. Of course, in those provisions, other considerations also apply.

31. Having regard to those observations on the state of the legislation and relevant common law principles concerning this particular element of the offence of theft, I am of the view that the Magistrate was correct in her conclusion that the element had not been proven beyond reasonable doubt, although for the reasons I have already outlined, her Worship's apparent approach to the time at which the intention is to be ascertained was incorrect.

32. In my view, the evidence overall from the time the cash was originally taken, not placed in accordance with correct police procedure, the conversation two days later when the complainant told the complainant that the money would be returned to him upon the complainant's release from custody and the actual return of the money to the complainant after he was released from custody, characterizes this case as one of unauthorized borrowing or temporary use. By the current terms of s.143, it is therefore not theft.

33. On the final element (and second limb of the appeal), in my view, the evidence below was not sufficient for the Magistrate to have been satisfied beyond reasonable doubt of an inference that at the time the money was taken the Respondent intended to convert it for his own use or the use of any other person.

34. The important focus there, as the Crown submitted, was on the Respondent's intention when he took the money, not what in fact was subsequently done with it. In that latter regard, there was no evidence that the Respondent did anything with the money during the period that he held it apart from holding it.

35. The evidence that the Respondent thanked the complainant when he returned the money could be suggestive of the Respondent having gained some sort of benefit during the time he held the complainant's money but, in my view, without more, that evidence was so equivocal that any inference based on it could not satisfy the criminal standard of proof for this particular element.

36. I conclude therefore by finding that the Magistrate was correct in her ultimate findings on the two elements which have been considered on this appeal. For the reasons stated, I am satisfied that the acquittal was rightly entered. The appeal therefore will be dismissed

37. As a postscript, I commend this case to the Legislature and the Attorney General as an example in favour of consideration being given to amending this part of the *Criminal Offences Act* so as to align it with similar amendments that have been made in other jurisdictions which may thereby result in cases of unauthorised borrowing or temporary use falling within the definition of theft or the creation of a separate offence/s.

SUPREME COURT TONGA

NUKU'ALOFA
25 June 2020

M.H. Whitten QC
LORD CHIEF JUSTICE