Mr Latu
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IN THE SUPREME COURT OF TONGA
APELLATE JURISDICTION
NUKU'ALOFA REGISTRY

AM 7 of 2020
[CR 72 of 2020]

BETWEEN:

POLICE Appellant

-and-

SETILI TALISA Respondent

REASONS FOR JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN
Counsel: Mr T. 'Aho of the Attorney General's Office for the Appellant
The Respondent in person
Date of hearing: 23 July 2020

1. At the conclusion of the hearing in this matter today, I delivered an ex tempore judgment in which I allowed the appeal and made other dispositive orders. These are my reasons.

Background

2. In this matter, the police appeal against the decision of Senior Magistrate Pahulu Kuli on 7 February 2020 in which she ruled that the respondent was to change his plea from guilty to not guilty and that he be acquitted of the charge of theft.

3. The Summons below in CR72/2020 alleged that the respondent, contrary to ss 143 and 144(a) of the *Criminal Offences Act*, committed theft when he stole, without any colour of right, a Samsung phone, a driver's license, teaching card, Westpac card, ANZ card and a Kiwi bank card all valued at $1360 and which belonged to one Tevita Maile.

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4. On 7 February 2020, the respondent appeared before the learned Magistrate and pleaded guilty to the single count of theft. The police prosecutor then provided the following summary of facts. On the night of 4 January 2020, the complainant went to a store with a lot of shopping. He did not notice that the items the subject of the summons fell, and he left them behind. The respondent noticed the items and walked over and threw his t-shirt on top of them. He then entered the store and returned and took the items with him. Once the complainant had noticed the items missing, he reported it to the police. The police attended the store and identified from security camera footage that the respondent had taken the items in the many described above.

5. At that point in the hearing below, the Learned Magistrate said;

> *"May the Accused stand. I will order that you shall change your plea because what is the difference between finding property and stolen property? ..."*

6. The police prosecutor then attempted to explain the procedure for a person who finds lost property as set out in s.151 of the *Criminal Offences Act* which includes reporting the items to the nearest district town officer or police.

7. Notwithstanding, the Learned Magistrate then said:

> *"I order here that you should change your plea. I will again read to you your summons and you are to plead not guilty to it".*

8. The respondent then pleaded not guilty, and without hearing any further from the police prosecution, the learned Magistrate acquitted the respondent of the charge.

Grounds of appeal

9. The appellant advances the following grounds of appeal, namely, that the learned Magistrate:

   (a) erred in law and in fact when finding that the respondent should have been charged under s.151 of the *Criminal Offences Act* for failing to deliver lost property instead of theft;

(b) erred in law by failing to take into consideration the provisions of s.152 of the *Criminal Offences Act* and, accordingly, erred in setting aside the respondent's guilty plea during the sentencing; and

(c) erred in law by not allowing the appellant to proceed to trial and rely on s.152, as it has intended, or to call evidence to establish that the items contained identification of the owner.

10. The appellant relies on the transcript comprising the notes of the clerk of the relevant passages before the learned Magistrate and the affidavit of Acting Sergeant 'Aluana Puafisi, the police prosecutor below.

Applicable provisions of the Criminal Offences Act

11. 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 —
> (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,
> 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.

12. There is no issue in this case that the items belonging to the complainant were things capable of being stolen under s.144.

13. Section 151(1) of the Act provides that:

> (1) Every person who takes possession of anything which appears to be of some value and to have been lost by another person, shall within 24 hours after taking possession of it deliver it to the owner if he be known and where the owner is unknown the thing so found shall be delivered to the district officer or town officer of the town in which the finder is residing or to the police. Any person failing to obey the provisions of this subsection shall be liable to imprisonment for any period not exceeding 3 months.

14. Relevantly, subsection (3) provides that:

> Nothing in the section shall exempt a person from liability to punishment for stealing or receiving property knowing or believing it to have been stolen if his action amounts to either of such offences.

15. Section 152 of the Act explains stealing of a thing found as:

> A person who takes possession of a thing which appears to have been lost by another person is not guilty of stealing unless —
>
> (a) at the time of taking possession he knows who is the owner of the thing
> or by whom it has been lost;
> (b) the character or situation of the thing or any marks on it or any other circumstances is or are such as to afford some indication as to who is the owner of the thing or the person by whom it was lost; or
> (c) it appears that the thing was not in fact lost but merely mislaid by being left by mistake in some place to which the owner would naturally return for it.

16. The section also provides the following pertinent illustration:

> A finds in the street a pocket book containing treasury notes, the owner's name being inscribed on the pocket book. A will be guilty of theft if he appropriates the pocket book or the treasury notes.

Submissions

17. Mr 'Aho filed detailed written submissions and spoke to them.

18. The Respondent declined to make any submissions.

Consideration

19. Dealing with the last ground of appeal first. The appellant relied on two decisions. In *Rex v Theresa Veamotu* AM 6/2018, Justice Cato observed that the Crown should have been given every opportunity to consider its decision in light of a probation report which was before the Magistrate but provided to the Crown. His Honour found that the Magistrate had denied the Crown natural justice by not permitting it an opportunity to consider the report.

20. Somewhat conversely, during a sentencing hearing in *Rex v Fatai* (CR 93/2018, unreported), Paulsen LCJ identified an issue from the Crown's summary of facts which raised a potential defence. His Honour allowed the accused to change his plea. I infer from the summary of submissions here that the Crown in that case was given an opportunity to consider its position. It ultimately offered no evidence.

21. In my opinion there can be no doubt that once the learned Magistrate here directed the respondent to change his plea to not guilty, even if she was correct in doing so, she should have afforded the Crown a reasonable opportunity to present its case at trial. It is bewildering that the transcript below contains no explanation for why she took that course. To have denied the Crown an opportunity to present its case at trial constituted an error of law, and on that ground alone, the appeal succeeds.

22. However, and turning to the first two grounds of the appeal, in my opinion, the learned Magistrate also erred in her decision to direct the Respondent to change his plea.

23. The key facts advanced by the police prosecutor, which it must be assumed the respondent accepted by his initial plea of guilty, included:

    (a) he saw the complainant drop the items in question;

    (b) once he saw the items fall from the complainants' person, the respondent put a t-shirt over them;

    (c) the respondent entered the store and then came back out and took the items with him;

    (d) several days later, after the police investigated the matter and approached the respondent, he had still not made any attempts to return the goods to either the store or the complainant; and

    (e) the respondent knew that the items belonged to the complainant because his name appeared on them including the cover of his mobile phone and bank cards.

24. Those factual observations alone supported the charge of theft as defined by s.143. In my view, the respondent's original guilty plea was appropriately entered.

25. Further, this was a case where the respondent knew that the items in question belonged to the complainant and it is not a case under s.151(1) where those items could have been regarded as having been 'lost'.

26. Had there been any doubt about it, the learned Magistrate needed only consider s.152, which would have made the proper legal analysis of the facts crystal clear.

27. Each of the three sub-sections applied to the respondent's actions in this case.

28. Firstly, at the time of taking possession of the items, he knew who the owner was.

29. Secondly, the situation in relation to the physical environment in which the items were initially lost by the complainant, the proximity of the respondent when he saw the items fall from the complainant's person and the close timing from when the items fell from the complainants possession to when the respondent observed the items, all afforded a clear indication of the identity the owner of the items.

30. Thirdly, the facts of this case ought to have made it clear to the respondent that the items in question were not in fact lost, but merely mislaid, by being left by mistake outside the store and that the owner would have naturally returned for them.

31. By application of any one or more of those provisions, the learned Magistrate ought to have accepted the respondent's guilty plea to theft. Accordingly, I find that grounds 1 and 2 are also made out.

Result

32. In light of my findings about the theft charge and the fact that the original guilty plea was appropriately entered, I do not consider it appropriate or indeed necessary to remit the matter back to the Magistrates Court for any trial based on the not guilty plea.

33. Therefore, I will quash the Magistrate's decision, set aside the respondent's not guilty plea, reinstate his guilty plea to the theft charge and remit the matter back to the Magistrates Court for sentencing.

34. A separate Judgment with the above orders in formal terms will be issued with these reasons.

NUKU'ALOFA
23 July 2020

M.H. Whitten QC
LORD CHIEF JUSTICE