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

AM 8/2023

ANDY FUKOFUKA

-v-

REX

RULING

BEFORE: ACTING JUSTICE LANGI

Appearances: Mr. James Lutui for the Respondent

Mr. Sunia Fili for the Appellant

Ruling: 07 March 2024

A. Introduction

1. This is an appeal from a decision of Principal Magistrate Salesi Mafi where he convicted the appellant of the following offences:
 - a. Abetment of theft contrary to section 8(a), 143(b) and 145 (b) of the Criminal Offences Act;
2. The appellant is represented by Mr. Sunia Fili for this appeal but was unrepresented during the trial in the lower court.

B. Grounds of Appeal

3. A summary of the appellant's grounds of appeal are as follows:
 - a. The appellant was unrepresented and did not have adequate legal advice before his trial and he therefore did not receive justice. He has been convicted and sentenced to something he believes that he is innocent of;
 - b. The Learned Magistrate had concluded the following facts:
 - i. The appellant accepted that he was in Ma'ufanga at the wharf when the boat engine was put inside his vehicle;
 - ii. The appellant knew it was Manu's engine;
 - iii. The appellant was in control of the taking of the engine;
 - c. All the facts in (b) are disputed as the appellant says that:
 - i. The vehicle that the stolen boat engine was put on did not belong to him but to someone named Taufa Latuselu;
 - ii. He did not know that the boat engine did not belong to Manu and was not aware that it had been stolen;

- iii. He was not in charge of the removing of the boat engine from the wharf because it was Manu who asked for a vehicle. He did not get off the vehicle when the boat engine was being put inside the vehicle.

C. Prosecutions reply to the grounds of Appeal

4. The DPP for the Prosecution made submissions in answer to the Appellant's grounds of appeal as follows:
 - a. All the grounds of appeal put forward by the Appellant are on facts only and the Learned Magistrate had already dealt with those facts in his judgement;
 - b. An appeal court should not take an appeal on facts lightly and should only interfere in extreme and exceptional cases;
 - c. It is the duty of the Appellant to prove that the Learned Magistrate had erred in law and he has failed to do so;

D. ANALYSIS

5. There is a general right of appeal from a judgement of the Magistrate's Court in both civil and criminal matters under section 74 (1) Magistrates Courts Act;
6. It is evident from the grounds of appeal that the appellant challenges the Learned Magistrate's findings of fact and the procedure in the lower courts. I caution myself that an appellate court should be slow to differ from a finding of fact which was made by the judge of first instance who had the opportunity to see and hear the witnesses
7. In relation to the first ground of appeal, I do not accept that the Accused was an innocent and naïve young person to have not considered the importance of getting himself legal representation. For him to now claim that he did not receive justice because he was unrepresented. He was first arrested and charged in September 2022 and the matter was not heard until May 2023. He had more than sufficient time to find himself a lawyer and was unrepresented as a matter of choice;
8. As for the rest of the grounds of appeal, I agree with the Prosecution that they are all on matters of fact. The Learned Magistrate had heard all of the evidence called by the Prosecution and the evidence of the Accused and chose to believe the Prosecution's version of events.
9. Section 81 of the Magistrates Courts state that any appeal of a decision of the Magistrate shall be decided only on its merits. There is a plethora of authorities which emphasize the need for an appellate court not to interfere with the findings of a trial judge on facts.

10. After analyzing the transcripts and judgment of the Learned Magistrate, I cannot see any shortcomings in the trial judge's analysis of the evidence. In my opinion, his findings were consistent with the evidence placed before him and the law.
11. Additionally, the Learned Magistrate was in the best position to judge matters of fact and this court should only interfere with findings of a trial court on matters of fact only in extreme and exceptional cases. An appellate court should not interfere with findings of fact of a court of first instance unless they are shown to be plainly wrong. *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1WLR 2477. The reasons given for this principle include the expertise of the trial judge in determining what facts are relevant to the legal issues to be decided and what those facts are if they are disputed, that trials are not to be regarded as dress rehearsals for appeal, that the duplication of the trial judge's role is a waste of resources which will seldom produce different outcome in an individual case and that in making his decision the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping (Lewison L.J. in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] ETMR 26 at para [114]).
12. A relevant guideline can be taken from the case of *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1997] 3 NZLR 190 (CA). Thomas J stated as follows: "*As evidence unfolds the trial judge gains an impression from the evidence which is not necessary or usually apparent from the cold typeface of the transcript of that evidence on appeal. The judge forms a perception of the facts in issue from which he or she adds or subtracts further as witnesses give their evidence and so obtains as a complete picture as is possible of the events in issue. The judge perceives firsthand the probabilities inherent in the circumstances traversed in the evidence and can obtain a superior impression of those probabilities as a result. An appellate court has none of these advantages and must acknowledge that the court at first instance is far better placed to determine the facts. Indeed, it would be an arrogance for an appellate court to assert the capacity to be able to "second-guess" a trial judge's findings of facts when it does not share those advantages. Exceptional caution from departing from the trial judge's findings of fact are therefore regarded as imperative*".
13. In light of the above, the appellant has failed to demonstrate, by a considerable margin, that the findings of the Magistrate were plainly wrong and there is therefore no reason for this court to interfere with them.

E. Result

14. The result is that the appeal is dismissed.

15. There was no appeal on the sentence passed by the Learned Magistrate and the appellant is ordered to immediately serve the sentence given by the Magistrate in the lower court as follows:

- a. Abetment of Theft: 12 months' imprisonment with the last six months suspended.

NUKU'ALOFA: 07 March 2024



A handwritten signature in blue ink, appearing to read "E. M. L. Langi".

'E. M. L. Langi

J U D G E