

December 2015, she was at the residence where she lived with the accused, his partner, child and others, including her grandmother Po'uha Lokosuka, great grandmother Amelia Lao, and another relative 'Ailoni Lao who was also a witness. The accused was her uncle. She was watching movies on a laptop on the 7th December when, at about 11pm, she said she saw the accused who was drunk. He had been angry with his little brother who is aged 4 whom she said he beat up. He left and went away again and called for his partner Silivia. She saw him go into the kitchen and take a bottle and uses it to sprinkle something in the hallway in the area of two bedrooms one of which was identified as belonging to the accused and his partner, being the one facing to the road. About three minutes later, he was standing in the entrance door to the kitchen calling out for a match or lighter. She said she did not have a match or lighter. After that the accused left and went outside. She said she did not know what else he did after that. She did hear him shouting from outside "when it's called for burning there will be burning, when it's called for fire, there will be fire. She admitted to the accused she did not give him a match and she did not see him lighting a match.

[3] After that, she said her grandmother Po'uha woke her up and she then went and assisted her mother, aged about 90 from the house. She herself did not see any fire until she went outside. She said that it was a short time between seeing him sprinkling and seeing the burning for the first time. She saw fire when outside from the area of the accused's bedroom. She saw him going about shouting for someone to get him a pair of scissors to cut his hair with.

[4] Po'uha Lokosuka who is the aunt of the accused said that the house belonged to her mother Amelia Lao. The house was in Tatakamotonga in the Eastern side of Tongatapu. She confirmed

that she was the grandmother of Kaneisini Kioa. She did not see the accused before or after the fire. She had been sleeping in the living room with Kaneisini who was watching movies on her laptop before the fire. She ran to the other side of the house where her brother 'Apiloni Lao was sleeping, and kicked the door open. They managed to get her mother out of the house. She said she did not see Silivia, the accused's partner, or a boy in the house.

[5] When asked about problems with Tevita in the household, she said one of the problems was when Tevita got drunk. Tevita was her nephew. She gave evidence of an earlier incident where the accused had set clothes alight after an argument with his partner. I considered after consultation with the Crown that this was sufficiently relevant in the circumstances of his present alleged offending for the Crown to lead this evidence from the witness. It emerged that a month before the accused had set fire to a suitcase of clothes belonging to his child, because he had been upset with his partner. The burning of the suitcase had taken place outside.

[6] Mr 'Apiloni Lao, aged 41 gave evidence that the accused was his nephew. He said a lot of people lived in the house. He said Tevita had gone and got drunk. He said Tevita's girlfriend was outside. He said he met up with Tevita outside when the house was burning. He said the fire was in the two bedrooms on the other side. He said that he had not gone into Tevita's room and he had not smelt anything. At this point, the Crown prosecutor Ms Fakatou asked that he made hostile. Having had translated for me a relevant part of the witness's police statement and it being read over to him, because he could not read, and he admitting the truth of what he had said to the police, I allowed the Crown to further approach him as a hostile witness. 'Apiloni admitted that he saw the room that belonged to the accused was burning.

The fire came from that room and he smelt benzene in the room. The fire came from the burning of clothes in a suit case in the room.

- [7] He also said he had seen the accused's partner, Siliva made it outside. She was hiding from Tevita who was calling out for her. He was calling out to her to fix him food. He said he had seen Tevita earlier in the living room. He said Tevita was drunk and his partner was afraid of him because when he asks for food and he is drunk and there is no food he beats her up. He said he saw him on that night beat her up.
- [8] The accused gave evidence and said he had gone for a drink up with the boys. He had got initially \$50 pa'anga from his partner and brought one bottle of spirits. Then he got more money he said \$150.00 from her later after they had finished that bottle. She had told him that he was being foolish. After that, she went outside and he asked Kaneisini for a match to light his cigarette. He continued drinking about 50 metres away from the house. From then someone screamed out and saw the house on fire. He called for his girlfriend and child. He went inside and part of the ceiling came down on his back. He said he went outside and used water to spray on his back. He said that he saw Po'uha and Amelia and they hugged and he had said to them it was all right because no lives were lost and that it was all right to think about how to rebuild the house. He said the police came and he was taken to hospital. He had not asked any questions of any of the witnesses concerning returning to the house or receiving burns, or being taken to hospital.
- [9] Under cross-examination, he admitted slapping his partner during their argument, and going back to the group drinking. He admitted going to Kaneisini before going out, but denied picking up any bottle and said there was no kerosene or benzene at their

house. He said he asked Kaneisini because she was the one who often used cigarettes to light tobacco for the old lady. He did not spray anything around. He admitted to an earlier incident of burning a suitcase full of clothes. He denied this was because he was angry but because clothes were too big for his child. His girlfriend had become angry and said it was a waste of the yams of his that had been given to his mother for the clothes. He said that 'Apiloni had attacked him outside. He denied lighting fire to the clothes in his room. He denied using a match to light any fire. He said he got a match from a Chinese shop 50 metres away and smoked there. He said he did not come back to the house before the fire. He said he only ran to the house later after it was burned suffering some injury from a falling ceiling. He admitted he got on well with Kaneisini but that may be she was lying.

Findings

[10] I accept the evidence of the witness Kaneisini that she had seen the accused come back drunk in the late evening and had seen him with a bottle scattering some liquid in the area of the hallway around his bedroom. I found her a well-spoken, 14 year old who gave a careful account of what she saw, and I had no reason to doubt the accuracy of her account. Her grandmother confirmed that she had been earlier watching videos on a laptop that evening as she had said before the fire. I accept Kaneisini had heard the accused shouting outside "when it's called for burning there will be burning, when it's called for fire, there will be fire." She assisted her great grandmother to get out of the house. I consider that the accused's words outside before the fire could be taken to evidence his awareness of the fact that a fire would occur.

[11] I accept that, on the night in question, the accused was drunk. He had slapped his wife at least during an altercation they had that evening. I accept the evidence of 'Apirioni that his partner was frightened of him. He was I find in a bad mood. I also accept the evidence of his aunt Po'uha Lokosuka that when he had been drinking there could be problems. I consider of relevance the evidence that a month before the residence was burnt down, the accused had been involved in another incident where he had set fire to clothes after an argument with his partner. I found unconvincing his explanation that this was because she had complained that the clothes were obtained from his mother for yams were too big for the child. In my view, the evidence was relevant because it established the propensity of the accused when agitated or annoyed with his wife and under stress to react by burning property. Although this was a suitcase of clothes and burned outside and there is no evidence that he had been drinking, at that time, his conduct in my view is so unusual that its probative value in this case outweighed its prejudicial effect, and it was relevant in the circumstances of this case as an item of evidence to identify the arsonist. Boardman v DPP[1975]AC 421;[1974] 3 All ER 887 has been qualified in a number of later English cases (eg DPP v P [1991] 2 AC 447) to diminish the need to show a "striking" similarity, to justify admissibility of propensity evidence. What is required is that the cogency of the propensity evidence outweighs the prejudicial nature of it. In the circumstances of this case where the accused has had a domestic argument with his partner, has been seen sprinkling some substance from a bottle in the vicinity of the accused's bedroom and has asked for a lighter, and then, outside is heard making comments suggesting his knowledge that a fire might take place, it is of considerable relevance, in my view, that the accused on a previous occasion after an argument with his partner, had reacted by burning property. To exclude this

evidence to adopt a phrase used in Boardman would be an affront to commonsense.

[12] I accept the evidence adduced from 'Aploni Lao, albeit that he had been declared hostile, that he saw clothes burning in a suitcase in the accused's room and the smell of benzene. Although often evidence from a hostile witness is of value only to impugn the credit of that witness as where he admits making a previous inconsistent statement but denies the truth of that statement or resiles from it, see R v White (1922) 17 Cr App R 60, it can be otherwise if the witness admits the truth of what has been said in the earlier statement, when giving evidence R v Carrington [1969] NZLR 790 (CA). In this case, I am satisfied that, although initially denying having gone into the accused's bedroom after being confronted with his earlier statement to the contrary, he admitted that he had gone into the room and had smelt what he thought was benzene. I can take this evidence into account generally on the issue of identification of the instigator of the fire. I would add here that I considered that this witness until he was confronted with what he had said earlier to police was being guarded concerning his nephew's involvement, but that after he appreciated he was on record as saying much more, he admitted the truth of what he had told police earlier and I take this evidence into account on the issue of identification.

[13] In my view, the combination of the evidence of Kaneisini concerning seeing him with a bottle taken from the kitchen and sprinkling liquid around , asking for a match even though he did not receive one, the fact that the seat of the fire is seen by 'Aploni to be in the accused and his partner's bedroom and involved the burning of clothes and a suitcase also, as well as his noticing a smell of benzene, the consistency of this with other witnesses who saw the fire start on that side of the house,

point to the accused's involvement in starting this fire. I also add to this the accused's very strange remarks before the fire that suggested a knowledge a fire would occur, and his earlier actions in setting fire to clothes after an earlier argument with his partner all of which in combination without reasonable doubt point in my view to the accused's guilt in deliberately commencing a fire which he would know would spread to the house.

[14] I did not accept the evidence of the accused. I can well understand when sober the grim reality of what he did and the grave danger his actions posed for several members of his family, is understandably something which he would want to deny. I accept he was angry and drunk that evening. I accept that his actions as reported by Kaneisini that night demonstrated a callous disregard or indifference to the danger he was putting the occupants in, all who seemed to be members of his family, and were consistent with his being very angry. I do not accept his denials of sprinkling area with substance from a bottle and I cannot see any justification for this in the circumstances of this case other than his using some accelerant. This is also consistent with the observation of 'Aploni that he smelt benzene in the accused's bedroom. Nor can I see any justification for his strange utterance outside "when it's called for burning there will be burning, when it's called for fire, there will be fire other than as his awareness a fire would arise.

[15] Accordingly, I accept beyond a reasonable doubt that the Crown has proven on or about the 8th December 2015 at Takamotonga, Tongatapu, the accused Tevita Lao did wilfully and without lawful justification set fire to a house which belonged to "Amelia Lao"; and knew or was reckless that human life is endangered when he set fire to that house because he knew it was occupied by people

at the time he set fire to the house. I find him guilty of serious arson. He is remanded in custody for sentence.

DATED: 14 JUNE 2017



A handwritten signature in black ink, appearing to read "C. B. Cato", is written over the seal.

**C. B. Cato
JUDGE**