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17/12/14

BETWEEN: R E X - Prosecution

AND: SIOKATAME 'OTUNUKU KUPU
TO'I FALEFEHI MOALA
SALESI KUPU - Accused

BEFORE THE HON. JUSTICE CATO

Counsel: Mr. T. 'Aho for the Prosecution
Mr. V. Mo'ale for the three Accused

RULING OF NO PRIMA FACIE CASE

[1] The three accused were charged with robbery arising out of an incident that occurred in Sopu on or about the 24th June 2017. Two people were in a motor vehicle in the early hours of the morning when a fourth person who had in fact pleaded guilty to robbery prior to trial and been sentenced gave evidence of approaching the driver and asking for a cigarette. The driver declined whereupon and he was struck a blow by the witness. Shortly after this, the witness said that the driver was hit by a brick thrown by someone he did not see. He said, however, that Mr Siokatame Kupu was standing in the vicinity of the passenger's side of the car and the object came from this direction. About this time, a second person in the car, a female who was in the backseat at the time was assaulted by a person who was not identified. She had left her purse in the front of the car and she said an unidentified person had stolen this. She said she and the driver had tried to stop him grabbing the purse but he was too strong and took it from her. The men soon after ran away. The witness said he did not see who took the bag but he saw two of the accused, later he said three, with it about two hundred yards away going through it.

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- [2] The witness did not give evidence that the men had acted pursuant to any plan to rob the occupants which I was expecting given his plea. In the absence of evidence of joint enterprise, I am left in a position whereby the two occupants of the car were assaulted by unknown persons aside from the witness who threw the first punch at the driver. The female occupant's purse was grabbed from the front seat by an unidentified person where she had left it and he had wrestled from her and the driver. That bag snatching event could amount to robbery but by an unidentified person and one that was an individual act rather than an act consequent upon a plan to rob. In these circumstances, in my view, the case falls no higher than several acts of assault that were not charged in the indictment accompanied by an individual act of robbery by an unidentified accused.
- [3] Nor is the fact that the witness saw it seems all three men going through the bag shortly afterwards 200 metres away from the car, evidence that assist the identification of the perpetrator of the robbery. In these circumstances, and I agree with Mr Moala who produced a memorandum of argument the case at its highest does not reach the prima facie case of a joint enterprise robbery. I add that I do not consider the evidence is such that there is a prima facie case either that a plan to rob was hatched on the spur of the moment by the group, rather than, at the highest an opportunistic robbery by an unidentified accused of the victim's purse after he had seen that it had been left in the front passenger seat. I do not overlook either the fact that the witness saw it seems all three accused going through the purse after the men had run away from the car evidence that they had acted in concert to rob; merely that they were interested in the spoils that arose after the purse had been taken from the occupants.
- [4] In any event, there was a further fundamental problem which the Crown could not surmount. The witness was an accomplice and as such under section 126 of the Evidence Act, his evidence had to be corroborated. In a joint trial like this, that means there had to exist independent evidence implicating each accused in a material particular in the offending before the witness's evidence could be used to support a conviction of an accused. This requirement is stricter in Tonga than the common law requirement for corroboration of accomplice evidence which has been abolished in Commonwealth jurisdictions a couple of decades ago. A request for reform here failed recently. Should reform not be effected and this requirement repealed here, there may well come a time in a more serious case where a material witness's evidence is excluded because of the absence of corroboration. This may result in a

miscarriage of justice. Curial directions appropriate to the case are required today in jurisdictions that have abolished accomplice corroboration. The modern approach elsewhere is that no further protection than an adequate curial direction or warning is required to expose any dangers associated with the evidence of an accomplice.

- [5] In this case, I inquired from Mr Aho at the start of the evidence what he was relying upon as corroboration. He said that in the purse stolen from the female occupant was a phone which was taken from, he said Siokatame Kupu, at the police station after they had been arrested. The female occupant had identified this as her phone. I inquired what he relied on as independent evidence implicating the others in the robbery and he candidly said that he recognised this was a problem for the prosecution.
- [6] His case, however, did not improve when the evidence subsequently failed to identify from whom the phone had been taken rather than from the group of accused under arrest. Evidence was not led as to which of the accused had the phone in his possession on arrest. In that event, in my view, there was no evidence that could be said to implicate any of the accused in a material particular in the robbery of the purse from the car. Any one of the three men on trial could have taken the purse and in the absence of evidence implicating one of them in a material particular in the robbery, the accomplice evidence could not be relied upon to convict any of the men of robbery.
- [7] For these reasons, I find no prima facie case of robbery exists and the accused are discharged from the indictment. They are acquitted of robbery.



C. B. Cato

J U D G E

NUKU'ALOFA: 11 December 2018