

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

CR 133 of 2019

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BETWEEN: R E X - Prosecution

AND: KELIKUPA MAILE - Accused

BEFORE THE HON. JUSTICE CATO

Counsel: Ms. 'A. 'Aholelei for the Prosecution
Mr. S. Fili for the Accused

VERDICT

- [1] The accused, Kelikupa Maile, was charged with one count of serious housebreaking contrary to section 173(1) and 5 of the Criminal Offences Act, and one count of theft contrary to section 145(a) and 145(b) of the Criminal Offences Act.
- [2] Evidence was given by the complainant Mrs 'Amelia Latu that a week before Christmas 2018 on a Thursday which would have been either the 13th or 20th December 2018, she left her home with her husband and returned after 12. She said she noticed that the front door was unlocked and the gate was open. She found out a television, laptops and other items from the house had gone and other items as well. The next day she reported this to the Police. She provided a list of the items stolen which was produced as exhibit one and included the items set out in the charge in count 2 totalling \$14,990.00. She said she was a neighbour of the accused and his wife, the later working for a bank in Tonga. She had received certain information that had made her suspicious about her neighbour and she informed the Police of this. About a month later, Detective Lolomana'ia asked her to confirm whether a bottle of perfume belonged to her and she said it did. About a week later she was asked to identify other items and did so including a bag belonging to her husband and a phone case she had lost. Also was a Tongan oil bottle with a picture of her niece on it. She also identified other items a bottle of vix from China, 3 ta'ovala, one mat a TV and a

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Tongan bag with oil. These items were photographed by the police and those photographs were exhibited, also

[3] She said she did not know the accused and his wife. They had not been to her house. She had recently moved into the area.

[4] Eita Pepa gave evidence that she and her husband knew the accused and his wife. They had been acquainted with them for about five years. She said that she recalled that it was on a Sunday evening before Christmas that she and her husband went to the accused's home and the accused gave her lotions and said it was a Christmas gift and he also gave her husband a Christmas gift of lotions and perfumes. She was asked whether she knew the items were stolen and I gave her a caution on the right to silence. She said she did not want to answer the question. She, however, said she believed that it was a gift. Later, she and the accused's wife left the residence and when they returned she was given jewellery, Tongan mats and a Kiekie. She said that she took the items home and that was on the Monday of Christmas week. She said the accused had given them to her to sell. She identified various items in the photographs taken by the police and produced. She sold all the items and halved the money with the accused and his wife. She sold them to people by the name of Ve'a and Lisia.

[5] Later, Elenoa Ve'a Fangupo and Lisia Mafi were called to give evidence that they had purchased items they identified in the exhibited photographs from Eita, and had paid her for these. Certain of those items had remained with the witnesses and were returned to the police. These were identified as being in the photographs. The later witness said that she had acquired the items shortly before going to Fiji on Christmas day.

[6] The officer in charge of the case, Detective Lolomana'ia, said that, as a result of inquiries of a bank where the accused's wife worked he was given a bottle of perfume by the accused's wife, and this was shortly after identified by the complainant, Mrs Latu, as belonging to her. Later, he talked with Mele Maile, the accused's wife at the police station and she took the officer to her home where he collected items including oils and perfumes. They were taken to the police station and photographed. Included in the photograph was a list of the items that were recovered. A TV screen that was photographed was located elsewhere. He said Mrs Latu identified the blue bag and the contents and other items that had been shown to her. The items were

returned back to Mrs Latu after examination. All the items in the photographs were returned back to her and one perfume was retained at the police station.

[7] Officer Lolomana'ia said that after they had collected the goods he and Mele had returned to the police station. He said that he had received certain information that the accused had been involved in the theft. He said he had a conversation with the accused and he asked him where he had got the perfume from and he said it was from his wife. He said his wife got it from a flea market. He said there were a lot of perfumes but they had shared it with Eita and her husband. He gave evidence that the accused had admitted the alleged offending and had signed his not book record on the 11th January 2019 as had he and another officer. The accused had admitted that he had broken into the house.

[8] Lolomana'ia said that before he had made the admission, he had told the accused that the accused's wife Mele who was present when the accused was spoken to at the police station as were some of the recovered items had a chance if he co-operated. Lolomana'ia said that at that time they were all to be charged, Mele, Eita, and others. He admitted that he had said and meant if you co-operate with us there is a possibility your wife may not be charged. He said that Mele had said for the accused to hurry up and tell me had committed this. He said the accused signed the notebook entry as did another officer, PC Vaea. Detective Lolomana'ia said that he had cautioned the accused prior to the admission being made.

[9] The accused gave evidence and said that he had been living apart from his wife and was staying at Hihifo but had returned secretly to get some clothes and he said he was surprise when he opened up the small house in front of his house referred to as a hut, the items were there. He said that he brought them inside the house and when Eita and Tau showed up he gave them the items. This area referred to as a small hut he later said was occupied by Ngana Tatafu from Vaini who used to live there. He said he did this because he saw no one was in the house and it was not locked so he took the goods inside his house. He said he contacted Ngana about them and he said to do what the accused wanted with them. He said he just given them away. He got no money for them. He said when questioned about why he had not told the police about Ngana's involvement that he was shaken when he came out and saw his wife had been arrested. He admitted that he had been spoken to by Lolomana'ia a day earlier than when had said he knew nothing about this. He said it had not crossed his mind the first time the officer Lolomana'ia had come to see him to tell him that Ngana had stolen the items. He said on the second occasion he had falsely admitted

his guilt to save his wife losing her job which he said Lolomana'ia had told him might happen. The accused did not take the opportunity of cross-examining any prosecution witnesses.

Reason for Verdict

[10] I listened closely to the accused give evidence and I did not accept the truth of the evidence he gave. I do not consider that the explanation he gave was credible. I do not believe that he returned secretly to his home because he was not living with his wife but elsewhere in the period before Christmas when these events occurred. Eita gave evidence that she and her husband had visited the couple at their home before Christmas when he had given she and her husband lotions and perfumes and had told her she could sell other items such as mats. I also do not believe his explanation that he by chance had entered a small building or hut at the front of his property and found the items, then moved them to the house. A good deal of the property was not recovered but what were, perfumes, a television and Tongan mats and clothing, were valuable items. I do not believe him that he contacted Ngana and was given permission to do what he pleased with the items. Nor do I believe him when he said that he received nothing for the items sold by Eita which is contrary to her evidence.

[11] I consider that Eita was quite possibly an accomplice, in this sense a receiver of stolen goods knowing they had been dishonestly obtained. Davies v DPP [1954] AC 378 She indeed took the privilege when asked about her knowledge as to whether the items had been stolen. Accordingly, I am required under section 126 to require or find corroboration that is independent evidence implicating the accused in the crime before I can act on her evidence. This rule is one that has been discredited in other jurisdictions and, in my view, there should be urgent reform of this law in Tonga, as well. For reasons given below, I find that there was corroboration present in the accused's signed admission of breaking into the house made to Officer Lolomana'ia. I believed Eita's evidence and the accused did not dispute any of her evidence, in cross-examination. I consider the accused gave her the items to sell in order to dispose of the items which he had stolen from Mrs Latu around the 13th of December 2018 which was a Thursday, the evening that Mrs Latu recalled was the night she came home to find items stolen.

[12] I accept under caution the accused made a signed admission to Officer Lolomana'ia of his involvement in breaking into the house in the presence of his wife and another officer. This was not simply a verbal admission that was uncorroborated. The entry

in the Police officer's notebook was signed by the accused and one other officer besides Lolomana'ia. I do not consider, having reviewed again in the light of the accused's evidence suggesting that he had made a false confession to protect his wife from losing her job, that the circumstances in which the admission was made which was in the presence of his wife was unfair and although there was an inducement it did not fall within section 21 of the Evidence Act because it did not suggest any advantage to him with the charges he faced. I accept that he had been cautioned before making any admission satisfying section 148 of the Police Act. Plainly, at that stage his wife, having shown the police where some of the property was at her home would be a suspect as would probably have been Eita and her husband who had been given some of the stolen property. She had been taken with the goods back to the station where the accused was already in custody on another matter. There, with the items present, the accused was spoken to by Lolomana'ia in the presence of his wife. This was not a coercive police environment. The fact that his wife had urged the accused to co-operate and admit his guilt was understandable. He did so after this, signing the notebook.

[13] I have considered very carefully this admission, its admissibility and weight under sections 21 and 22 of the Evidence Act. As I have said I see no reason to revise my ruling that the inducement was not of a kind that was directed at securing any advantage or avoid any evil of a temporal nature in regard to the proceeding against the accused and accordingly did not fall within the prohibition in section 21. Nor do I consider that the police's conduct was unfair given the state of the evidence that the police had and the circumstances in which the property had been located with the assistance of the accused's wife at their home. I am satisfied that the admission was voluntary although I accept that the accused may well have chosen to admit his responsibility so as to avoid his wife being charged with the obvious loss of her job. He had been cautioned, however, and I am satisfied well understood the importance of his admission. I do not consider the Police conduct could be describe as oppressive.

[14] This is not a case either where aside from the verbal admission there is little other evidence to implicate the accused. The accused had no employment his wife did. I accept as Mr Fili, who later appeared for the accused, submitted that there was no eye witness to the break and entry, nor forensic evidence such as finger prints to associate him with the crime. However, I accept the evidence of Eita that she had received incriminating items from the accused that had been stolen and later located after being resold to at least one purchaser prior to Christmas 2018. In my view, the

admission by the accused that he broke into the residence is independent evidence linking the accused in a material particular with the offences charged and I accept that he did make this admission, (and he does not deny this). It gives the lie also to any suggestion that he happened fortuitously to locate the goods in the area occupied by Ngana and the suggestion that it was he who was the thief, and accordingly an explanation for the presence of incriminating goods recently stolen being at his residence. I do not believe the accused when he states that he made a false admission to incriminate himself for his wife's sake. I am satisfied that he knew full well what he a doing when he signed the notebook and that he was admitting to being the person responsible for entering Mrs Latu's home and stealing a large number of items.

[15] I am satisfied beyond reasonable doubt that the goods located at the accused's residence, and taken from subsequent purchasers of them and identified by the complainant were hers and were stolen in the value stated by her. I am satisfied also that a good deal of the property was not returned.

[16] I conclude therefore beyond any reasonable doubt that the accused is guilty of housebreaking on or about the 13 December 2018 at Longolongo, namely he entered the dwelling house of Mrs Latu with intent to steal items and did so steal the particularised items in the sum charged of \$14,985.00. Some of this property was recovered but much of it was not.

[17] I record also that the accused had chosen to call his wife to give evidence. I had granted an adjournment when it became clear that there were some difficulties with her evidence proceeding. She obtained Mr Fili as counsel for the accused and he having had a further conference with the accused informed me that his client no longer wanted to call his wife to give evidence. Mr Fili continued to act for the accused.



C. B. Cato
JUDGE

NUKU'ALOFA: 5 September 2019