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

CR 16 of 2019

BETWEEN: R E X - Prosecution

AND: MA'AKE KALI - Accused

BEFORE THE HON. JUSTICE CATO

Counsel: Ms. T. Kafa-Vainikolo for the Prosecution
Accused – Self represented

VERDICT

- [1] The accused, Ma'ake Kali, was charged with counts of;
1. Serious housebreaking contrary to sections 173(1)(b) and 5 of the Criminal Offences Act particulars of which were that between February and May 2018 at Pili, he did together with Samuela T Hafoka entered the dwelling house of Peni Vaea as a trespasser and committed a crime.
 2. Theft contrary to section 143(a) and 145(b) of the Criminal Offences Act namely between February to May 2018 at Pili he did together with Samuela T Hafoka dishonestly take and without colour of right various named items in the sum of \$20,970.00.
 3. In the alternative, Abetment to theft contrary to section 8(a), section 143(a) and 145(b) of the Criminal Offences Act that he on or about February to May 2018 did assist Samuela T Hafoka to dishonestly take without colour of right specified goods in the sum of \$2200.00.

Verdicts

- [2] I heard evidence from the complainant which I accepted beyond any reasonable doubt that he had returned to his father's home at Pili where he had formerly resided and had been left vacant for some time whilst he and his family resided in a family home elsewhere to find that a large amount of property had been stolen from the house in the sum of about \$20,970.00. There was no challenge to the value of the property stolen and I accept the value placed on the stolen items of \$20, 970.00. Much of the property had not been recovered.
- [3] Samuela Hafoka had been called to give evidence having been provided with an indemnity exhibited in evidence. Mr Hafoka had been convicted after a guilty plea of housebreaking and theft for his involvement in this offending earlier by Paulsen CJ and sentenced to a suspended term of imprisonment on conditions one of which was that he perform community work. He had breached this condition and was liable to recall to serve the suspended sentence. The Crown, appropriately in my view, indemnified him essentially against this possibility in exchange for his truthful evidence.
- [4] Mr Hafoka gave evidence that he had recently commenced living with the accused at Pili around February 2018 in a residence which the accused had rented when he and the accused entered the neighbour's vacant residence and stole various items most of which he confirmed were those that had been particularised in the charge. He suggested they went there also on the day after the initial entry. He said that some of the items were heavy. He said that the accused wanted the property to be able to sell it to pay rent and water bills. Various of the items stolen were sold and some items, he said, had been picked up from their property. It seem that little was recovered.
- [5] The accused challenged Mr Hafoka and suggested that he alone had gone into the house and that the accused had not done so. Mr Hafoka did not accept this. Indeed, the accused in his record of interview that had been admitted into evidence after a voir dire because I had been satisfied that the accused had been appropriately cautioned and had made a voluntary statement, had denied entering the house but admitted receiving certain items later that he had advertised for sale. He had denied receiving any other items than those he admitted to receiving.

- [6] The accused also gave evidence and maintained that he had not gone into the house. He said there had been no plan for both he and Mr Hafoka to enter the house or steal items. He, however, said that he had taken the property which Mr Hafoka had deposited on the boundary with his residence (knowing that it had been unlawfully taken from his neighbour's house) into his residence which he rented, adjacent to the complainant's residence. He admitted that he had not been able to pay the rent for the past month, and left after this, although later he said the goods were not taken for rent as Mr Hafoka had said but it was needed to purchase more alcohol.
- [7] Mr Hafoka was an accomplice and under section 126 of the Evidence Act his evidence had to be corroborated in some material particular by other independent evidence before Mr Hafoka's evidence could be used to convict the accused. The Tongan section is more rigorous than the common law requirement of corroboration which could allow the trier of fact to convict in the absence of corroboration if satisfied, after a direction that it was dangerous to act on uncorroborated evidence of an accomplice, if the evidence, notwithstanding, was reliable and trustworthy. Section 126 as I have said on several occasions is, in my view, in need of urgent reform and repeal, as has common law corroboration been the subject of reform in other Commonwealth jurisdictions.
- [8] I am satisfied here that there was corroboration that is independent evidence implicating the accused in a material particular in the offence of theft. Corroboration as was stated by Lord Reading CJ in *R v Baskerville* [1916] 2 KB 658, at 665 does not mean that there must be confirmation of all circumstances of the crime. It is sufficient if there is confirmation as to the material circumstances of the crime and of the identity of the accused in relation to the crime. I am satisfied that the accused's admission that he knowingly accepted and transported property taken from the boundary that were left by Mr Hafoka, knowing they had been obtained unlawfully, and that he carried it from there into his house, although likely a selective and convenient explanation to avoid any suggestion that he had entered the complainant's residence, amounted to an admission that he was knowingly complicit in the theft of goods from his neighbour's residence. In his record of interview, he also acknowledged receiving some of those items. I consider that he admitted at the very least aiding and abetting Mr Hafoka to steal the goods, on the basis of his admission even if he did not enter the house, and this admission amounted to corroboration of his involvement in stealing the property. I also note that I am satisfied contrary to what the accused said that the accused had planned this

enterprise with Mr Hafoka which was for the accused's obvious advantage. I reject any suggestion that the theft was the consequence of Mr Hafoka's independent activity.

[9] As to the housebreaking, however, there does not seem to me any independent evidence implicating the accused in that. There is no forensic evidence such as the accused's fingerprints in the house for example which would provide corroboration of his entry which he consistently denied. The Crown points to the weight of some of the items and submitted that I should treat this as a circumstantial fact supportive of the accomplice's account that two men were involved in entering the house for the purpose of stealing the contents. I agree that it is most unlikely that one man could have removed some of the heavier items but it is possible on the account of Mr Hafoka that a third party was involved a Mr Manu who we did not hear from. Mr Hafoka said Manu also had entered the house, and so I cannot safely draw the inference the Crown suggests that it must have been the accused that assisted Mr Hafoka to remove the heavier items from the house. Accordingly, I cannot rely on the evidence of Mr Hafoka in so far as the house breaking charge is concerned because I am not satisfied that there is independent evidence implicating the accused in the housebreaking, that is he trespassed inside the complainant's property with intent to commit a crime.

[10] The accused's evidence made little sense to me. I am satisfied that the accused owed money and one witness, Tevita Fatongiatau, gave evidence of taking some of the property to discharge a debt owed by the accused to him. I am satisfied also that he owed money for rent as Mr Hafoka said although he denied this. Mr Hafoka had only just moved into the accused's address before the housebreaking. It was the accused, Mr Hafoka said, who owed money and it was the accused, in my view, who had rented the property for two months long enough to know that his neighbour's' home was vacant and presented an opportunity to steal the contents, when the need for money arose. I consider contrary to the accused's evidence that the venture was likely to have been planned by him, and was not solely the unsolicited endeavour of Mr Hafoka as he suggested. It was the accused who had the motive to steal the items and sell them, and it seems most of the property was sold or disposed of before police became involved. I consider his involvement went far further than he was prepared to admit.

[11] For reasons which I have given, however, whilst I am satisfied there is corroboration of Mr Hafoka's evidence as an accomplice to the offence of theft because there is, in my view, no corroboration of Hafoka's evidence as to the accused's entry, I direct myself under section 126 of the Evidence Act that I must not act on Hafoka's evidence to convict the accused of housebreaking. This is not a verdict which I would have come to in the absence of the operation of section 126 of the Evidence Act.

[12] It is otherwise as I have said when it comes to his evidence concerning the theft where the accused admitted his involvement with property that he knew had been unlawfully taken by Mr Hafoka and he took the property from the boundary into his residence although, as I have said, it was likely an explanation that was convenient and assisted him to maintain his denial that he had not entered the house. I consider his admission of knowing involvement is independent evidence capable of being corroborative of the evidence of Mr Hafoka on the offence of theft, as I have said. I arrive at the verdict of guilty of theft in count 2 on the basis of Mr Hafoka's evidence that both were involved in the theft, and the accused's admission to taking the property inside his house knowing it had been unlawfully obtained. Further, I consider the accused had an obvious motive to steal the goods, because he was, I am satisfied, in debt and he had lived in the residence for long enough to know that the adjacent property was vacant. I have no doubt that the theft was planned by him and was not the unsolicited work of Mr Hafoka as the accused's suggested. I have no doubt that the accused is guilty of theft as charged in count 2 of the indictment. There is no reason for me to return a verdict on count 3.

[13] Verdict on count one not guilty.
Verdict on count two guilty.

[14] He is remanded in custody for sentence.

NUKU'ALOFA: 26 September 2019



C. B. Cato
JUDGE

A handwritten signature in black ink, appearing to be "Cato", written over the printed name and title.