

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 42/2020

BETWEEN : REX

- Prosecution

AND : LAFITANI MAHE

- Accused

BEFORE HON. JUSTICE NIU

Counsel : Mr. F. Samani for the Crown

Mr. Lafitani Mahe, accused, for himself

Trial : 16 June 2020.

Submission : 17 June 2020

Ruling : 8 July 2020.

RULING (VERDICT)

The Charges

[1] The accused is charged with serious housebreaking, contrary to S.173 (1) (b) and (5) of the Criminal Offences Act, and with theft contrary to S.143 (a) and S.145 (b) of the Criminal Offences Act, in that he entered the house of 'Ana Kama at Houmakelikao on 19 February 2019 as trespasser and stole:

- (a) 1 40 foot fihu mat,
- (b) 4 15 foot paongo mat,
- (c) 5 8 foot 5 inches ngafingafi ta'ovala,
- (d) 1 6 foot 4 inches ngafingafi ta'ovala,
- (e) 3 4 foot 3 inches ngafingafi ta'ovala,
- (f) 2 ngafingafi drapes,
- (g) 1 20 measure tapa,
- (h) 2 Tongan double,
- (i) 2 Bluetooth speakers.
- (i) 1 i Phone.
- (j) 1 i Pad.
- (k) \$500 cash.

altogether valued at \$34,000, properties of 'Ana Kama.

Plea and election

- [2] He pleaded not guilty and elected trial by judge alone, and has represented himself in this trial.

Burden and standard of proof

- [3] The Crown has the burden of proving that the accused committed these two offences. The accused has no obligation to prove that he is innocent or that he did not commit the two offences because the law says that he is innocent until he is proved to have committed them. The accused is aware of that and he did not give evidence or call any witness to prove anything in this trial. And he is allowed to cross examine and to try and discredit the

evidence of the witnesses called by the Crown, and he did cross-examine the witnesses who gave evidence in this trial.

- [4] The Crown has to prove its allegations against the accused to a high standard such that there is no reasonable doubt that the accused committed these two offences.

The evidence for the Crown

- [5] The Crown called 5 witnesses who are all police officers.
- [6] **Havea Fusikata**, 37 years old, with 12 years in the force of which 7 has been in the forensic section, during which he has been a photographer, said that on 19 February 2019, he and Officer Tu'itavuki went to a house breaking and theft complaint at the house of 'Ana Kama and he took photographs there which he produced in a booklet of 16 photos as Exhibit 1.
- [7] The photographs showed two houses, a two-storey house and a one storey house, with the roof of the one storey house touching the wall of the two storey house with a narrow corridor between the two houses about 4 feet wide with a concrete block wall about 5 feet high at one end of the corridor and thereby joining the wall of the one storey house to the bottom wall of the two storey house. The other end of the corridor opens out into a narrow verandah of the one storey house and a wide verandah of the two storey house to the left.
- [8] On the wall of the one storey house facing the corridor there are two louver windows next to each other with 6 louver glass blades in each, and on the outside of the blades there are wire mesh sheets and mosquito netting affixed to the wooden frames of the windows.
- [9] The photograph no. 8 shows that the wire mesh and mosquito netting on the window towards the concrete block half wall has been lifted from the outside all along the bottom and along the right side to about the 6th blade at the top of the window, and bent outward to allow entry, and then all bottom three louver blades had been removed and stood on their ends on

the concrete floor and leaned against the wall of the windows but a little distance to the right of the windows.

- [10] The gaping hole left by the bent wire mesh and the missing louver blades, which is about 4 feet from the floor, was then an easy access into the one storey house.
- [11] On the wall of the bottom storey of the two storey house facing the verandah, there are two louver windows, one on each end of the verandah. On the window furtherest from the corridor, the second louver glass blade from the bottom had been removed and placed on a sofa chair just beside the window inside the house. There was no wire mesh or mosquito screen on that window.
- [12] **Officer Fusikata** said that he did the photographing and that Officer Tu'iatvuki did the dusting for fingerprints. He said that 4 fingerprints were found on one blade and that he applied the tape onto those prints and lifted all of them from the blade and marked each tape with numbers 1 to 4 and were each signed by the complainant, 'Ana Kama. He then produced the 16 photographs as Exhibit 1 and the 4 tapes of prints as Exhibit 2.
- [13] He was then **cross-examined** by the accused as to his qualification to do the work he did. He said that he had attended a one week course at the Loumaile Lodge in 2015 where they were taught by an overseas expert on the works at a crime scene and that he had another course on photography in 2017 and he produced his certificates of satisfactory completion of those courses. The accused said he could not read them and I read them out in Tongan to him.
- [14] He said that the tape he applied had a selophane protection cover which he had to peel off before he applied the tape onto the prints on the blade to lift the prints from the blade onto the tape. He said that all the 4 prints were found on the one blade which was on the sofa in the room of the two storey house.

- [15] **Patelesio Tu'itavuki**, 44 years of age, police officer in finger printing, photography, crime scene and records, said that he and officers, Fusikata, 'Ahohako, Moala and Heimuli, went to the home of a police officer named Niua Kama at Ma'ufanga where they met the complainant, 'Ana Kama, and that she showed them the louver windows with the removed louver blades. He said that that was about 12 noon on 19 February 2019.
- [16] He said that he did the dusting for fingerprint on the 3 louver blades leaning against the wall in the corridor and found no discernable print on them. He said he then went and dusted the lower blade on the sofa in the house and found 4 discernable prints on it although the blade was dusty. He said that the 4 prints were lifted off with tapes and that the complainant signed the back of each tape.
- [17] He said he also drew a rough sketch of the layout of the 2 houses and that he later drew a plan of them which he then produced as Exhibit 3, showing the locations of the two louver windows with the removed blades.
- [18] In **cross-examination**, he said that of the 23 years he has had in the police, he has worked in the forensic unit for 20 years and that he had the proper experience for the work he did.
- [19] I asked him and he said that he and another officer, Leniti Pale, worked on the prints to see if they matched any print they kept. He said that he then stopped but officer Pale continued.
- [20] The accused then asked and the witness said that they were only using magnifying glasses to try and match the prints and that they were only doing the work manually.
- [21] **Misinale 'Ahohako**, 32 years of age, with 13 years in the force, said that he was one of the officers who had attended at 'Ana Kama's home on 19 February 2019 and that he had written out her statement that same day when she came to the police station afterwards.

[22] He said that on the night of 20 February 2020, 'Ana Kama telephoned him, and that after he talked with her, he then directed officer, Litili Televave, to go with other officers right away to the home of one, Vili Ongosia, at Ngele'ia, and seize one Bluetooth speaker from him and to also bring Vili Ongosia.

[23] He said that he saw Vili Ongosia at the police station and that after talking with him, he then went and found the accused and brought him to the station. He said he then had the speaker, which was also at the station, photographed. He identified the photographs as the photos no. 15 and 16 in Exhibit 1.

[24] He then referred to a note in the diary of action, no. 24, which stated:

“.0319 24 D/Ahohako, D/Tapueluelu, D/Lauti, D/Pongi arrest
.. 701 Hrs Lafitani Mahe (m) 30 yr old of Pili from dwelling
 House at Touliki with offence of serious house
 Breaking and theft and he has been informed of
 the offence with which he is arrested.”

[25] The accused asked him no question.

[26] **Viliami Ongosia**, 36 years old, of Ngele'ia, home keeper, said that the accused and a girl came to him and offered a speaker to him on 20 February 2019. The accused had the speaker with him. He was shown the photographs no. 15 and 16 and he said that that was the speaker that the accused came with. He said that the girl said that the speaker was her's but that he did not know her. He said that the accused offered it to him for \$50.00. He said he asked them if it was theirs and that they said it was. He said he then accepted and gave the accused the \$50.00.

[27] He said that he then advertised the speaker on the internet and the owner of the speaker who were a boy and a woman came as well as a police officer and took the speaker and arrested him.

- [28] He said he was charged with an offence concerning the speaker and that he pleaded guilty and was fined \$200.
- [29] In **cross-examination** by the accused, he was shown the photos no. 15 and 16 and he recognised them as the photographs of the speaker that the accused gave him, and that he had brought it to him at between 6 pm and 8 pm. He said he agreed that there were many speakers like this speaker.
- [30] I then asked him and he said that he photographed the speaker after he got it and put the photograph on the net at about 8 o'clock and that the police came at about 10 o'clock that same evening. He then said that he seemed to recall that the 2 handles on the speaker were broken.
- [31] **Leniti Pale**, 38 years of age, with 18 years in the police, and acting officer in charge of the forensic unit, and 15 years in that unit, said that he had qualifications on finger printing in Apia, Samoa, in 2008. He produced his certificate from that course dated 30 May 2008. He said he made a report of the work he carried out on the fingerprints concerning this case, and he produced his report, which is dated 24 April 2019, as Exhibit 4.
- [32] In that report, he stated that on 26 March 2019 he had found a print found at the house of 'Ana Kama on 19 February 2019 that matched the right thumb print of the hand of the accused. He then produced a sheet which he marked as "A" on which there were two enlarged photographs of fingerprints which were side by side.
- [33] He said that the print on the right was the right thumb print of the accused which was taken at the police station on 12 March 2019, and the print on the left was the print which was print no. 4 which was lifted from the lower blade at 'Ana Kama's house. On both prints on the sheet there are 12 lines drawn with a number from 1 to 12 printed at the end of each line on the sides of the two prints, and each line ending on the other end at a particular spot on each print.

- [34] He said that each "pointed" spot on one print was identical to a spot on the other print, such that there are altogether 12 points on the print on the left which were identical to the 12 points on the print on the right, and that therefore according to a worldwide rule of finger printing identification, there was a match of the print on the left to the print on the right. He said that that meant that it was the accused's right thumb print which was found on the louver blade of 'Ana Kama's house. He said that no 2 people in the world have identical fingerprints, even identical twins do not have identical prints.
- [35] He also produced another sheet which he marked as "B" on which he set out the 12 numbers and the description of each point to which a line was drawn on the first sheet, "A".
- [36] When **cross-examined** by the accused, he said that he had been trained for 5 years before he was issued with his certificate. He said that photo no. 13 was the photograph of the fingerprint numbered 4 found in the house where the offence happened which he found matched the right thumb print of the accused. He said that the photo showed that there may have been 2 marks made by the same finger and that the bottom or first mark may have been smudged and replaced by the second mark which was the clear one.
- [37] He was asked whether he was 100% sure of the fingerprint identification which he had made and he replied that he believed without doubt there was a perfect match of the print on the louver blade and the print of the accused's right thumb and that it was because there were 12 points on each print which matched each other.
- [38] I asked him and he said that the world requirement was 12 points but that there could be more than 12 points which could be found.
- [39] The two sheets "A" and "B" and the fingerprint sheets of the accused which were taken on 27 September 2018 and on 12 March 2019, which were marked "C" and "D" respectively, were produced as Exhibit 5.
- [40] With that, the prosecution case closed.

Evidence for the accused

[41] The accused elected to give no evidence and to call no witness and to make his oral address to the Court the following day.

Submissions of the accused

[42] The accused submitted that the witnesses for the Crown were all not 100% qualified to make the finding which they gave in their evidence in this trial. He said that the officer Fusikata could not possibly have had the proper qualification to do the work he did after only about 4 days of training like he said he did. He also said that that officer said in his evidence that the 3 blades had been removed from the east side of the house but officer Tu'itavuki said that they were removed from the westside of the house.

[43] And as for officer Tu'itavuki, he said that his qualification was not a proper qualification either.

[44] He said that it was the same thing with the qualification of officer Pale, his qualification was not a proper qualification. He said it was not 100% qualification.

[45] Accordingly, he submitted that he should not be convicted of the offences with which he was charged because all these witnesses were not 100% qualified.

Submissions of the Crown

[46] Mr. Samani for the Crown submitted that the officer Fusikata properly lifted the 4 fingerprints from the louver blade at the house and they were of good condition and clarity to be used for comparison.

[47] He then referred to the evidence of Viliami Ongosia in which he said that it was the accused who gave the speaker to him, as a result of which the accused was then arrested for this offence. He said that the truth of what that witness stated was proved by the fact that the witness was charged and convicted and fined \$200 for receiving the speaker.

[48] He then referred to the evidence of officer Ahohako who stated that the complainant confirmed to him that the speaker was her property, and which he then gave to her to keep and which she did. He submitted that that confirmed that the accused had the speaker after the house breaking happened and he gave it to Viliami Ongosia the following day.

[49] He said that the evidence of officer Pale was that the fingerprint found on the louver blade at 'Ana Kama's house was the fingerprint of the accused because of the matching of 12 points on the two prints compared, and that that was proof beyond any doubt that the accused committed these offences.

[50] As to Officer Pale's qualification, he said that the certificate that was issued to him at the end of his training course was the evidence and proof that he was properly qualified with the proper knowledge to conduct fingerprint matching and identification.

[51] He accordingly submitted that the Crown has proved its case beyond reasonable doubt, that the accused committed these two offences.

Accused reply

[52] The accused replied that Viliami Ongosia was not very sure when he was shown the photographs of the speaker whether it was the same speaker because he said that the one he was given had its 2 handles broken. He said that there should not be any mistake in a criminal trial and that that is why everything should be 100%. He said that he still maintained that he was innocent.

Consideration

:Fingerprint evidence

[53] Archbold 2003, para. 14 – 53, states:

“A person may be identified by finger print alone: *R v Castleton*, 3 Cr. App. R. 74, CCA.”

It then carried on to say as follows:

“The National Fingerprint Standards were laid down in 1953. These require a match of 16 ridge characteristics on any one digit or, where prints are uplifted from two digits, not less than 10 matches for each digit. However, the current consensus of experts is that these standards are too exacting. In the absence of alternative national standards or non-numerical protocols, the Court of Appeal in *R. v. Buckley*, 163 J.P. 561, CA, gave the following guidance:

“If there are fewer than eight similar ridge characteristics, it is highly unlikely that a judge will exercise his discretion to admit such evidence and, save in wholly exceptional circumstances, the prosecution should not seek to adduce such evidence. If there are eight or more similar ridge characteristics, a judge may or may not exercise his or her discretion in favour of admitting the evidence. How the discretion is exercised will depend on all the circumstances of the case, including in particular: (i) the experience and expertise of the witness; (ii) the number of similar ridge characteristics; (iii) whether there are dissimilar characteristics; (iv) the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fragment of print than in an entire print; and (v) the quality and clarity of the print on the item relied on, which may involve, for example, consideration of possible injury to the person who left the print, as well as factors such as smearing or contamination.

In every case where fingerprint evidence is admitted, it will generally be necessary, as in relation to all expert evidence, for the judge to warn the jury that it is evidence opinion [sic] only, that the expert’s opinion is not conclusive and that it is for the

jury to determine whether guilt is proved in the light of all the evidence" (at p. 568).

The Crown must show that the fingerprints taken from the scene of the crime match those on the fingerprint form, and also identify the fingerprints on the form. An inability to explain the presence of fingerprints, or a failure specifically to deny the fingerprints in question, does not amount to an admission by the defence. Strict proof is required: *Chappell v. DPP*, 89 Cr.App.R. 82, DC."

[54] I agree with Mr. Samani that the officer Pale was and is properly qualified to make the fingerprint matching and identification and he has been so qualified and has practised it for 12 years, and he has shown that by the matching which he has made of 12 points on the two prints. I myself can see those 12 points on the two prints. That also means that Officer Tu'itavuki had properly done the dusting of the prints on the louver blade with material and dust properly acquired for the purpose, and that Officer Fusikata had properly taped and lifted the 4 prints from the louver blade, thereby preserving them for the matching which officer Pale subsequently carried out.

: The speaker

[55] I have no reason to doubt the evidence of the witness Viliami Ongosia that:

- (a) it was the accused who brought the speaker to him,
- (b) he was arrested with the speaker,
- (c) he told the police that the accused gave him the speaker and the police arrested the accused,
- (d) he was charged with receiving of the speaker and he pleaded guilty and was fined \$200.

I also conclude from those evidence that he himself knew that the accused had stolen the speaker from someone else before selling it to him.

Otherwise he would have pleaded not guilty and called the accused as his witness, but he didn't.

[56] I am also satisfied from the evidence of Officer Ahohako that the speaker belonged to 'Ana Kama, because, soon after the speaker was advertised on the net by Viliami Ongosia at about 8:00 pm, 'Ana Kama telephoned officer Ahohako in consequence of which he instructed the police to go and arrest Viliami Ongosia with the speaker at Ngele'ia, which they duly did at about 10:00 pm that same night, as Viliami Ongosia said in his evidence. The speaker was, after being photographed at the police station was returned to 'Ana Kama.

[57] I am satisfied that the speaker was recently stolen on the 19 February 2019 from 'Ana Kama's house at Houmakelikao and that it was found in the possession of the accused by the witness Viliami Ongosia at 8 pm on 20 February 2020, as a result of which, it was returned to 'Ana Kama.

General presumption

[58] S.40 of the Evidence Act provides for a presumption that where recent stolen property is found on a person, the person is presumed to have stolen it, unless he can give a satisfactory explanation for having it. It provides as follows:

"40. Where a person is found in the possession of property proved to have been recently stolen he shall be presumed to have stolen it or to have it knowing it to have been stolen unless he shall give satisfactory explanation of the manner in which it came into his possession."

[59] Applying that presumption to the possession of the speaker by the accused, and there being no explanation, let alone satisfactory explanation, by the accused as to how he had come to have possession of the speaker, I have to conclude that he had stolen it.

Speaker part of properties stolen

- [60] The charge of theft against the accused in this trial lists 2 Bluetooth speakers amongst the properties of 'Ana Kama which the accused had stolen from her house at Houmakelikao on 19 February 2020. One of those two speakers was the one that was taken by the accused to Viliami Ongosia and which was subsequently returned to 'Ana Kama on or about 20th or 21st February 2019, as stated herein earlier.
- [61] The law is stated in **Archbold 2003** para. 21 0 7 at page 1807. It states that it is not necessary to prove all the articles mentioned in the indictment to have been stolen, if it is proved that the defendant stole any one of them, it is sufficient: *Manchent v Quinn* [1970] 2 All ER 255 DC; *R v Parker*, 53 Cr. App. R. 289 CA (per Donaldson J at p.289). It says that the sentence should relate only to the articles proved to have been stolen.

Evidence not 100%

- [62] In essence the accused's submission is that because all the 3 witnesses who worked on the fingerprinting evidence which they have given in this trial did not have proper qualifications, as he has submitted, to carry out their work, the Crown evidence is not 100%, and that because the evidence is not 100%, the Crown has failed to prove that he had committed the two offences with which he is charged in this trial.
- [63] It is not the law that the Crown must prove its case against any accused 100%. That is because a 100% proof of a case is proof beyond any doubt. What the law requires is that the Crown must prove its case beyond reasonable doubt. And in the present case, I have to be satisfied beyond reasonable doubt that the 3 officers had performed their work correctly before I can convict the accused.
- [64] Now having listened to them in this trial and having seen the photographs of the fingerprints which they had dusted, taped, lifted, photographed, magnified and again photographed and analysed and pinpointed with 12

points of matching with the accused's right thumb fingerprint, I have no reasonable doubt at all that the fingerprint found on the louver blade removed from the louver window of the two storey house and placed on the sofa inside that house, is the fingerprint of the accused. And I am satisfied beyond reasonable doubt the only way that that thumb print of the accused came to be on that blade is because he touched that blade, and that he touched it to remove it from the window in the process of breaking into the house for the purpose of stealing of properties inside the house.

[65] And in the circumstances of this case, namely, that the accused had possession of one of the items stolen from the house on the day following the theft and housebreaking, without any explanation as to how he came by it, I have to apply the presumption of the law that he stole it. In those circumstances, I exercise my discretion because there are only 12 (and not 16) matching points and admit the fingerprint evidence as evidence in this trial. I also exercise it because in the present case there is no dissimilar characteristics in the prints and also because the size of the print relied upon is only a fragment of print and not an entire print.

Conclusion

[66] Accordingly, having thus considered the evidence and the law as I have outlined above, I have come to the conclusion, and I am satisfied beyond reasonable doubt that the accused committed the two offences with which he is charged in this trial and I convict him of both offences.

NUKU'ALOFA: 8 July 2020.



A handwritten signature in blue ink, appearing to be "Niu J", is written over the seal and extends to the right.

Niu J
J U D G E