

Scan and file.

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 39 of 2020

BETWEEN : REX

- **Prosecution**

AND : TEVITA VALIKOULA

- **Accused**

BEFORE HON. JUSTICE NIU

Counsel : Ms. 'E. Lui for the Crown

Mr S. Fili for the accused

Trial : 22, 23 and 25 June 2020

Submissions : by Lui on 16 July 2020

by Fili on 6 August 2020

Hearing : 6 August 2020

Ruling : 18 August 2020

RULING (VERDICT)

Charge

[1] The accused was charged with receiving stolen property contrary to S.148(1) of the Criminal Offences Act, and the particulars of the offence stated that in or about the month of June 2019, at Ha'ateiho, he received from Sione Mafi Lolohea 11 fuatanga toka 10, 2 lokeha, 39 kie Tonga, 2

ta'ovala, 2 falafihu and 1 falavala altogether valued at \$19,400, believing those properties to have been stolen.

Amendment

- [2] After all the evidence in this trial were heard and in her written submissions which were filed on 16 July 2020, Mrs Lui asked to amend the charge by replacing the month "June" with the month "May" only in the Tongan version of the indictment, and by replacing the place "Ha'ateiho" in both versions with the place "Matangiake". The reason she asked for those amendments is because the evidence revealed that the month in which the alleged offence of receiving occurred was May, and not June, 2020, and that the place where the alleged receiving occurred was Matangiake, not Ha'ateiho. She relies upon the authority of the case of *R v Faletau* (AM4/2020), a copy of which judgement by the Lord Chief Justice on 12 May 2020 was attached to her submissions.
- [3] Mr. Fili produced his submissions in the morning of the hearing of the submissions on 6 August 2020 and opposed the amendment sought. He says that the trial is over and it is unfair to the accused because the amendment should have been sought before the trial commenced or at least during the trial, so that the accused is not surprised like this. He refers to clause 13 of the Constitution which provides that no one shall be tried on any charge but that which appears in the indictment for which he was brought to trial. He says that this amendment sought by the Crown is a major amendment and it deprives him of a fair trial.
- [4] It would appear that Mr. Fili was not aware of the **Faletau Case** to which Mrs Lui has referred and I urge him to make himself familiar with that case because it is a very useful guide to amendments of charges in summons in the Magistrate's Court and of indictments in the Supreme Court. In it, the Lord Chief Justice has made a consolidation of previous authorities and statement of principles on this issue out of some 7 cases from 2004 to

2014. The amendment sought is proper and is in accordance with those principles.

- [5] In respect of the only authority for the objection of the accused in the present case, namely, clause 13 of the Constitution, I would only repeat the words of clause 13 upon which the accused relies:

"No one shall be tried on any charge but that which appears in the indictment, summons or warrant and for which he was brought to trial:"

The critical word is "charge". The charge is the offence which is alleged that the accused has committed. That is what clause 13 requires must not be changed with another offence, except the offences specified in clause 13 itself.

- [6] Clause 13 does not prohibit amendment of particulars of the offence which is charged in an indictment or summons on which an accused is tried. The Courts in the 7 cases referred to by the Lord Chief Justice in the **Faletau Case** have confirmed that, and section 90 of the Magistrate's Court expressly provide for amendments to be made to particulars of charges contained in summons, which provisions do not conflict with clause 13, as follows:

"90. Variations and amendments in criminal cases

Where at the hearing of any criminal case the evidence discloses a distinct offence from that charged in the summons or warrant, the Magistrate shall dismiss the charge, but where there is merely a variance between the summons or warrant and the evidence as to the time or place at which the offence charged was committed or some other minor error or discrepancy in the summons or warrant which may be amended without injustice to the defendant, the Magistrate shall amend the charge and if it appears to him that the defendant has been misled by the charge as originally stated, he may adjourn the further hearing of the case to some future day."

(underlining added).

- [7] Does the Supreme Court not have such power which the Magistrate Court has because there is no similar provision contained in the Supreme Court Act giving the Supreme Court such power? Of course it does have such power. Section 5 of the Supreme Court Act provides that the Supreme Court "shall have power ... to exercise **all the powers** of the Magistrate's Court"
- [8] The question however is whether or not the amendment sought by the Crown in the present case shall cause an injustice to the accused, such that he would be prejudiced by the amendment, if allowed to be made.
- [9] Mr. Fili has stated and given no reason why the amendment sought would prejudice the fair trial of the accused which has so far been held. If there was any genuine reason why he would be so prejudiced, Mr. Fili ought to have said so and to have given the particulars of such prejudice. But he has not done so other than to say that this trial has been over, which I take to mean, the giving of evidence has been completed, because this trial is not yet over. An amendment maybe made even after judgement is given.
- [10] The amendment sought is simply in respect of the "time" and of the "place" of the offence, not the offence itself, and it was certainly not argued at any stage of this trial there were separate offences in May and in June or at Ha'ateiho and at Matangiake, so that the amendment would prejudice the accused with regard to the offence with which he has been tried in this trial.
- [11] I therefore do not see any reason why the amendment would prejudice or cause any injustice to the accused, and I have not been provided with any reason why an adjournment would be needed to be granted to the accused to alleviate any prejudice or injustice which might be caused to the accused by the amendment.
- [12] Accordingly, I grant leave and I order that the particulars of the charges are amended as the Crown has sought.

The evidence

- [13] **Sione Tonata Tupou**, also called Sione Fisi, aged 26 of Navutoka, made an agreement with the Crown that if he gave evidence in this trial for the Crown, he would not be prosecuted for any offence in connection with that evidence. He accordingly gave evidence as the fifth witness for the Crown in this trial.
- [14] He said that he used to live at the accused's tax allotment at Matangiake. That tax allotment is only about half a kilometer away from Matangiake. He said that one day in 2019, while he and another man, Sione Mafi Lolohea (Lolohea) who was also staying at the tax allotment, and the accused were talking at the tax allotment, Lolohea asked the accused, who was running and driving his own car as a taxi, if he knew the home of a prison warden at Ha'ateiho, and that the accused said no.
- [15] He said that one night all three of them went in the accused's taxi to Ha'ateiho and Lolohea told the accused to turn down a road there and as they drove along that road, Lolohea told the accused to stop by the village water pump. He said that Lolohea got off the car and that he and the accused then went to the Vaiola Hospital taxi stand, where the accused operated his taxi.
- [16] He said that at about 2:00 am that night, Lolohea telephoned the accused to pick him up. He said that he told the accused to drop him off at Veitongo (which is not far from Ha'ateiho) so that he could look for his telephone and then pick him up later. He said that he was dropped off at Veitongo and the accused left. He said that the accused did not come back for him and he walked back to the tax allotment at Matangiake. He said he got there at about 5:00 am. He said that the accused's son, Tupou, was sleeping in the tent there and he woke him up and that they talked and he went back to sleep.
- [17] He said that Lolohea then arrived. He had also walked. He said they talked until daylight when the accused arrived in his taxi car. Lolohea went and

opened the boot of the car and brought out a bundle wrapped in a sheet and opened it up in the tent. It was a bundle of Tongan mats and ta'ovala (Tongan koloa). He said that the accused remained in the car. He said that he and Lolohea folded up the items and packed them into black plastic bags (used for rubbish bags) and filled 2 bags.

- [18] He said that Lolohea then went and asked the accused to go with him and he took the two plastic bags of the items and put them on the back seat of the car and they left, and may be an hour later, they returned and Lolohea got out. He said that he then asked the accused if he could take him to his home at Navutoka and they left. He said that the two bags of the stuff were still on the back seat of the car.
- [19] He said that when they got to his home at Navutoka, he got off and the accused left with the stuff still in the plastic bags on the back seat of his car.
- [20] He said he could remember some of the Tongan stuff that they were folding up. He said that some items had the surname "Kailahi" written on them. He was shown photographs of the Tongan items which were later found by the police in the tent at the tax allotment, which photographs were exhibited no.6, and he recognised the ta'ovala in photographs no.3. He said that he remembered that one because it was violet in colour and that it was the only violet one and that it had a slight tear in it. He said he also remembered the one shown in photographs 9 and 10 because it had the name Kailahi written on that ta'ovala as shown in the photographs.
- [21] He said that at the time the police came to the tax allotment, the accused's car was not running (it had broken down) and that he, the witness was not there.
- [22] That evidence of this witness was not challenged by the accused, who represented himself at this trial, because he did not wish to ask him any question.

- [23] **Kaati Taufa**, police officer, 38 years of age of Tatakamotonga, senior constable with 19 years in the police force, of the Mu'a Police Station, said that on 23 May 2019, they received a complaint from a man named 'Aloha Likio and he spoke with the witness Sione Tonata Tupou of Navutoka, but also called Sione Fisi. As a result of the information he received, he obtained a search warrant to search both the town allotment and tax allotment of the accused at Matangiake. He said that there were two search parties, one searching the town allotment and the other one searching the tax allotment, at the same time. He said that he was in the party searching the tax allotment.
- [24] He said that they found Lolohea and Tupou Valikoula (accused's son) and his partner at the tax allotment and that they found the Tongan stuff in the tent there in the plastic bags and one mat spread under a manioke plant.
- [25] He said that they also found Tongan kava which were already cut up into small pieces for drying in the sun and that they were being spread over sheets of corrugated iron which were laid over saafa bush amongst the saafa bush. He said that they also found similar pieces of kava bundled in a plastic sheet which was under the shade of a fallen tree trunk. All these, together with the Tongan stuff were photographed and he identified them in those photographs (Exhibit 1).
- [26] He said the other search party then arrived with the accused, who had been found at his town allotment, that he charged and arrested him and his son Tupou, and Lolohea, with the theft of the kava and of the Tongan stuff.
- [27] The accused did not ask this witness any question.
- [28] **'Anau Ma'afu**, aged 34, of Tatakamotonga, of the Mu'a police station, said that she was in the search party that went to the tax allotment and that she recorded all the items found and taken by them from there. She was shown the items and she recognised them as the items that they had found and had taken from the tax allotment. They were:

1 konga kie Tonga.

1 konga kie Tonga with the name "Kailahi no. 7" written on it.

1 konga kie Tonga with the name "I. Kailahi no. 11" and also 'Ilaisaane, Pili, Ma'ufanga written on it with violet ink.

1 konga kie Tonga which was also called a ta'ovala kie.

1 falavala

1 violet coloured ta'ovala putu

She produced them as **Exhibit 5**.

[29] It was put to her by the accused that there was no name written on any of the items but she said that there were.

[30] **Sione Vaea**, aged 30, police officer in the Central Police Station at Nuku'alofa, said that Pesalili Kailahi, husband of 'Ilaisaane Kailahi had complained of house breaking at their dwelling house and of the theft of the Tongan stuff of his wife from it. He said that he received a call from the Mu'a police station and he went there and saw the Tongan stuff which were there and he brought them to the central police station. He said he later had another police officer, Kava, to take photographs of the stuff and he identified those photographs and produced them as **Exhibit 6**. In photograph no.4, there is shown a sheet of paper which he said that he had written and placed on one of the items before it was photographed. The note that he had written is as follows:

"CRA : 613/2019 : HOUSEBREAKING/THEFT (in Tongan)

Comp: 'ILAISAAANE KAILAHI (F) HA'ATEIHO

Acc : SIONE MAFI LOLOHEA (m) 34 YR OF POPUA

Date : 18.6.20.

03 : Konga kie.

01 : Ta'ovala kie.

01 ; Ta'ovala falavala.

01 : Ta'ovala 'uli'uli."

- [31] He was questioned by the accused when it was that he had the photographs taken and he said that he had them taken the week before the trial. It was put to him that the names were not written on the items before he had them and he answered that they were already there when he received them from the Mu'a Police Station, and that the same items were already photographed at his tax allotment when they were found there.
- [32] **Tupou Valikoula**, 29 years old, son of the accused, said that he was at the tax allotment with his partner, Sisi Va'enuku, and Lolohea, when the police came and searched. He said that the police found the Tongan stuff in the tent. He said he did not know whose they were because they had no such things. He said that he and Sisi only saw them there then although only him and his partner lived in the tent and that they had been away for 2 days and that the properties were only put there while they were away at Fahefa.
- [33] He said that when they returned to the tax allotment, there were Lolohea, Sione Fisi and the accused there and he saw the black plastic bags on the side inside the tent. He said he opened the bags and looked at the items in them and saw names written on some items. He was shown the photographs in Exhibit 1 and he identified the items shown in them as the items he saw in the bags. He was shown photo no.2 in Exhibit 6 and he identified the name written on the item as the name that he had seen.
- [34] He said that he became suspicious and he asked Lolohea and Sione Fisi and they told him that they brought them from Veitongo in the accused's taxi, that is, the 3 of them did.
- [35] **He was questioned by** the accused and he said it was true that he had never asked the accused whose the properties were. He also agreed that

the accused never told him that the properties were from a funeral of relatives of Lolohea. He was asked by the accused if he, the accused, had told him to see if the properties were stolen property and that if they were, to take them away or they would be caught with them, and he answered yes. He agreed that the accused would only come to bring the meat for their food and then he would leave to run his taxi.

[36] I asked him and he said that Lolohea was the one who had taken the mat out of the black bag and laid it under the manioke plant and who laid on it in the morning of the same day that the police came.

Defence evidence

[37] The accused chose not to give evidence and he called only one witness, Lolohea. **Sione Mafi Lolohea**, aged 34, of Popua, but presently serving a prison sentence, said that the accused was not involved in the theft of these Tongan stuff of 'Ilaisaane Kailahi. He has already pleaded guilty to the housebreaking of her dwelling house at Ha'ateiho and theft therefrom of the items in respect of which the accused is presently being tried of receiving, in the month of May 2019.

[38] He said that the accused only knew of these Tonga stuff when the police found them in his tax allotment, and that the accused kept telling the police that he did not know about them but they still kept all three of them, that is, the accused and his son, Tupou, and him, for one week and then released them.

[39] **In cross-examination**, he admitted that he had pleaded guilty to the theft of these items. He denied that the accused had dropped him off to do the stealing and then picked him up with the stolen items. He said that he had stated in a statement to the police that the accused did that but that statement was not true because he was not under oath when he made that statement.

- [40] He said that he had walked from Ha'ateiho to Matangiake carrying the stuff and that he was walking through bush tracks, and that he threw away some of the items which were worn out and torn and then carried the rest to the tax allotment.
- [41] He said that when he got there, there was no one there at all and that Sione Fisi was lying to say that he was there when he arrived.
- [42] He said that Sione Fisi was correct in saying he went in the car to take him to do the theft, but that it was only him and Sione Fisi who went and that the accused did not go with them. He denied that the accused was in the tax allotment and he did not know when the accused had said to his son Tupou, "Find out if that is stolen property and take it away or we would be caught with it".
- [43] I asked him and he said that he was lying on the mat under the manioke plant when the police arrived.

Submissions and consideration

- [44] Mr. Fili has submitted that the evidence of Lolohea is that the accused did not know of the theft of these items because there was only himself (Lolohea) and Sione Fisi who had dropped off Lolohea to steal them, and that the accused did not know that they were in his tax allotment. He says that the evidence of the witness Sione Fisi was a lie when he said that the accused was driving when they dropped Lolohea off at Ha'ateiho, because Sione Fisi did not remember the day or the month that that happened. He also says that Sione Fisi's evidence was a lie because the accused's car was not running then because it had broken down, and also because the items were such a lot that they could not have been wrapped in a sheet like he said that they were.
- [45] As to that last point, there is the evidence of Lolohea who said that he threw away many of the items which were worn out or torn on the way

whilst he was carrying them through the bush tracks from Ha'ateiho to Matangiake. But I do not believe Lolohea's evidence about that.

- [46] I prefer and I believe the evidence of Sione Fisi (Sione Tonata Tupou) instead. I accept that the accused did drive the motor vehicle and dropped Lolohea off at Ha'ateiho, near the place where the complainant's house was, and then went with Sione Fisi to the taxi stand at Vaiola Hospital and waited for Lolohea's call. Lolohea did call and they went to collect Lolohea but Sione Fisi wanted to be dropped off at Veitongo to look for his phone and the accused dropped him off at Veitongo, and I believe he then went and that he did pick up the items wrapped in a sheet and Lolohea put them in the boot of the car. They then went somewhere in the car and then Lolohea was then dropped off to walk to the tax allotment.
- [47] Lolohea got to the tax allotment and Sione Fisi was already there, having walked from Veitongo. They talked until daylight when the accused arrived in the car with the items still in the boot of the car. Lolohea went and got them and he and Sione Fisi then folded them up and put them into 2 large black plastic rubbish bags which he then put on the back seat of the car while the accused was still sitting in the car. Lolohea and the accused then left in the car and were gone for an hour or so before they returned. The two plastic bags of the items were still in the back seat of the car when the accused alone took Sione Fisi and left him at Sione Fisi's home at Navutoka.
- [48] When the accused left Navutoka he was alone in the car with the 2 plastic bags which contained all the items folded up by Lolohea and Sione Fisi.
- [49] I have no doubt at all that at that stage he had the possession of the items in the 2 bags, and that he knew that Lolohea had stolen them from a home at Ha'ateiho near the place he had dropped him off there and from which he picked him up again, because the items were wrapped in a sheet which he then put in the boot of his car. He also knew that the items were then folded by Lolohea and Sione Fisi and put into the 2 plastic bags and that they were then put on the back seat of his car.

[50] I have no doubt that those 2 plastic bags were then subsequently put into the tent at his tax allotment at Matangiake with the knowledge of the accused, where they were subsequently found by the police, because they could not have got there without his knowledge or consent.

[51] I have no reasonable doubt at all that, although he did not sleep in the tent or even eat at the plantation, he was in possession and control of the items in the two plastic bags in the tent when the police arrived and found them there.

Accomplice evidence be corroborated

[52] I must however consider the application of S.126 of the Evidence Act which provides as follows:

“126. An accused person shall not be convicted upon the testimony of an accomplice unless it is corroborated in some material particular by other evidence.”

[53] An accomplice is such a person as is described in S.8 of the Criminal Offences Act as an abettor, that is a person who directly or indirectly commands, incites, encourages or procures the commission of an offence by any other person, and every person who knowingly does any act for the purpose of facilitating the commission of an offence by any other person.

[54] I ask myself whether Sione Fisi (Sione Tonata Tupou) was an abettor of the theft of the items by Lolohea or of the receiving of the items by the accused. If I find that he is an abettor, then I cannot rely upon his evidence unless his evidence is corroborated in some material particular by other evidence.

[55] Sione Fisi said that he was with the accused in the car when Lolohea was dropped off at Ha'ateiho. He then had no further involvement until he helped Lolohea to fold up the stolen items and put them in 2 big black plastic bags which Lolohea then put on the back seat of the accused's car.

- [56] On the other hand, Lolohea said in his evidence that it was Sione Fisi, and not the accused, who had dropped him off at Ha'ateiho to do the stealing.
- [57] Although his part is small, he was involved because he accompanied the accused to drop off Lolohea to commit the theft and he helped Lolohea to fold up the items at the tax allotment after the theft was committed. He was thereby assisting in the disposal of the stolen items. I have to accept that he was at least encouraging Lolohea by accompanying him to steal the items, and then waiting with the accused for Lolohea's call and also helping to fold up and dispose of the stolen items. I therefore find that he is an accomplice of the accused and of Lolohea.
- [58] I therefore have to consider whether Sione Fisi's testimony is corroborated in some material particular by other evidence, in so far as the charge of receiving against the accused is concerned. The crux of that charge is that the accused had possession of the stolen items, and the essence of possession is knowledge by the accused that the items were in his possession and control. Is there evidence that the accused knew of the presence of the items in his tax allotment? That is, evidence of some witness who was not an accomplice.
- [59] The answer is yes. It is the evidence of the accused's son, Tupou, when he was cross-examined by the accused. He was asked "Did I not tell you to check if the property was stolen property and to have it removed or we would be caught with it?" and he replied, "yes".
- [60] That question and answer confirmed to me that the accused was aware of the presence of the stolen items in the tax allotment and that he had authority to direct what was to be done with it. It corroborates the evidence of Sione Fisi that the last he knew of the items was when they were on the back seat of the accused car when he left him, Sione Fisi, in Navutoka on the morning after the theft. The items ended up in the tax allotment, where the police found them. There is no doubt the accused brought them there. He was, I find, in possession and control of them.

S.40 presumption

[61] Section 40 of the Evidence Act provides as follows:

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

and Mrs Lui submits that that provision applies in the present case, and that the accused has failed to give any explanation, let alone, satisfactory explanation, as to the presence of the stolen properties in the tent. I agree with Mrs Lui. The evidence is that the accused had the possession of the properties at Navutoka when he dropped off Sione Fisi there, and the properties had only been stolen that morning and he has failed to give any explanation why they were in the tent on his tax allotment at Matangiake. I have to conclude, such as the provision requires, that he had received these items knowing that they have been stolen, as indeed they were, because Lolohea has pleaded guilty to having stolen them.

[62] I find that the accused knew that Lolohea had stolen them because he had dropped him off there to steal them and that he picked him up again from there with them and which were put into the boot of his car.

Conclusion

[63] Accordingly, I have come to the conclusion, and I am satisfied beyond reasonable doubt, that the accused, Tevita Valikoula, is guilty of the offence with which he has been charged, as amended, and I convict him of it.



Niu J
J U D G E

NUKU'ALOFA: 18 August 2020.