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MA'AKE KALI

VERDICT

BEFORE: LORD CHIEF JUSTICE WHITTEN
Appearances: Ms 'A. 'Aholelei for the Prosecution
The accused in person
Date of trial: 17, 18 August 2020
Date of verdict: 18 August 2020

1. At the conclusion of the evidence at the trial of this matter, I delivered the following ex tempore verdict.
2. In this matter, the Accused stands charged with one count of receiving stolen property contrary to s.148(1) of the *Criminal Offences Act*. The particulars of the charge are that on or about 2 January 2019, at Tongatapu, the Accused received a motor vehicle registration number C15244 from an unknown person believing it to have been stolen. The Crown identifies four elements to the charge, namely, that:
 - (a) the Accused;
 - (b) received the motor vehicle;
 - (c) from an unknown person; and
 - (d) believing it to have been stolen.
3. Section 148(1) provides that any person who receives any property knowing or believing it to have been stolen or obtained in any way whatsoever under

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circumstances which amount to a criminal offence is guilty of an offence and is liable to the same punishment as if he had committed theft. Sub-section (3) provides that a person may be indicted and convicted of receiving whether or not the principal offender (that is, the thief) has been convicted. Sub-section (5) provides, relevantly, that a person shall be treated as receiving property if he dishonestly undertakes or assists in its retention, removal, disposal or realization or if he arranges to do so.

4. The Crown also relies on s.40 of the *Evidence Act*, entitled "Possession of Stolen Property", which provides that 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 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.
5. The Crown called evidence from three witnesses.
6. Folau Mafi was described as the complainant in the case. He in fact works at the Sunshine Store for the Chinese owner of the car in question. Folau gave evidence that on 1 January 2019, as he went to the store, the car was not in its usual parking area. Security video footage of the night before showed a person getting into the car and driving off. His employer told him to go to the police station to lodge a complaint and provide any information required. Folau did so. He also gave evidence that about seven days later the car was returned to the store, he did not know who returned it. Photographs of the car were tendered and marked Exhibit P1. Folau confirmed the car depicted in the photographs as the stolen car in question. He also confirmed that generally the appearance of the car in the photographs was as he last saw it except that the number plate had not only been changed from the registered number for the car but the front and rear plates contained different numbers. Also, Folau said the four wheels had been changed and the ignition have been removed. There had been no attempt to fix it since the employer has since disposed of the car. The Accused did not cross-examine Folau.

7. The next witness was Barry Lauti, the investigating police officer. Officer Lauti gave evidence that on 2 January 2019 he received a complaint about the stolen vehicle. The report of the stolen vehicle was posted on the internet on a Facebook page. The officer gave evidence that he received information from Monika Kolofale saying that she could help with the investigation. He said that about four days later, on a Sunday evening, the Chinese owner contacted him and told him that Monika had returned the car. As a result of the information the officer received from Monika and one Simulata Tupou, he then arrested the Accused.
8. When he was arrested, the Accused declined to participate in a record of interview and said that he would give his evidence to the court. In answer to a question from the bench, Officer Lauti said that he examined the security video footage of the night on which the car was stolen but he was not able to identify the thief "100%" because the quality of the video was "alright", but it only showed the thief's back. Officer Lauti originally arrested the Accused for theft. He warned the Accused that he did not have to say anything. The Accused told him he did not steal the car. He told the officer that he was walking through a village when he saw the car there. When the officer asked the Accused whether he contacted the police about the car, the Accused said 'no' and that 'it was a gift from the heavens that he would use'. The Accused did not cross-examine Officer Lauti.
9. The third witness called by the Crown was Monika Kolofale. She gave evidence that she became aware of the stolen car when she was on the internet and she saw a post about it having been stolen and a reward being offered for its return. A short while after seeing the post, Monika said that the Accused arrived at her residence in the car in question to see Simulata Tupou ('Simi') who lived there. He went inside the house. She went in too to find the phone number on the Facebook post about the vehicle. She rang the number and a Chinese woman named Lina answered and gave her the number for the owner of the car. Monika said that the Chinese person who, as it turns out, was also her employer, came to her house and asked her for help to have the car returned. Monika said that she then contacted her girlfriend to tell the Accused to return the vehicle to the Chinese owner. The girlfriend told Monika that she was with

the Accused at Sopu and asked Monika to meet them at Sopu. Monika said that when she went back to the Sopu area with Simi and a person named Siteni, they saw the Accused and a girl in the car about to reverse out of the property. Monika stopped them and told them that the police and the owner were on their way. The Accused told Monika to mind her own business. Simi then went over to the car and asked the Accused to get out of the vehicle. The Accused got out and started talking to Simi. Monika then got in the car. She noticed the car had no key. She used plastic scissors to start it. Monika then drove the vehicle to Popua to the Chinese store. She told Lina that it was the vehicle that had been stolen. Lina thanked her and gave her the reward. The Accused did not cross-examine Monika.

10. The Crown opened its case by including Simi among its intended witnesses, who had been subpoenaed the week before the trial. He did not attend court during the trial. The prosecutor indicated that having reviewed the evidence to that point, and in light of the fact that Simi had not attended even though he had been subpoenaed, the Crown no longer intended to intend call him to give evidence.
11. Following the close of the Crown's case, and after being advised as to his rights and options, the Accused elected to give evidence. He explained how he came into possession of the vehicle. On that day, he went to a friend's house. On the way home, he had no ride, so he had to hitchhike back to town. Along the way, between two villages and a bush area, he noticed the car. He said the car was open, meaning that the doors were not locked, and as he was going to ask the driver to drop him into town. He noticed there was no driver in the car but the engine was still running. The Accused said he called out to see if the owner of the car was nearby, but nobody answered. Because of that, the engine being on and the inside of the car being muddy, he said he knew the car was stolen. The Accused therefore decided to take the car home and to take it to the police the next day.
12. On his way back, he said he turned into Simi and Monica's residence whom he regularly visited. During the ten minutes or so he was there, he told them that he found the car and that it was stolen. After talking with them, the Accused

returned to his home in the car. He said that about half an hour later, Simi called and told him that Monika had seen the car reported on Facebook as having been stolen. He said that Simi also told him not to return the car to the police but to bring it to Simi's place and that Monika would return it. The Accused then arranged to meet with Simi at Sopus. He did so and Monika took the car to the Chinese owner.

13. During cross-examination, the Accused agreed with Monika's evidence that when she told him to get out of the vehicle, he told her to mind her own business. When asked why he didn't take the car straight to the police, the Accused repeated that he intended to take it that day, but he went to Simi and Monika's residence, after which, he decided to go home to have a shower. He then recounted the call he received from Simi and Monika about taking the car to the Chinese owner and that there was a reward of \$500 to be had.
14. The Accused also agreed with Officer Lauti's evidence that when the officer asked the Accused whether he had contacted the police about the car, the Accused said that 'no' and that 'it was a gift from the heavens that he would use'.
15. I note at this point that the Accused did not say anything to Officer Lauti at the time of his intention to return the car to the police or its owner. In that regard, what the Accused told Officer Lauti was inconsistent with the evidence he gave during the trial. In explaining why he agreed with Simi and Monika to let her take the car back to the Chinese owner, and to collect the reward, the Accused explained that Simi said that the Accused's name would not be involved. He said he didn't want his name involved because the Chinese owner would have asked who took the vehicle and because he had previous convictions he didn't want his name disclosed.
16. In my opinion, that evidence by the Accused is fatal to his defence in this case. His defence was based on his intention to return the vehicle to the police. However, by saying in his evidence that he did not want his name involved in the return of the vehicle, the rhetorical question may then be asked: 'how then was he going to return it to the police if he did not want his name involved?'. If

anything, the converse may have been more plausible, that is, had the Accused had an honest intention in relation to the vehicle, including not having stolen it in the first place, which he maintained throughout, then there would have been no problem in returning the vehicle either to the police or to the owner and disclosing his own name because, if true, he would be returning the stolen car to the rightful owner.

17. The Accused's evidence therefore reveals a dishonest intention, in my view. I am satisfied that the only reason he agreed to hand the car over to Simi and Monika was because he believed that he would be receiving a share of the reward for the car. The Accused's dishonest motive was compounded when in further answer to the question why he didn't go with Monika to return the car, he said "they didn't want him to get in the car because they didn't want to give him the reward". That evidence conflicts with his earlier evidence about the agreement between the three to return the car for the reward and is belied by the fact that he then went on to give them the car.
18. Finally, when asked about whether he received any of the reward, the Accused gave evidence that when Monika returned, she told Simi that she did not receive any money from the Chinese owner. That was not put by the Accused to Monika, whose evidence I accept in full.
19. The Accused elected not to make any closing submissions. The Crown's closing submissions sought to demonstrate that the evidence fulfilled each of the elements of the charge.
20. Turning to the elements, there is no issue that the Accused knew or believed the car to have been stolen when he took possession of it. The only element which attracts analysis is that whether the Accused received the motor vehicle in the sense provided for by s.148 of the Act. As noted at the outset, subsection (5) refers to a person being treated as receiving property if he dishonestly undertakes or assists in its retention, removal, disposal or realization or if he arranges to do so.
21. Further s.40 of the *Evidence Act*, when applied here, has the effect of presuming the Accused to have received the vehicle unless he provides a

satisfactory explanation for how it came to his possession. In my opinion, the last limb of s.40, that is, the manner in which it came into possession ought be interpreted to mean an explanation for why the car here remained in the Accused's possession throughout the time he had it. As the Prosecutor stated in opening, the Accused bears the onus of satisfying the court of the satisfactory explanation required by s.40 on the balance of probabilities.

22. Having regard to those provisions, as I have explained them, and the evidence I have outlined including, in particular, Officer Lauti's evidence of his discussion with the Accused and the Accused's failure to mention any intention of returning the car to the police at the time and the Accused's own conflicting evidence about not wanting his name involved with the return of his vehicle., I am of the view that the Accused did not intend to return the vehicle until he heard about the reward for its return.
23. In those circumstances, I am not satisfied that the Accused has provided a satisfactory explanation about the manner in which the vehicle came into his possession and remained in his possession for the time that he had it. It follows that the presumption within s.40 of the *Evidence Act* that the Accused received the vehicle has not being rebutted. For those reasons, I am satisfied beyond reasonable doubt that the Crown has proven the elements of the charge.
24. Accordingly, on the single count of receiving stolen property, I find the Accused guilty.
25. The Accused is to remain in custody where he is presently serving a term of imprisonment for another offence. He will be sentenced for this matter on 18 September 2020 at 9 am.

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18 August 2020



A handwritten signature in blue ink, appearing to read "M.H. Whitten".

M.H. Whitten QC
LORD CHIEF JUSTICE