

REX

-v-

MA'AKE KALI

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN
Appearances: Ms L. Aonima for the Prosecution
The accused in person
Date of trial: 17, 18 August 2020
Date of verdict: 18 August 2020
Date of sentence: 18 September 2020

The offending

1. The Defendant pleaded not guilty to one count of receiving stolen property in contravention of s.148 of the *Criminal Offences Act*. After a two day trial, he was found guilty and convicted of the charge. He appears today for sentencing.
2. On or about 2 January 2019, the complainant noticed that his employer's vehicle, which was normally parked at the front of the store where he worked, was not in its usual parking space. He asked the owner about the vehicle's whereabouts. The owner confirmed that he had the keys, but he did not know why the car was not parked outside.
3. Security video footage from the night before showed a man, whose face was not able to be identified, breaking into the vehicle and driving off in it.
4. The owner of the vehicle posted notices on social media that the vehicle had been stolen and offered a reward for its return.

5. On about 4 January 2019, Monika Kolofale saw the defendant driving the vehicle, which she recognised from the social media notices. The defendant pulled up at her house to visit her boyfriend. Monika rang the number on the social media notice and spoke to the owner who was also Monika's employer. The owner went to Monika's house and asked for her help in returning the vehicle.
6. Monika made arrangements to meet the defendant with the vehicle. She told him that the police and the owner of the vehicle were on their way. The defendant told her to mind her own business. Monika's boyfriend asked the defendant to get out of the vehicle. He did and they spoke for a while. Monika then got in the car with another person. She noticed it had no key and that the ignition was damaged. She used plastic scissors to start the car and drove it to the owner's store.
7. From information provided by Monika and her boyfriend, police arrested the defendant. The defendant declined to participate in a record of interview and said he would give his evidence in court. However, after being warned, the defendant told the investigating officer that he did not steal the car but found it when he was walking outside a village. When the police officer asked the defendant whether he contacted police about the vehicle, the defendant said "No, it was a gift from the heavens that he would use".
8. During his evidence at trial, the defendant admitted that he knew the vehicle was stolen when he found it. He said that he intended to take it home in order to take it to police the next day. In light of the different explanation the defendant gave the investigating officer and the evidence of the other witnesses about the events which followed that next day, the defendant's account was not accepted by the court. In particular, the defendant gave evidence that when Monika was about to take the car to its owner, the defendant said he did not want to go with them because the owner would ask who took the vehicle and he did not want his name involved because of his previous convictions. That evidence conflicted with his earlier evidence that he intended to take the vehicle to the police, which, if genuine, would most likely have meant him having to give his name to them. The court also formed the view that the defendant did not have any intention of

returning the vehicle until he heard about the reward being offered which he said he agreed to share with Monika and her boyfriend.

Crown's submissions

9. The Crown's submissions revealed that the defendant has previous convictions. Relevantly:
 - (a) in 2001, he was sentenced to 3 months imprisonment for theft which was suspended for two years;
 - (b) in 2003, he was sentenced to 3 months imprisonment for escaping from prison;
 - (c) in 2007, he was sentenced to 3 years imprisonment for unlawful assembly and riot and 7 years for destruction of buildings;
 - (d) in 2009, he was sentenced to 6 months imprisonment for again escaping from prison;
 - (e) on 11 June 2019, he was sentenced to 2 years imprisonment for theft, the last nine months of which were suspended on conditions.
10. The Crown identifies the following aggravating features of the offending, namely, that:
 - (a) the defendant received the car from an unknown person believing it to have been stolen;
 - (b) he did not report the vehicle to the police and instead decided to use it before allegedly intending to return it; and
 - (c) the returned vehicle was in a damaged state.
11. The Crown submits that there are no mitigating factors.
12. Section 148 of the *Criminal Offences Act* provides that the penalty for receiving stolen property is the same as for theft. The Crown relies on s.145(b) which provides that where the value of the thing stolen exceeds \$10,000, the maximum

penalty is imprisonment for seven years. In this case, the summary of facts asserted that the estimated value of the vehicle was \$12,000.

13. The Crown provided the following comparable sentences:
 - (a) In *R v Siaki Tongatu'a* (CR 95 of 2018), the defendant pleaded guilty to receiving stolen property valued at \$2,180. He was sentenced to 2 years imprisonment with the final six months to be served cumulatively with a sentence of five years he was serving on a separate matter.
 - (b) In *Koni Kusitafu v R* (AC 11 of 2010), the appellant was convicted of housebreaking, theft and three counts of receiving goods totalling \$1,080. The Court of Appeal revised the sentence imposed below to two years for the housebreaking, four months for the theft and one year for each of the three counts of receiving. All sentences were to be served concurrently. As the appellant was a first offender, the last year of the sentence was suspended for three years.
14. The Crown submits, based on the continued assertion that the vehicle was worth approximately \$12,000, that an appropriate starting point should be two years imprisonment. It further submits that by reason of the defendant's previous criminal record, in particular, his most recent sentence imposed in 2019 for dishonesty offences, the fact that he did not cooperate with police and his lack of remorse, no part of the sentence to be imposed should be suspended.

Probation report

15. A letter from the probation office dated 11 September 2020 identified that in relation to the defendant's most recent sentence in CR 16 of 2019, the last nine months of the two-year sentence was suspended on conditions which included that the defendant be placed on probation and that, among other things, he was required to report to probation and live where directed by his probation officer. The probation office contacted the prison authority to make arrangements for an interview with the defendant for the purpose of preparing a presentence report in this matter in the expectation that the defendant would still be serving the balance of his term of one year and three months. However, the office was informed that

the defendant was discharged from prison on 27 August 2020 (nine days after the conclusion of his trial in this matter). Therefore, the probation office sought out and found the defendant and arranged for him to attend an interview on 11 September 2020 and to complete the other conditions of his previous sentence. However, the defendant did not attend that appointment and (as at 11 September 2020) he has not reported to, nor made any attempt to contact, the probation office.

16. Accordingly, the probation officer stated that he wished to report the defendant for breaching the conditions of his last sentence in CR 16 of 2019. For those reasons, a presentence report for this matter, in the usual form, has not been able to be prepared.
17. The probation officer also recorded his concern that in relation to the last sentence (by his calculation) the defendant only served 11 months in prison compared to the effective 15 months his sentence required. In that regard, a statement of criminal record from the Ministry of Police dated 9 September 2020, annexed to the Crown's submissions, records that sentence as commencing from the date of the defendant's remand in custody for that offence. That date is not stated.

Consideration

18. The defendant is 42 years of age.
19. He has spent almost half his life intermittently on the wrong side of the law. The instant offence is yet another entry in an unenviable criminal record including for offences of, and related to, dishonesty.
20. At trial, the prosecution did not adduce any evidence of value of the vehicle. Nor has it sought to do so for the purposes of this sentencing. Having seen the photographs of the vehicle tendered at trial depicting its quite poor condition and taking into account the evidence of some additional damage and alterations (e.g. wheels changed) to it during the period it was stolen, I doubt very much that the vehicle was worth anything like \$12,000 at the time it was stolen and later received by the defendant. Section 145(a) provides that if the value of the thing

stolen does not exceed \$10,000, the maximum penalty is three years imprisonment.

21. However, even in that context, having regard to the defendant's previous record for dishonesty and lack of remorse for the instant offending, I nonetheless agree with the Crown's submission that an appropriate sentence is two years imprisonment.
22. I am unable to identify any basis for any mitigatory reduction of that starting point.
23. It is clear that the previous prison sentences have had little effect in deterring the defendant from further criminal activity. His lack of remorse for the instant offending and reported breaches of the conditions of suspension attached to his most recent sentence reinforce the view that he is unlikely to be suitable for, or benefit from, further opportunities for rehabilitation which might otherwise be presented by suspension of any part of the sentence. I therefore decline to suspend any part of the sentence.
24. Further, s.24(3)(d) of the *Criminal Offences Act* provides that a breach of conditions imposed during a period of suspension of a sentence may, upon application, result in the rescission of suspension. By reason of the abovementioned probation officer's report on the failure of the defendant to abide by the conditions of his suspended sentence in proceeding CR 16 of 2019, the Crown has applied for rescission of that suspension. I am satisfied that it is appropriate to do so.

Result

25. The defendant is convicted of receiving stolen goods and sentenced to two years imprisonment.
26. The suspension order in CR 16 of 2019 is rescinded thereby requiring the defendant to serve the remaining nine months of that sentence.
27. I direct that the final 21 months of the two-year sentence for receiving in this proceeding be served cumulatively upon the expiration of the remaining nine months in CR 16 of 2019.

28. The net result is that the defendant is sentenced to imprisonment for a period of 30 months from the date hereof.

NUKU'ALOFA
18 September 2020



A handwritten signature in blue ink, appearing to read "M.H. Whitten", is written over the seal.

M.H. Whitten QC
LORD CHIEF JUSTICE