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

CR 140 of 2020

REX

-v-

Paea FAINGA'A

JUDGMENT AND RULING

BEFORE : THE HONOURABLE COOPER J
Counsel : Mrs. Lui for the Prosecution
The defendant in person
Date of Judgment : 2 August 2021

The Indictment

1. Count 1 : Serious House Breaking contrary to section 173(1)(b) and (5) of the Criminal Offences Act.
2. Count 2 : Theft contrary to section 143(b) and 145(b) of the Criminal Offences Act.

Siaosi Vete

Sworn 1143 hrs.

3. He resides at 'Anana.
4. He gave evidence that his white Mitsubishi motor vehicle was faulty and that the defendant offered to fix it for him. He thought this took place about this time of year in 2019.
5. Albeit it is his car, he could not remember the whole number plate, but he did recall it had C2261 in it.

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6. He stated he and the defendant do not know each other well but are just acquainted. They have friends in common.
7. It had been a Sunday and the defendant came over to where he lived.
8. Mr Fainga'a was going to use my Vete's tools. During the course of making these repairs the defendant drank cola and bourbon mix, Mr. Fainga'a had bought these in a store in Fasi.
9. Mr. Fainga'a had said he would continue to fix the car and he, Mr. Vete, went back in doors. This was some time early morning after mid night. At that time the keys were in Mr. Vete's trouser pockets and he hung those trousers up in his room for the night.
10. He woke up at 1000 hrs. the next day and keys, car and Mr. Fainga'a were all gone.
11. He had not given the defendant permission to take the keys or the car.
12. The vehicle was restored to him about a month later by the police.

Cross Examination.

- The two of them are not friends, but they had known each other for about two years.
- Mr. Vete said he was not sure why he had allowed the defendant to fix the car. He had not told Mr. Fainga'a the car needed fixing.
- Nor was he sure how Mr. Fainga'a knew that it needed fixing in the first place.
- Simply by looking at a car one could not tell it needed repairs to its breaks.
- He agreed Mr. Fainga'a had fixed it though.
- There was no arrangement as to payment for this and they had not got round to negotiating that side of things.
- He denied that he had paid Mr. Fainga'a in methamphetamine.
- He agreed that the only way to test the breaks would be to drive the vehicle.
- There was no arrangement for the defendant to take the car away to fix.

- After the car went missing he had tried to find the defendant at an address he had dropped him at one before, but he was not there. He agreed he knew friends of the defendant and so where to find him eventually.
- Regarding his failure to attend court this morning he explained he had gone to the wrong court and that he did not know he was to attend at the Supreme Court in Nuku'alofa

Re-examination

- The car had its breaks tested that Sunday.
- The defendant had bought the alcoholic drinks that same afternoon about 1600 hrs, that was after the vehicle was fixed.

Lupe'eva Tausinga

13. She is a serving Police Officer.
14. Following information received, on 16th November 2019 she attended Tu'atakilangi's residence and recovered the car in question, index C22671.
15. None of this was disputed by the defendant.

Cross-examination

- She recalled that Mr. Fainga'a wanted police to get some stuff out of the car, but she did not know what that was.

'Alifeleti Latuselu

16. He explained that he lived at the residence of Sione Filipe on the Hihifo road. There was a time in 2019, around the end of the year when a car had turned into the drive of where he resided. It had then died on the drive and a skinny male had left with the tool box.
17. He made left the car fairly swiftly and hurried away.
18. He did not identify who the person who left the car was or the make of the car.

19. He thought this had been about 1100 hrs that day and the police took the car away, towing it about two hours later.

No cross examination.

20. Close prosecution case, submission no case to answer.
21. In relation to the submissions raised on behalf of Mr. Fainga'a, the prosecution argued that it was conceivable there was no talk of payment, other evidence supported this, for example the complainant taking the keys at the end of the evening and the defendant staying on to fix the car.
22. Moving on, that the defendant stayed on at the complainant's home address was at the defendant's insistence.
23. Of the last point, the Crown accepted that Mr. Vete's account of why he had not attended court as required this morning was not believable, but it was a tangential issue.

Ruling :

24. The correct approach is as per R. v. Galbraith, 73 Cr.App.R. 124, CA : could a reasonable jury, properly direct convict on the evidence before it ?
25. On behalf of Mr. Fainga'a the second limb of R v Galbraith is relied upon; "...The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence."
26. It is inherently unlikely that there would have been no talk of payment.
27. In evidence in chief, Mr. Vete stated the car was still being repaired beyond midnight, in re-examination, that repairs had been completed before 1600 hrs that Sunday.
28. Mr. Vete stated he had not told Mr. Fainga'a that the car needed repairing, but that some how Mr. Fainga'a had found out about, how Mr. Vete could not explain, though he accepted that one could not tell a car needed its breaks repaired simply by looking at it.
29. His evidence that he could not explain why he had allowed Mr. Fainga'a to repair his car, inherently made no sense.

30. These last two points sat very uncomfortably with the claim Mr. Vete made that he was only associates with Mr. Fainga'a and they were not friends.
31. Mr. Vete's explanation as to why he had not attended court, that he had the wrong address to go to, was totally unbelievable.
32. This case turns on the credibility of Mr. Vete. The last point may be a tangential issue, but credibility is always central to a witnesses' evidence and here that witness's evidence the Crown are totally reliant upon.
33. I am very concerned about Mr. Vete's evidence.
34. He has given every appearance that he wanted to distance himself from knowing this defendant; when he plainly must have; the arrangements for fixing the car, stating he did not even know why he had let the defendant repair it, or how Mr. Fainga'a knew that this repair was needed. Then, his refusal to attend court, pretending that he was on his way this morning, yet having to be arrested on a warrant I issued. Then the claim that he was given the wrong address.
35. In the round I find him a totally unconvincing witness and in my view it would be dangerous for his evidence to be relied upon.
36. Accordingly and in line with *R v Galbraith*, I find that sole evidence that I have to rely upon so inherently weak that the case against Mr. Fainga'a should not be allowed to proceed.
37. Accordingly I conclude that in respect of both counts, their being dependant on the credibility of Mr. Vete's evidence, there is no case to answer and both counts are dismissed and Mr. Fainga'a is acquitted on both counts.

NUKU'ALOFA
2 August 2021

