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SIU 'I VAHANOA TU'IPULOTU

VERDICT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mrs S. Aleamotu'a for the Prosecution
The Accused in person
Trial: 11, 12 October 2021
Verdict: 13 October 2021

Charges

1. The accused stands charged with one count of serious housebreaking contrary to s 173(1)(b) and (5) of the *Criminal Offences Act* and one count of robbery contrary to s 154(1) of the said Act.
2. Section 173 provides, relevantly:

173 House-breaking

(1) A person is guilty of an offence under this section if —

...

(b) having entered any building or part of a building as a trespasser he committed or attempted to commit any crime in the building or that part of it.

3. Section 154(1) provides, relevantly:

154 Robbery

(1) Robbery is the taking of anything capable of being stolen by using violence or threats of injury to the owner or person in lawful possession of the thing taken or to any property of his so as to put him in fear and thereby overcome his opposition to the taking.

4. The particulars of the alleged serious housebreaking are that on or about 18 December 2019, at Ma'ufanga, the accused entered the store of Xiu Ming Zhou ("**the complainant**"), as a trespasser, and committed a crime therein. During closing submissions, the prosecutor sought leave to amend the particulars to count 2 to align with the evidence. Leave was granted. Accordingly, by those amended particulars, the Prosecution alleged that on the said date and place, the

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accused took a can of corned beef, a packet of Milo, a mobile phone and a drivers licence, from the lawful possession of the complainant, by using violence when he repeatedly punched the complainant, which put him in fear and thereby overcame his opposition to the taking.

Procedural history

5. The accused was not legally represented at the trial. Towards the conclusion of the trial, he said that he needed a lawyer. To understand the significance of that and my decision to continue on with closing submissions and this verdict, it is necessary to recount some of the somewhat unusual procedural history of the matter.
6. On 26 November 2020, when the matter was first listed before this court for arraignment, the accused failed to appear and a warrant for his arrest was issued. On 29 January 2021, the matter was mentioned again but the accused had not then been arrested.
7. On 26 February 2021, the accused appeared before the court and explained that he was unable to appear on the first occasion because he was then an inpatient of the psychiatric ward at the Vaiola hospital. When asked why he was there, the accused said that it was because "they think I'm crazy". He said he had completed his treatment and had been released on 12 December 2020, with medication. His next appointment with Dr Puloka was the following month. In the circumstances, I determined that, in accordance with s.18 of the *Criminal Offences Act*, a mental health assessment was required before the accused was arraigned to ascertain whether he was mentally fit to plead to the charges, and if so, whether he was legally insane at the time of the commission of the alleged offences. An order for an assessment was made pursuant to s 63 of the *Mental Health Act*, the matter was adjourned to 9 April 2021 and the accused was granted bail to appear again on that date.
8. On 25 March 2021, Dr Puloka, Psychiatric Specialist, reported that the accused was fit to plead, and that on the date of the alleged offending, he was unlikely to have been legally insane.
9. On 9 April 2021, the accused was arraigned and pleaded not guilty to both counts. When asked for his election as to the mode of his trial, the accused said that he was looking for a lawyer. Accordingly, a default order was made for the trial to be conducted before a judge and jury unless, prior to trial, and following any legal advice the accused might receive, an application was made pursuant to s.14(1A) of the *Supreme Court Act* for the matter to be heard by a judge alone. Trial dates were set. Bail on the instant proceeding was extended, although, by that time,

the accused had been remanded in custody by the Magistrates Court on a different matter.

10. On 15 April 2021, the Court was informed that the accused was then serving a two-week sentence for being drunk in a public place and that the Magistrates Court originally granted him bail on the instant charges conditional upon him providing sureties, which he failed to do. As I had previously granted the accused bail without sureties, I confirmed that once he completed his sentence, he was to be released on bail in respect of this proceeding, to appear again at his trial.
11. As the trial had been listed to be conducted before a judge and jury, a pre-trial conference was conducted on 5 October 2021. On that day, the accused, who again appeared without legal representation, changed his election to trial by judge alone. Otherwise, both the prosecutor and the accused confirmed that the trial was ready to proceed and that the estimated duration of three days remained accurate. The accused did not make any mention of still looking for a lawyer. He did confirm that he had received a copy of a document issued by the court containing information on the criminal trial process for unrepresented defendants and that he had familiarised himself with its contents.
12. And so, the trial commenced on 11 October 2021. Again, the accused did not make any mention of not being in a position to proceed because he required legal representation.

Elements

13. In her opening submissions, the prosecutor identified that in respect of the two charges, the Crown was required to prove beyond reasonable doubt the following elements:
 - (a) on the serious housebreaking - that on 18 December 2019, the accused, entered the complainant's store as a trespasser, and committed a crime therein; and
 - (b) on the robbery charge - that on 18 December 2019, the accused, took items from the complainant, by using violence or so as to put the complainant in fear thereby overcoming his opposition to the taking.

Prosecution evidence

14. A number of photographs (exhibit P1) were tendered in opening. Most were tendered by consent although the accused objected to a number of photographs which depicted a mobile phone and a drivers licence belonging to the complainant, which he said he had never seen before. Therefore, those photographs were then tendered for identification only.
15. The Prosecution called three witnesses.

Xiu Ming Zhou

16. The complainant, Xiu Ming Zhou, gave the following evidence. At the relevant time, he owned a store in Ma'ufanga. On the day in question (which he described as being about two years ago), he went to get new stock for his store from a nearby bakery. He locked the front door of his store but not the back door because he knew he would only be away for a few minutes. When he returned, he opened the front door and entered the store. He noticed the accused standing in an area near the back door. He knew it was the accused because the accused had been a customer on a number of previous occasions and they had spoken to each other. He also identified the accused in court. When he saw the accused in his store, he noticed that the accused was taking corned beef cans and other items from the shelves. The complainant was surprised and yelled to the accused words to the effect "*what are you doing, get out*". The accused did not respond. The complainant tried to chase the accused away but the accused turned and came towards him. He could smell alcohol on the accused and described him as intoxicated. The complainant also recalled that when he left the store earlier that day, he noticed the accused was drinking with another person out the front. As the accused approached the complainant, the complainant tried to push the accused away when the accused punched the complainant on his face, around his eye area. The complainant fell to the floor and the accused continued punching him. The complainant tried to defend himself whilst being beaten on the floor. He estimated that the accused landed six or seven punches. Once the accused stopped punching the complainant and the complainant was left lying on the floor, he saw the accused go back over to the shelves and take more goods and the complainant's mobile phone. After the accused left the store, the complainant said he felt frustrated because he couldn't really do anything. So, he locked the doors and telephoned his cousin to explain what happened. He then got into his vehicle and went to the premises of other Chinese persons who had been living in Tonga longer. When he arrived at their place, he used their phone to contact the police.
17. The complainant confirmed a number of photographs in exhibit P1 showing injuries to his face as a result of the accused's assault on him. The complainant also confirmed that there was a security camera operating that day with an internal view of the front door area to the shop. Video footage from the recordings of the day in question were then played (exhibit P2). The first depicted the complainant, with injuries to his face, shortly after the accused left the store. The second showed the accused in the front of the store. It showed him walking further into the shop, and therefore out of camera view for about 10 seconds, and then returning to the front and he left. At that time, the complainant said he was afraid and had locked himself in a room at the back of the store. The security

footage then showed the accused return through the front door of the store and take something from a shelf which the complainant suggested was likely to have been a can of fish.

18. After the complainant reported the matter to police, he was taken for medical treatment. Apart from the reference to cans of corned beef and his mobile phone (which contained his driver's licence), the complainant was not sure about what other goods had been taken from his store. He did confirm that his mobile phone and licence were later returned to him by police.
19. During cross-examination, the accused put to the complainant that the altercation in the shop occurred because the complainant attacked the accused with a large knife. The complainant agreed that when he first saw the accused standing in his store, he grabbed a knife from the kitchen area but only used it to wave at the accused when telling him to get out of the store. The accused then volunteered that, at the time, he was drunk and had been smoking cannabis, and that when he saw the complainant coming at him with a knife, he was very afraid. The complainant denied that he ever approached the accused with the knife. The accused then put to the complainant that he threatened to kill the accused with the knife if he did not leave. Again, the complainant denied that. The accused then put that because he was frightened, he slapped the complainant's face causing the complainant to fall backwards but that the accused had done so in self-defence. The complainant also denied that.
20. The complainant then confirmed his earlier evidence and that he told the accused on numerous occasions to leave the store. The only approach by the complainant was to try and push the accused out of the store which was when the accused started punching the complainant. He added that when they struggled, the knife fell from his hand. At no time did the complainant try to strike the accused with the knife. He said he only used the knife to scare the accused away because it was his property and he had a right to defend it.

Semisi Taotala

21. The next witness was Semisi Taotala. He has known the accused for about 10 years. He gave evidence that during the afternoon of 18 December 2019, he and others were celebrating ("a drink up") at a residence some 20 to 30 metres from his house which is directly opposite the complainant's store. After a while, the accused showed up with goods including a three pound can of corned beef and a tray of "superhero" drinks. The accused also had a mobile phone which was given to Semisi and a bluetooth speaker which was given to another friend. Semisi said he did not know why the accused had given them the goods. Then the accused turned around and ran while yelling "be silent until you die". Semisi noticed that the mobile phone had a driver's licence inside the cover. He

recognised the person on the licence as the complainant. So he took the mobile phone to his house to be returned to the complainant. The next day, Semisi was "passed out drunk" when police woke him and took him to the station. He told them what had happened and the complainant's mobile phone and driver's licence were recovered.

22. Semisi was not cross-examined.

Sgt Bray Lauti

23. The final Crown witness was Sgt Bray Lauti. At the relevant time, he was a member of the police investigations division. He was not the officer in charge in this case but he was the countersigning officer during the accused's record of interview (exhibit P3). He explained that the accused was arrested on 18 December 2019 and was taken before Principal Magistrate Mafi who remanded the accused in custody until he was interviewed. On several occasions during his interview, on 20 December 2019, the accused answered to effect that he could not recall anything that occurred on the day because he was drunk. Police told him that they had a statement from Semisi in relation to the accused coming over with the can of corned beef and a mobile phone. The accused said that was "false". When he was again asked later during the interview about Semisi's statement that the accused had given him the mobile phone, the accused repeated his earlier answers that he could not remember anything. The officer confirmed that the accused was not affected by alcohol or any other substance when he was interviewed, and that if he was, they would not have proceeded with the interview.

24. During cross-examination, the accused put to the officer that he had told the accused that after the record of interview he would be taken before a magistrate and then released. On that basis, the accused said that he lied to the police during his interview. When he was asked to clarify which of his answers, if any, he gave during his interview were untrue, the accused was unable to elaborate.

Accused

25. Following the close of the Crown's case, the accused was informed (as had already been explained in the information document for self-represented defendants) that:

- (a) he was under no obligation to say anything; or
- (b) he could give an unsworn statement from the bar table, on which he would not be cross-examined but which might carry less weight than sworn testimony; or
- (c) he could give sworn evidence, on which might be cross-examined; and/or

- (d) he could call evidence from others.
26. The accused elected to give an unsworn statement from the bar table. Unfortunately, nothing he then said was relevant to the charges or the evidence before the court. He concluded by asking the court to forgive him and to give him a “chance to take courses”. When asked whether that amounted to an admission to the charges, he then said he wanted a lawyer.
27. The accused said that he had not secured legal representation because he had been in and out of prison. Given that the accused:
- (a) had almost a year (during which the matter had been before this Court) to arrange a lawyer;
 - (b) had done nothing in that time (when he was not in prison) to secure one during that period;
 - (c) had been given written information about the trial process which he said he had read;
 - (d) was clearly capable of cross-examining the witnesses he chose to question during the trial; and
 - (e) was given full opportunity to be heard and had elected to make an unsworn statement from the bar table,

I determined to proceed with closing submissions.

Submissions

28. The prosecutor provided helpful written submissions in which she reiterated, in summary, the evidence of the Crown witnesses and the elements of the Crown's case to be proved. She also made submissions on the issue of self-defence which appeared to have been raised by the accused during the course of his cross-examination of the complainant.
29. The prosecutor referred to the Court of Appeal decision of *Azuelo* [2009] TOCA 8 and a more recent discussion of the relevant principles on self-defence in *Fusikata* [2021] TOSC 101. In short, the prosecutor submitted that there was no basis for self-defence in this case because:
- (a) the force used by the accused was not necessary;
 - (b) nor did he hold a genuine or honest belief that warranted that force; and
 - (c) he was an intruder, who entered the complainant's store, assaulted him and stole from him.

30. Even though the accused had only given an unsworn statement from the bar table, the prosecutor submitted that his "evidence" was inconsistent and unreliable because the accused:
- (a) put factual propositions to Crown witnesses during the trial, especially the complainant, which involved a detailed account of what he considered happened on the day, yet when he was questioned two days after the offending, the accused did not once mention to police any of those details, including, importantly, the knife;
 - (b) maintained during his record of interview that he was too drunk to remember anything; and
 - (c) denied any knowledge of the complainant's mobile phone or that he had given it to Semisi, and yet when Semisi gave that evidence in court, the accused did not cross-examine him on that.
31. As such, the prosecutor submitted that the statements made by the accused both during cross-examination and at the conclusion of the trial smacked of recent invention and reflected a consciousness of guilt. On the other hand, she submitted that the court should accept the evidence of the Crown witnesses as being reliable and that, therefore, the Crown had proven the charges beyond reasonable doubt.
32. The accused was then asked whether he had anything further he wished to say. Unlike his unsworn statement from the bar table the day before, the accused then stated, in summary, that:
- (a) on the day in question, he was at a party;
 - (b) his uncle gave him \$5 to give to the complainant and to get cigarettes on the uncle's account with the complainant;
 - (c) (again) he was 'too drunk' and 'high' from smoking cannabis;
 - (d) when he got to the store, the complainant told him he was going to get bread and that he would serve the accused when he returned;
 - (e) the complainant 'lied' in his evidence because it was the complainant who forgot to close the shop doors;
 - (f) the complainant had a knife which he used to attack and threatened to kill the accused;
 - (g) the accused turned around and grabbed the complainant and placed him up against the wall, took the knife off him and threw the complainant on the ground;

- (h) (later) he grabbed the knife when the complainant was on the ground and threw it away;
 - (i) he then went outside;
 - (j) as he was exiting the store, he looked to his left and saw corned beef which he took; and to his right, he saw a tray of drinks, which he also took;
 - (k) outside the store, he saw a police officer's father who told him to "*shop as much as you can*";
 - (l) he then ran off and, at some point, fell over;
 - (m) others searched him and took the complainant's phone from him; and
 - (n) he was then told that the police were on their way and so he ran home.
33. At that point, I asked the accused why he had not given that account, which clearly amounted to a confession to both charges, when he was first interviewed by police and certainly much earlier in this proceeding. It was also very apparent that the accused had lied to police when he was interviewed and told them he could not remember anything about the matter. When asked what, if anything, had occurred in terms of his memory between when he was interviewed by police and giving the detailed accounts he had during this trial (i.e. almost two years later), the accused was unable to answer. He then repeated his earlier request for a lawyer.

Consideration

34. I accept the evidence of the Crown's witnesses without reservation. It is equally apparent that the accused did not seriously challenge any of their evidence. His unsworn statements at the end of the trial also amounted to an admission of the relevant facts for each charge. To the extent that any account given by the accused differed from that given by the complainant and the other Crown witnesses, I prefer the latter. The accused's statements (that is, what he put to the complainant and what he stated in closing submissions) were internally inconsistent and wholly inconsistent with what he told the police during his record of interview. He was not truthful with them nor has he been entirely or timeously truthful with this court.
35. As the prosecutor correctly identified, the only potential issue the accused raised was one of self-defence, that is, that he struck the complainant in order to defend himself from a possible attack by the complainant holding the knife.
36. Further to the prosecutor's submissions on this point, I consider that self-defence does not arise in this case for the following reasons.

37. Firstly, the accused was not charged with any assault or other offence against the person to which a defence of self-defence could apply. However, as threatened or actual violence is an element of the robbery charge, further consideration is required.
38. Secondly, the accused entered the complainant's shop at a time when it would have appeared to any reasonable person to have been closed, and therefore, without the owner's permission or acquiescence. He did so by entering through an unlocked backdoor and was found taking goods from the shelves. That is, he evinced an intention to steal. He was then repeatedly asked to leave the store, which he refused to do, and thereby became a trespasser.
39. Thirdly, in those circumstances, the complainant was legally entitled to use reasonable and necessary force to defend himself and/or his property. At common law, a person may use reasonable force in defence of his or her property.¹ No more force may be used than is necessary for the purpose.² The right to defend property extends to minor trespasses.³ Further, in *Azuelo v Rex* [2009] TOCA 8 observed:

“[16] It was suggested in argument that the use of a pocket knife by the Appellant against a man who did not have a deadly weapon must have been excessive. But fists may be lethal, depending on the weight and strength behind them, and the principles we have referred to do not admit any such hard-and-fast rule...”

40. Here, the complainant was a man of short stature and slight build. Although the accused was not much taller, he is of a stronger build and, in his drunk and drugged state, would likely have presented to the complainant as a capable threat.
41. Fourthly, there was no evidence that the complainant used or threatened to use the knife on the accused. He gestured with it as he was telling the accused to leave the store as a means of trying to scare the accused away. At that point, the two were some 2 to 3 metres apart. I also accept that the only physical contact applied by the complainant was when he tried to push the accused out of the store, which, in my view, was reasonable force he was entitled to apply. Thereafter, the accused attacked him in the manner described, including multiple punches to the face, which continued after the complainant had fallen to the ground. The knife played no active part in the assault.

¹ *Weaver v Bush* (1798) 101 ER 1276; *Scott v Matthew Brown & Co Ltd* (1884) 51 LT 746; 1 TLR 54, Ch; *Harrison v Duke of Rutland* [1891-94] All ER Rep 514, CA; *Robertson v Balmain New Ferry Co Ltd* [1910] AC 295; *R v Hussey* (1924) 18 Cr App R 160, CCA.

² *R v Barrett* (1980) 72 Cr App R 212, CA.

³ *R v Richards* [1985] Crim LR 368.

42. Fifthly, I am not satisfied on the evidence that the accused applied force to the complainant as a means of defending himself from any perceived threat of attack by the complainant with the knife. The accused had already demonstrated an intention to steal from the store. His refusal to leave when challenged by the complainant confirmed that intention. The ensuing assault by the accused was therefore solely for the purpose of overcoming the complainant so that the accused could continue stealing from the store, which he did.

Result

43. For those reasons, I am satisfied beyond reasonable doubt that the prosecution have proven each of the elements of both charges and I find the accused guilty of serious housebreaking and robbery.

NUKU'ALOFA
13 October 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE