

IN THE SUPREME COURT OF TONGA  
CRIMINAL JURISDICTION  
PANGAI, HA'APAI REGISTRY

NO. CR.07/2002

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BETWEEN : REX - Prosecution

A N D : PELENAISE FEHOKO LATAI - Accused

BEFORE THE HON CHIEF JUSTICE WARD

COUNSEL : Mr S. Sisifa for prosecution  
Mr S. Tu'utafaiva for the accused

Date of Hearing : 18, 19 & 20 March, 2002  
Date of Ruling : 20 March, 2002.

**Ruling**

The accused is charged with housebreaking and theft on a date in August 2001. The prosecution case is that she broke into the house of her neighbour in Faleloa and took a fine mat that had been stored under the mattress in one of the bedrooms.

The evidence is that the loser did some work on the mat in late July and then folded it and put it under the mattress in the second week of August. In the second week in September she was asked about the mat and only then, discovered it was missing.

There is no evidence of when, in that period, the mat was taken. When it was discovered to be missing, instead of going to the police, the loser sent someone to Tongatapu to consult with a card reader. That person told them it had been stolen by one of the girls next door but, as they would deny it, the loser was to go and ask a young girl who had been there at the time. There was nothing remarkable about the card teller's prediction as it became clear during the evidence that she had been told of the suspicions of the loser. However, she and her husband went to the little girl who was seven or eight at the time and were told it was the accused. There was, at that time, nothing else to link the accused with the loss of the mat but the loser and her husband, a preacher in the church, proceeded on the basis that the card teller was correct.

When the accused denied the offence, the loser reported it to the police and it is clear that they too attached some weight to the card teller's predictions. The girl, now eight years old, was called by the prosecution at the trial but she refused to answers any questions.

Following the complaint, the police arrested the accused and took her to the police station where she admitted the offence in an interview under caution. There was a trial on the voir dire and I ruled the interviews inadmissible under section 23 of the Evidence Act.

However, immediately after the interview, the accused was taken back to the loser's house and asked to demonstrate what she had done. The prosecution case is that she went to the back door, told the officers that she had had to unbolt it, went into the house and pointed to the bedroom and then to the bed under which it had been stored.

She then apologised to the loser.

That is the total evidence against the accused and Mr Tu'utafaiva for the accused submits no case to answer.

Clearly there is some evidence upon which a jury properly directed might find the accused guilty. However, I have ruled in previous cases that where, as here, there is no jury and so the judge is the judge both of fact and law, the court must look beyond the usual rule. If at the end of the prosecution case, the judge feels that, even accepting the evidence as it stands, he could not be satisfied to the required standard in a criminal trial that he would ever convict, then he should not put the accused to his defence.

That is effectively what counsel for the defence is asking the court to do. What little evidence there is, is not only likely to have been induced by the same factors as induced the accused to give the police the answers she did in her interview but the accounts of events at the house are so varied and even contradictory that the court could never be satisfied beyond reasonable doubt which version was true.

Although the trial within a trial was directed on the interview only, Mr Tu'utafaiva is entitled to ask the court to consider the same factors in relation to the demonstration given by the accused.

The prosecution points out that the accused was cautioned before she did the demonstration but I must take notice of the fact that prior to the interview she had been cautioned and yet her denials were ignored. As the officer told the court, his intention was to keep her in custody until she admitted the offence.

There was some doubt as to when she was first told that she would be released after the demonstration. The officer in charge of the investigation, PC Latu, initially said she was told before she left the police station and it was made clear she would be released whether she gave a demonstration or not. At the end of his cross-examination, he agreed that he only told her



she was to be released after the demonstration had taken place. The burden is on the prosecution and I take it in the accused's favour that she was not told until after the demonstration. In those circumstances, I consider that the affect of the time she had been in custody may still have affected her will so she believed that, unless she gave a demonstration, she would not be released. It should be borne in mind that the demonstration was taken to be a correct account of what had happened when the mat was taken but there was no other evidence whatsoever that the door by which she entered was the door by which the thief had entered.

That would be sufficient for me to stop the case but, had I not found in that way, I would have stopped it on the basis that the accounts from the prosecution witnesses of what she actually did during the demonstration were so conflicting that the court could not accept the prosecution had proved that she did give a demonstration as either of the witnesses stated.

There was no dispute that the loser and the accused used to weave together in the past and they had done so in each other's houses. There can be no doubt that the accused would have known perfectly well where the loser kept her mats. If she wanted to fall in with an admission that she had taken them, she would have been able to point out the place without difficulty.

The evidence was that the door by which she entered at the demonstration had a bolt on the outside. The loser had told the court that it was very rarely bolted. Her husband stated that it was often bolted at night but rarely otherwise but that, on the day of the theft, it had been. That was a remarkable statement in a case where the precise time of the breaking could not be fixed closer than a period of four weeks. It gives little probative effect to the suggestion she said she had had to unbolt the door.

The loser said that when the accused was brought to the house, she was asked by the police to demonstrate what she had done. She was then asked which room she had gone into and pointed to the room where the mat had been stored. The investigating officer said she mentioned that she had unbolted the door but, after that, said nothing, simply pointing to the room and then to the bed. The police officer who accompanied him and who was also in the house during the demonstration, said the accused went into the room and said it was the room she took the mat from and that was the bed she had taken it from.

The same woman officer stated that, after that confession, they went into the sitting room of the house and the accused apologised to the loser for what she had done and said she would weave another to replace it. She made no note of that because she thought the investigating officer would do so even though she told the court she did not think he was in the house at the time.

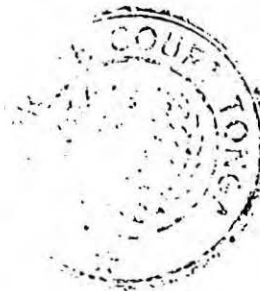
In fact, that officer told the court he had heard an apology although he made no note of it despite its clear significance. His recollection was that the accused said "Sorry I took the mat. I used it to pay off my debts".

Both officers said that it was spontaneous apology and admission. The loser however, whose memory of the apology was "I am sorry, it was I who broke into the house and took the mat", said that, when they came out of the room following the demonstration, the woman police officer told the accused that she should be sensible and realise that the charge and the dropping of the charge was in the hands of the loser and suggested she should apologise.

As I have said, that was the total evidence. Had there been anything else to confirm what happened at the demonstration or that the demonstration fitted the facts of the breaking, the court might have been able to proceed to put the accused to her defence. But there is nothing else. Although that amounts to the barest prima facie case, it falls far short of proof beyond reasonable doubt and I could never convict on such evidence.

The accused is acquitted of both counts.

NUKU'ALOFA: 20 March, 2002



*A Ward*

CHIEF JUSTICE