

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

AC 11 of 2018
[CR 67 of 2017]

BETWEEN : HEAMANI LOPETI

- Appellant

AND : REX

- Respondent

Coram : Handley J
Blanchard J
Randerson J

Counsel : Appellant in person
Mr. 'A. Kefu SC and Mr. T. 'Aho for Respondent

Hearing : 12 April 2019

Date of Judgment : 17 April 2019

JUDGMENT OF THE COURT

[1] The appellant Mr. Lopeti was convicted on 14 June 2018 after jury trial before Cato J on one count of armed robbery and one of causing serious bodily harm. He was later sentenced to 10 years imprisonment on the first count and to 2½ years on the second count, to be served concurrently. Mr. Lopeti now appeals against both conviction and sentence.

The Crown Case

[2] The Crown case was that on 9 November 2014 Mr. Lopeti entered the complainant's house in the prison compound at Hu'atolitoli while she was at a morning church service. He confronted and struck her 18 year old son Pese on the lower leg with a machete, and stole 10 Tongan mats. Later that day a prison officer, Inspector Vake, responded to a report of a car crash in Veitongo. His evidence was that he found Mr. Lopeti in the driver's seat. He located a number of Tongan items wrapped in a piece of cloth in the back seat and another Tongan item on the driver's seat wrapped in a hoodie. Mr. Lopeti had been sitting on it.

[3] The complainant gave evidence identifying the items found in Mr. Lopeti's vehicle as belonging to her husband. She also confirmed that she knew Mr. Lopeti and that he had been to her residence before. Another prison officer, Mr. Moeaki, gave evidence of receiving advice from the complainant about an incident at her house on the day in question. He found two sets of footprints at the back of the complainant's residence. The footprints suggested two directions backward and forward. He followed the footprints and located a machete in a plantation behind the residence. The machete was produced in evidence.

[4] The complainant's son Pese was in New Zealand at the time of trial but his statement was read to the jury and a photograph of the wound to his lower leg was produced. He described being woken in the house while his parents were in church. Someone was poking his neck with a knife. He was told to keep quiet. There were

two men in the room but it was still dark and he was only able to give a partial description of them. One of the men he described as the “big guy” was wearing a hoodie. This man hit his right leg with the machete, removed Tongan items and then both men disappeared. The Crown did not suggest Pese was able to positively identify Mr. Lopeti as one of the men.

[5] The prosecution’s principal witness was a serving prisoner Mr. Penisiliti Malafu. He was initially charged with the armed robbery along with Mr. Lopeti. However Mr. Malafu was later acquitted after the police offered no evidence against him. Shortly before trial, Mr. Malafu was spoken to with a view to his giving evidence for the prosecution. He made a statement implicating Mr. Lopeti and was granted immunity from prosecution by the Acting Attorney-General on the usual basis that he give truthful evidence.

[6] In evidence at trial, Mr. Malafu said he met Mr. Lopeti at Pahu and was told to get into the vehicle Mr. Lopeti was driving. Mr. Lopeti said they were going to Vaini to “pick up some stuff.” Mr. Lopeti drove. They went past Vaini to the Hu’atolitoli prison compound. Mr. Lopeti told him they were going to break into the house occupied by the complainant and her husband and steal Tongan items he said belonged to the complainant. Mr. Lopeti told him he had seen the items there on previous visits to the house. Mr. Malafu said he had been lied to by Mr. Lopeti and did not want to go into the house. He then saw Mr. Lopeti pick up a machete and go into the house. Around that time he heard the church bells ringing for the morning service. Mr. Malafu said he did not go into the house but heard a kid yelling.

[7] Mr. Malafu went back to the car and was joined by Mr. Lopeti carrying Tongan items. Mr. Lopeti told him he had assaulted the son of Si’i Kae Ha (the complainant’s husband) with a machete. Mr. Malafu then gave an account of the movements of Mr. Lopeti’s vehicle, an attempt by Mr. Lopeti to have someone take the mats and then the collision with a sign post. At that point, Mr. Malafu left the scene and

found his own way home. When he left, Mr. Lopeti was in the driver's seat and had been sitting on one of the Tongan items.

The Defence Case

- [8] Mr. Lopeti's defence was two-fold. He denied any involvement in the robbery and asserted that Mr. Malafu was the robber. On the morning of the robbery he was driving his car in the vicinity of Vaini village. He stopped for a man named Pila Pasina who was asking about a tyre for his vehicle. Mr. Malafu emerged with a package. He asked Mr. Lopeti to take him to Lapaha. Mr. Malafu asked him if he knew anyone who would buy Tongan items.
- [9] Mr. Lopeti said he saw a man named Sunia walking towards Vaini village at the time he first saw Mr. Malafu that day. Mr. Lopeti said Mr. Malafu told him that he and Sunia had carried out the robbery and it was Sunia who had hit the boy Pese. He then gave an elaborate account of attempts by Mr. Malafu to sell the Tongan items, the car crash and his arrest.

Grounds of Appeal against Conviction

- [10] Mr. Lopeti's appeal ground was that the jury's verdict was "against the weight of evidence". He pointed in his written submissions to a number of discrepancies in the evidence of the Crown witnesses but did not advance these in his oral submissions before us. Rather, he focussed on Mr. Malafu's evidence. He submitted Mr. Malafu lied throughout his evidence pointing to a statement Mr. Malafu had made soon after his arrest that he had been picked up Mr. Lopeti at Ha'ateiho whereas he said in evidence it was at Pahu.
- [11] Mr. Malafu had made this change to his evidence in his examination in chief and it was part of the material before the jury to consider. The Judge drew attention to this discrepancy in his summing up.

- [12] Mr. Lopeti's main point was a submission that his trial was unfair because Mr. Malafu had been granted an immunity shortly before trial, had made a statement only a few days before about events 4 years before, and had then given evidence Mr. Lopeti submitted was untruthful.
- [13] We are not persuaded Mr. Lopeti's trial was unfair for the reasons advanced by Mr. Lopeti. The circumstances in which Mr. Malafu gave his evidence were all before the jury including the terms of the immunity which were read to the Court and the fact that Mr. Malafu was a serving prisoner. In cross-examination Mr. Lopeti elicited from Mr. Malafu the fact that he had been convicted of breaking and entering involving the theft of Tongan mats on a previous occasion. There is no evidence that the charge against Mr. Malafu was dropped in return for his offer to give evidence against Mr. Lopeti. A significant period of time had elapsed between these two events.
- [14] The Judge dealt with the immunity issue fully and correctly in his summing up to the jury, including warning the jury to take care in scrutinising Mr. Malafu's evidence.
- [15] Mr. Lopeti also raised an issue about the introduction of Pese's statement which was read to the jury. The trial transcript shows this statement was introduced with Mr. Lopeti's agreement. Mr. Malafu was recalled so that Mr. Lopeti could question him about Pese's statement that he saw two men in the house when the incident occurred. Mr. Malafu said only Mr. Lopeti went into the house and denied Mr. Lopeti's suggestion that it was he (Mr. Malafu) and the man Sunia who went into the house.
- [16] A final point raised by Mr. Lopeti was that the Judge stopped him asking questions about an alleged beating up by the Police after his arrest. The Judge rightly stopped this line of questioning because it was irrelevant. The issue had been canvassed in a voir dire in which Cato J ruled an interview with Mr. Lopeti and an associated demonstration to be inadmissible.

- [17] We have reviewed the entire trial transcript in the light of Mr. Lopeti's submissions. Our assessment is that this was a case in which the jury's task was to assess whether Mr. Malafu was telling the truth. Their verdict shows they found Mr. Malafu's account to be truthful. His account, if accepted, provided ample evidence to support the verdict. It was a matter for the jury to consider whether there may have been a second man who entered the house as Pese stated. In Pese's absence, it was open for the jury to accept Mr. Malafu's evidence that Mr. Lopeti was the only person who went into the house but the jury might equally have found the man Suni had gone into the house with Mr. Lopeti as suggested in cross-examination of Mr. Malafu.
- [18] The fact that Mr. Lopeti was found to be in possession of the Tongan items soon after the incident tends to corroborate Mr. Malafu's account and demonstrates that Mr. Lopeti was at least a party to the robbery. The jury's verdict shows they were satisfied he was the principal.
- [19] We conclude by drawing attention to the ground of appeal Mr. Lopeti relies upon. It is not a ground of appeal to assert the verdict is "against the weight of evidence." In terms of s.17(1) of the Supreme Court Act, the correct legal ground relating to sufficiency of evidence is that the verdict is unreasonable having regard to the evidence. A verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused is guilty: *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [5].
- [20] Our conclusion that the verdict was open to the jury if Mr. Malafu was accepted as a truthful witness means the verdict was not unreasonable having regard to the evidence. Nor have we found any unfairness to Mr. Lopeti in the way in which the trial was conducted or in the prosecution's reliance on Mr. Malafu's evidence and the immunity from prosecution he was granted. The appeal against conviction is dismissed.

Sentence Appeal

- [21] Mr. Lopeti appealed against his sentence on the ground it was manifestly excessive. However he did not advance any submissions in support other than to say he denied the offending.
- [22] We are satisfied the sentence was appropriate having regard to the totality of the offending. The sentence of ten years imposed for the armed robbery was consistent with this Court's decision in *Alatini v R* 4/18 (Appeal from CR208/08). Although the offending in that case was more serious than the present, the Judge was right to take into account that this was a deliberate and planned theft involving the use of a lethal weapon to inflict a serious wound on an innocent young man. The taking of Tongan mats is a further aggravating factor having regard to their cultural significance. Mr Lopeti also has a history of convictions for housebreaking and minor assaults. The fact that this offending occurred while Mr. Lopeti was on leave from prison is also a serious aggravating factor which warranted some recognition in the final sentence.
- [23] The appeal against sentence is also dismissed.

K.B. Handley

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Handley J



P. Blanchard

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Blanchard J

O.P. Randerson J

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Randerson J