

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

CR NO's 31/17, 32/17

POLICE

v

TALIMEALAHU TUILEILA (aka Tali Ofa)

Hearing date: 6 September 2017

Counsel: Ms A Herman for the Crown
Mr N George for the Defendant

Judgment: 5 December 2017

**DECISION OF THEIR WORSHIPS JUSTICES OF THE PEACE
MRS CARMEN TEMATA, MRS BERNICE MANARANGI and MR TAEPAE TUTERU**

Introduction

[1] It is alleged that on the night of 25 January 2017, the defendant did break and enter two buildings in Nikao with intent to commit a crime therein. He was with an accomplice, Robert Piniata.

[2] One of the buildings broken into is a residence, the property of Teariki Heather. Items taken from the Heather residence were bottles of wine from the fridge.

[3] The other building broken into is a tourist accommodation, Nikao Cottage, where two tourists, a father and son were staying. Items stolen from their accommodation included the father's passport, a wallet containing \$200, a pair of running shoes, baseball bats and a quarter full Bombay blue bottle of gin,

[4] The matter was reported to the police who came to the Nikao Cottage, talked to them and check out the surroundings fifteen minutes after it was reported.

The Law

[5] The defendant, Talimealahi Tuileila is charged with one charge of burglary pursuant to s 263(a) of the Crimes Act 1969 which carries a maximum penalty of 10 years imprisonment and one charge of theft pursuant to ss 242(1)(a) and 249(b)(viii) of the Crimes Act 1969 which carries a penalty of a term of imprisonment not exceeding 5 years.

General Elements

[6] The person named in the charge is the same person who is appearing in Court.

[7] There is a date or period of time when the offence charged is alleged to have taken place.

[8] There must be a place where the offence was alleged to have been committed.

Specific Elements

[9] The accused took or carried away something capable of being stolen.

[10] The accused did this without the consent of the owner.

[11] The accused, at the time of such taking, intended to permanently deprive the owner of the things taken.

[12] The accused did not have a claim of right in the property taken.

[13] All elements of breaking, entering, and the elements of theft are not disputed by all parties.

[14] Crown submits that there is only one issue in dispute for this case, which is the identification of the accused and that the defence absolutely denies.

[15] We must determine this issue:

Whether it was the accused who committed the burglaries

[16] The prosecution must prove all elements beyond reasonable doubt. The prosecution must provide evidence to prove that it was the accused who committed the offence i.e. it was the accused who stole the property.

[17] The victim, Isaac Kaminsky, gave evidence that all lights in the cottage were off and the outside doors were also locked before they went to bed in their separate rooms that night.

[18] He said he was awoken by voices and when he came out of his bedroom and he saw the intruder and noticed that the lights were on because he specifically remembered turning them off when they retired to their bedrooms that night.

[19] He described the intruder as a man without a shirt/top, had shorts on but no shoes. He clearly remembered his features as having short hair on the side, black hair on top and tan skin standing at the door to his father's bedroom so he yelled out and chased after him to the sliding door where he escaped outside.

[20] His Dad's bedroom door was right next to his room and he saw the intruder up close for a short time and enough to remember his hairstyle, and what he was wearing, shorts with no top.

[21] As the intruder ran he dropped the iPhone taken from the sitting room and escaped with nothing.

[22] He noticed several things were missing from their unit, namely his Dad's wallet, a baseball cap, a quarter full Bombay blue bottle of gin and a pair of running shoes from outside the sliding door.

[23] The police returned the next morning, took his statement and looked around their accommodation and asked him to come to the station to identify two individuals in custody.

[24] He said that he looked at the first individual but did not think he was the person he saw in their unit on the night of the burglary for he appeared taller than the person he saw.

[25] Next he looked at the second individual from sideways and from the back and he was sure that the defendant is the person he saw in the house that night. However, in his evidence

he said that he did not see the person's face but only his features, the shorts he was wearing and no top.

[26] Defence counsel asked him about the police process in identifying the defendant at the police station. He said the defendant was brought into the police office from the cell and seated by himself. Police Constable Akai then asked the victim to identify him from a distance of about three metres.

[27] Defence counsel argues that there are proper methods of identifying suspects which the police are authorised, such as for the suspect to agree to be part of an identification parade.

[28] He said that the police could have used other methods of identification but they failed to do so and relied on the victim's identification of the defendant at the station.

[29] Defence counsel argues that the police identification process was improper, unlawful, without consent and in doing so they have also breached the defendant's Constitutional rights under article 64 of the Constitution.

[30] Under cross examination, Police Constable Akai confirmed that finger print analysis was undertaken on the Nikao Cottage but no finger print was lifted.

[31] The victim's description of the burglar's features and the clothes he wore, from his recollection on the night of the alleged incident agrees with Police Constable Pokipoki's evidence. She said when their truck was stopped by the police on the road, they identified the defendant as the driver and Robert Piniata the passenger.

[32] She said the defendant was not wearing a top or shirt but she could not recall the pants he was wearing, but she recognised Piniata because he was wearing the same three quarter pants that she saw him earlier in the driveway next to the Nikao Cottage.

[33] The victim's evidence is consistent with Police Constable Pokipoki's evidence.

[34] The victim in his oral evidence said that he was not certain that it was the defendant that he saw in their house until he saw him at close range at the police station during the

identification process. That is when he became certain about the defendant's identity as the intruder.

[35] Daisy Kimiora in her evidence explained what she discovered when she arrived at her workplace at Teariki Heather's residence at Nikao in the morning.

[36] She noticed the door is open and the lights were on because she never leaves the door open and the lights on when she finishes work each day. She also saw a red pareu hanging on the tree outside the house which she did not recognise as belonging to the Heather residence. She went into the house and reported the burglary to Teina Heather.

[37] She then checked out the whole house and found the fridge open and the bottles of wine inside were missing. She also found that some of the louvre blades on the balcony have been removed.

[38] When she was shown photographs of the empty wine bottles she confirmed that they are Mr Heather's favourite brand of wine.

[39] Under cross examination, she said that she does not know where the wines were bought from, but agreed that they do look like Mr Heather's bottles of wine taken from the fridge.

[40] Police Constable, Taa Tereapii in his evidence said that he was assigned to investigate the burglary at Teariki Heather's residence at Nikao the next day.

[41] He said that he inspected the houses within the compound and confirmed what Daisy Kimiora had told him.

[42] He said that the police were unable to lift finger prints off the louvre blades and the wine bottles found at the defendant's campsite that was done by Senior Sergeant George.

[43] There was no finger print evidence procured linking the defendant to the burglary of Teariki Heather's house at Nikao.

[44] In the absence of vital evidence from the Crown we now look at the evidence presented to the court about the events before and after the alleged burglary which is called

circumstantial evidence. These are good evidence and our panel must take them into consideration when delivering our decision.

[45] Firstly, why did the defendant run away just as the police was about to take him and his accomplice to the police station. There could be many reasons why, but we don't know for sure.

[46] Crown submits that he ran away to avoid being identified by the victim, Isaac Kaminsky, because Sergeant Bishop said that he had just shown Piniata to him but ruled him out as the intruder he saw in their unit.

[47] Defence argues that the defendant ran away because he knew that he has breached his bail conditions.

[48] Police Constable Akai in his evidence said that the defendant smelled alcohol, so he knew before he ran away that he had breached his court order.

[49] Secondly, the different explanations the defendant and his accomplice gave the police when they stopped their truck in Nikao and questioned them as to what they were doing there.

[50] Sergeant Bishop said that Piniata told them that his truck broke down and that he was waiting for his wife to pick him up when the defendant came by hence his being in his company now and also said that they came from Arorangi.

[51] However, Police Constable Pokipoki said that while she was outside of the Nikao Cottage she saw a white truck driving from town going towards Arorangi, which she thought at first was a motorcycle because it has only one light on.

[52] Moments later she and Sergeant Bishop both walked towards the road and saw the same truck pulling out of the vacant land adjacent to Teariki Heather's residence.

[53] Thirdly, Police Constable Akai said on their way back to the Station they saw a red bike parked on the side of the road, approximately half way between the Nikao Cottage and the Heather residence, so they took it to the station. He said that he recognised the bike as belonging to the defendant because he had seen him driving around on it.

[54] He said, two weeks later, the bike was picked up by the defendant's partner so we can be certain the red bike belongs to the defendant.

[55] Crown raises the question, why was his bike parked on the side of the road within the vicinity of the Nikao Cottage and the Teariki Heather residence.

[56] Crown submits that it is logical to conclude that the defendant was involved in these burglaries and we support this logic.

[57] Fourthly, the alcohol bottles found near the campsite of the defendant and his family were camping at Nikao next to Vaiana's Beach Bar.

[58] Police Constable Akai said they searched surroundings of the campsite early in the morning and found various bottles of alcohol including the Bombay Sapphire Gin bottle, red and white wine bottles, thrown away with alcohol still in them. They also found a box of empty Heineken beer bottles.

[59] These items were found only a few metres from the defendant's campsite.

[60] Police Constable Akai showed the Bombay Blue Gin bottle to the victim, Isaac Kaminsky who said that it looked like his bottle for it was the same size and had about the same amount of alcohol left in it.

[61] Defence suggests that the alcohol bottles recovered by the police near the defendant's campsite could have been from Vaiana's Beach Bar.

[62] However, that is unlikely given the campsite is on a private beach property and why would Vaiana's Beach Bar staff throw away partially consumed bottles of alcohol.

[63] Defence submits that it was not the defendant who brought the bottles to the campsite and that someone else could have put them there, however this not a public campsite and at the time it was occupied by the defendant and his family.

[64] Crown submits the defendant stole these items from the burgled homes and then threw them away. This suggests that he was trying to get rid of the evidence that will link

him to the burglaries after he was flagged down by the police on the road near the Nikao Cottage.

[65] Hence the bottles of alcohol remained partially consumed when they were recovered from nearby the defendant's campsite and probably the police's quick response to the burglary did not allow time for the alcohol to be consumed.

[66] Daisy Kimiora, when shown the wine bottles was sure that they were the ones from Teariki Heather's residence.

[67] She said that she knows exactly the type of wine Teariki Heather drinks because she is familiar with the brand he likes and that she sees them in the fridge every day.

[68] Finally, the defendant's vicinity to the burglaries. Exhibit 7, map of the Nikao area shows the close locality of his family's campsite to the two burgled buildings.

[69] The intruder at the Nikao Cottage was caught by the victim and ran away.

[70] The police's quick response to the victim's complaint enable them to catch the burglars involved and recover the stolen items from both buildings.

[71] Police Constable Pokipoki saw the white truck going towards Arorangi direction and not long after together with Sergeant Bishop they saw the same truck pull out of the vacant land next to Teariki Heather's residence.

[72] They flagged them down and both the defendant and Piniata were inside. The defendant was the driver and Piniata the passenger.

[73] Crown submits that when the defendant fled the crime scene, he must have gone back to their campsite to get the truck and was returning to pick up his accomplice Piniata when the police stopped and questioned them.

[74] During the police investigation of the victim's complaint of burglary at the Nikao Cottage at around 12.30am on Wednesday morning, the only persons they came across were the defendant and his accomplice Piniata.

[75] It is very unusual for them to be out and about in the neighbourhood at that time of the night, given they do not reside in Nikao but were camping on the beach.

Conclusion

[76] We have determined that the one issue in dispute for this case, which is the identification of the accused is not proven because we agree that the police identification process was improper, unlawful, without consent and in doing so they have breached the defendant's Constitutional rights under article 64 of the Constitution. Under cross examination, Police Constable Akai confirmed that finger print analysis was undertaken on the Nikao Cottage but no finger print was lifted from there. The victim, Isaac Kaminsky in his oral evidence said that at first he was not sure of the identity of the intruder in their unit and he only became certain when he saw him at close range at the police station during the identification process. However, we cannot accept this evidence because it was obtained unlawfully therefore consider it as unfair to the defendant. The lack of any finger print evidence linking the defendant to the burglaries is crucial to the Crown's case.

[77] After careful consideration of the evidences presented to the court, we are persuaded by the fact that the accused was identified in the vicinity shortly after the burglaries and the map of Nikao produced as exhibit 7 shows the location of his family's campsite to the two burgled buildings. The defendant and Piniata were the only persons the police came across during their investigation of the burglaries on that night.

[78] We find the defendant and Piniata lied about their being in the Nikao area at that hour of the night is because of their inconsistent explanation to the police. We are not persuaded that their presence in the area is coincidental, it is pre-planned.

[79] We find that the defendant's red bike found about 50 metres between the two burgled buildings is a link to the defendant's involvement of the burglaries more so when it was picked up by his partner two weeks after the burglaries thus confirming ownership of the bike.

[80] We accept the police reasoning as to why the defendant ran away from the police. Because it is a logical explanation, that he did it for fear of being identified by the victim and not because he had breached his bail conditions as submitted by the defence.

[81] We accept the alcohol bottles found only a few metres from the defendants campsite at Nikao next to Vaiana's Beach Bar matched those taken from the two buildings and recovered from nearby defendant's campsite. The victim, Isaac Kaminsky and Daisy Kimiora both identified them as similar to the ones taken from their buildings during the burglary. We do not support Defence argument that someone else could have brought the bottles to the campsite, however, this is not a public campsite and at the time it was occupied by the defendant and his family only. We agree with Crown, that the defendant took these items from the burgled homes and then threw them in the hope of getting rid of the evidence that will link him to the burglaries after he was flagged down by the police on the road near the Nikao Cottage. Hence the bottles of alcohol remained partially consumed when they were recovered by the police. We are convinced that their quick response to the burglary complaint did not allow the alcohol to be consumed.

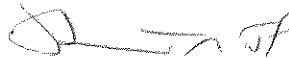
[82] Our panel agrees that the circumstantial evidence is strong and we are convinced that the defendant did commit the burglary at the Nikao Cottage and Teariki Heather's residence at Nikao with the intent to commit crime therein, therefore we find the defendant guilty on both charges.

[83] This matter is adjourned to 30 January 2018 for sentencing and existing bail conditions to continue.

[84] A probation report is ordered to be ready and distributed to all parties at least three days before the sentencing date.


Carmen Temata, JP


Bernice Manarangi, JP


Taepae Tuteru, JP