## WAPOLE TALEMAITOGA v STATE

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

6 March, 14 March 2003

[2003] FJHC 68

**Criminal law — appeals — appeal against conviction and sentence — grounds for appeal — whether there was a fair trial — whether evidence did not support verdict — whether there was inadequate disclosure — whether sentence harsh and excessive — whether Appellant was entitled to mitigation — first time offender — Penal Code (Act 17) s 300(a).**

Wapole Talemaitoga (Appellant) and Tuimasi Baleibua (Co-accused) broke and entered the storeroom of Dennis Evans and stole one sack of bêch de mer valued $600 and five regulators valued $1500. A total value of $2100 was the property of the said Dennis Evans. The Appellant was convicted and sentenced to 18 months' imprisonment. The Co-accused had been acquitted after the prosecution closed its case. The Appellant appeals against conviction and sentence on the grounds that he was not given a fair trial, the evidence did not support the verdict, inadequate disclosure and sentence was harsh and excessive.

**Held** — (1) On the day of trial, the Appellant was given more time to read the witness statements. He already knew what the witnesses were going to say. Even if he had received the statements late, his cross-examination of the witnesses disclosed his defence clearly. He was given adequate time to consider the witness statements. He was not prejudiced by late or non-disclosure. He conducted his trial ably and presented his defence clearly.

(2) The doctrine of recent possession is when it is proved that premises have been entered and property stolen and that very soon after the entry, the Accused has been found in possession of the property, it is open to the court to convict him of burglary. Appellant had been in possession of the stolen goods shortly after the break-in and that he could therefore be convicted of the offence of storeroom breaking entry and larceny.

(3) The Appellant was a first time offender but the court record shows a list of previous convictions for offences of larceny, trespass and robbery with violence. He was clearly not entitled to the leniency normally shown to first offenders. The 18 months' sentence was correct in principle.

Appeal dismissed.

**Cases referred to:**

*Epeli Labalaba v State* Crim Rev No HAR 4 of 2001S; *R v Loughlin* (1951) 35 Crim App Rep 69, cited.

The Appellant appeared in person.

*N. Lajendra* for the State.

**Shameem J.** The Appellant pleaded not guilty to the following charge:

*Statement of Offence*

STOREROOM BREAKING ENTRY AND LARCENY: Contrary to Section 300(a) of the Penal Code, Act 17.

*Particulars of Offence*

WAPOLE TALEMAITOGA and TUIMASI BALEIBUA, between 5th and 6th day of August, 2001 at Saqani Settlement, Vanuabalavu, Lau in the Southern Division, broke and entered the storeroom of DENNIS EVANS and stole from therein one sack of bêch

de mer valued $600.00 and five regulators valued $1500.00 all to the total value of $2,100.00 the property of the said DENNIS EVANS.

At a court hearing in Vanuabalavu, the case was first called on 1st October 2002. The Appellant pleaded not guilty. The prosecution said that statements had been disclosed. The case was called next on 3rd October 2002. The Appellant and his co-accused were given until 10am to read the witness statements.

The trial then commenced. Judgment was delivered at 4pm. The co-accused had been acquitted after the prosecution closed its case. The Appellant was convicted, and sentenced to 18 months imprisonment.

The Appellant appeals against conviction and sentence. His grounds of appeal may be summarised thus:

(1) The Appellant was not given a fair trial;
(2) The evidence did not support the verdict;
(3) There was inadequate disclosure;
(4) The sentence was harsh and excessive.

**The facts**

Procesution witness 1 (PW1), Dennis Evans gave evidence that he is a professional diver living at Saqani settlement. He dives for bêche de mer. He then processes the bêche de mer and stores it in his storeroom before sending it to Suva. On the 6 August 2001, he opened his storeroom and found that it had been broken into and one bag of bêche de mer was missing together with five regulators. He said that the bêche de mer cost $1500, and that the regulators also cost $1500.

Procesution witness 2 (PW2), Sefanaia Korovou gave evidence that he owned a vehicle with the registration number DE625. He said that the Appellant approached him on 9 August 2001 and asked him if he could hire his vehicle to go to Lomaloma. Mr Korovou agreed and the Appellant boarded the vehicle. He stopped the vehicle on the outskirts of the village. The Appellant got out of the car, loaded a white sack into the car. Mr Korovou then drove the Appellant to the house of one Moala to sell whatever was in the sack. He said that Moala always bought bêche de mer. He dropped the Appellant there. Under cross-examination he said he did not see what was in the bag.

Procesution witness 3 (PW3), Josefa Moala, gave evidence that he has a business for buying bêche de mer. He said that he bought bêche de mer from all villages on Vanuabalavu. He said he knew the Appellant and the 2nd Accused very well. He said that in August the Appellant came to his house to sell him bêche de mer. Mr Moala said that he could not buy it as he had no cash. He told the Appellant to give the bêche de mer to one Qalo, an employee at Kavula.

In the evening the Appellant came back with the bêche de mer. Mr Moala saw it the next morning at Kavula. He saw a 50 kg bag with bêche de mer inside. Another bag/sack had black regulators. "Qalo" told Mr Moala that the Appellant had brought them. Mr Moala then told Qalo to tell the Appellant to take the sacks back as he had no cash. He later told the police about the incident. Under cross-examination he said that he could not say that the bêche de mer was stolen and that only Qalo could say which vehicle had brought the bags.

Procesution witness 4 (PW4) was Qalo Sepesa, an employee of Mr Moala. He said that in August 2001, the Appellant came to his home in Kavula and told him to put a sack of bêche de mer inside. The sack was brought by the Appellant from the vehicle belonging to Korovou. He then said that there were two sacks and that he did not check the contents. The sacks were left inside the storeroom and the next morning Moala told him to tell the Appellant to take the sacks away. At

about 8 am Mr Sepesa saw the Appellant taking the sacks away with the 2nd Accused. Under cross-examination by the Appellant, the witness again said that he did not know what was in the sacks.

The last witness was PC 1792 Inoke Waqalevu, who interviewed the Appellant under caution. He tendered the record.

Under caution the Appellant told the police that he knew nothing of the breaking-in at PW1's storeroom. He said he did not go to Qalo's house on the 9 August and that he had loaded bags of coconut into Korovou's lorry. He said he took the coconuts to their camp at Lomaloma and not to Kavula as alleged by Korovou. He denied taking a bag of bêche de mer and a bag of regulators to Qalo's house. The Appellant made no statement when he was charged.

The 2nd Accused was acquitted after the prosecution closed its case. The Appellant chose to give sworn evidence. His evidence was as follows:

> On that evening I played touch rugby at Mualevu. I asked the vehicle driver to take me to Lomaloma. Past the village I stopped the vehicle and loaded two sacks of coconut to take to Suva. We came and stopped at Tayaga's house our Team Manager. Korovou went back. We were camping in this hall. It's not true what PW3 and PW4 told the Court. I used to go to them in the year 2000 not 2001. Before we depart for Suva, Police searched my bags, they didn't find anything.

Under cross-examination the Appellant said that he did not take the bags to Kavula, that the evidence of Korovou was untrue, that he did not steal the bêche de mer, nor did he try to sell it to Moala.

Judgment was delivered on the same day. The learned magistrate reviewed the evidence and said he believed the evidence of Korovou, Moala and Qalo that the Appellant had taken the bags to Moala. He said that the Appellant had not rebutted the evidence of Korovou when he said he had driven to Moala's house. He said that the Appellant was allegedly supposed to be camping at Lomaloma, yet he was playing rugby at Mualevu, only returning to Lomaloma and to deliver coconuts. For this he said he was prepared to pay $15–20 for vehicle hire. He further said that there was an inconsistency between the Appellant's statement to the police in which he said the coconuts were being brought to the hall in Lomaloma, and his sworn evidence during which he said he was taking the coconuts to Tayaga's place. He finally said:

> As I had stated hereabove that I believe the evidence of PW2, PW3 and PW4 and do not believe this accused for the various reasons stated herein. In view of all I have stated, I find that the prosecution have proved their case beyond all reasonable doubt. I find the accused guilty as charged, and he is convicted accordingly.

**The grounds of appeal**

The first ground of appeal is that the Appellant was not given a fair trial. In support of this ground, the Appellant who argued his appeal in person, and who was both articulate and forthright in his submissions, said that he had not been given adequate time to prepare his defence.

The Appellant was interviewed by the police on the 24 September 2002, and formally charged on the same day. In the course of the interview, the statements made by Qalo, Korovou and Moala were put to the Appellant as allegations. He denied all allegations except as to the use of Korovou's truck. The case was first called on the 1 October 2002 and the prosecution said that all statements had been disclosed. On the day of trial, the 3 October, the Appellant was given more time to read the witness statements. The Appellant denies receiving the statements on the 1 October. I am of course bound by the court record in this regard. However,

I do observe that the statements of the witnesses must have contained few surprises for the Appellant. He already knew what Korovou, Moala and Qalo were going to say. Further, even if he had received the statements late, his cross-examination of the witnesses disclosed his defence clearly. His defence was that the sacks contained coconuts and that Moala, Qalo and Korovou were lying when they said that he had delivered bêche de mer to Qalo's house at Kavula. I do not think that the Appellant was given inadequate time to consider the witness statements. Nor do I consider that he was prejudiced by non or late disclosure. He obviously conducted his trial ably and presented his defence clearly.

Further, I find that the trial was conducted fairly by the learned magistrate. This ground fails.

The second ground is that the verdict was against the weight of the evidence. The decision of the learned magistrate was based on the weight he gave to the evidence of the prosecution witnesses. The prosecution case was that on the 6 August 2001, the Complainant's storeroom was broken into and bêche de mer and regulators found missing. Three days later the Appellant conveyed two sacks to Qalo's house at Kavula. According to Moala, the sacks contained bêche de mer and regulators. Moala refused to buy them and the Appellant took both sacks away the next morning. If the prosecution witnesses were to be believed, then the Appellant was found in possession of stolen property shortly after the breaking and entering of the storeroom. Where it is proved that premises have been entered and property stolen and that very soon after the entry the accused has been found in possession of the property, it is open to the court to convict him of burglary (*R v Loughlin* (1951) 35 Crim App Rep 69) This is known as the doctrine of recent possession. In most such cases, an alternative count of receiving stolen property should be laid so the court can convict on either count, depending on the evidence. However, it was certainly open to the learned magistrate to conclude that the Appellant had been in possession of the stolen goods shortly after the break-in and that he could therefore be convicted of the offence of store room breaking entry and larceny contrary to s 300(a) of the Penal Code. Further, it was a matter for the learned magistrate to accept the evidence of the prosecution witnesses and reject that of the Appellant.

The third ground of appeal related to disclosure. I have already dealt with it in relation to the first ground of appeal.

The last ground is that the sentence was harsh and excessive.

**Sentence**

State counsel submitted that an 18–month sentence for this offence was not harsh nor wrong in principle. In *Epeli Labalaba v State* Crim Rev HAR0004/2001S I held that a 2–year term for Shop-breaking Entry and Larceny was right in principle. In that case the total value of the goods stolen was $5018.77, and the bulk of the goods was never recovered.

In this case, the total value of the stolen items was $2100 and nothing was recovered. The mitigation was that the Appellant was married with one child and that there would be no one to support the family if he were sent to prison.

The learned magistrate was told that the Appellant was a first offender but the court record shows a list of previous convictions for offences of larceny, trespass and robbery with violence. He was clearly not entitled to the leniency normally shown to first offenders.

In these circumstances I consider that the 18–month sentence was correct in principle. I decline to reduce it.

*Appeal dismissed.*