



IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 16/20

THE REPUBLIC

-v-

PIETA KEPAE

Before: RM Penijamini R. Lomaloma
Republic: Mr. Ronald Talasasa, DPP
Defendant: Ms. Francilia Akubor
Trial: 13-17 July & 20 July 2020
Judgment: 21st August 2020

JUDGMENT

Catchwords: Section 154 –Theft; section 160---Burglary; Circumstantial evidence used to convict.

Introduction

1. The accused is charged with the following offences:

Count 1

Statement of Offence

Burglary: contrary to section s160(1)(a)(b)(c)(i) of the Crimes Act 2016

Particulars of Offence

Pieta Kepae on the 24th of March 2020 at Nauru, entered the container storage belonging to the Republic of Nauru with intent to commit theft therein, and that he did not have the right to enter the container storage.

Count 2

Statement of Offence

Theft: contrary to section 154(1)(a)(i) of the Crimes Act 2016

Particulars of Offence

Pieta Kepae on the 24th of March 2020 at Nauru, dishonestly took or carried away a motor bike Zoomer X black in colour with the intention of permanently depriving the Republic of Nauru of the motorbike valued at \$3,500

2. Section 160 of the Crimes Act defines the offence of burglary as:

160 Burglary

(1) A person commits an offence if:

- (a) the person enters or remains in a building; and
- (b) the person does not have the right to enter or remain in the building; and
- (c) the person enters or remains in the building with intent to commit:
 - (i) theft of any property in the building; or

Penalty: 10 years imprisonment.

(2) In this section:

'building' includes the following:

(f) a warehouse;

(g) an office;

(h) a place of religious worship.

3. Section 154(1)(a)(i) defines theft for the purpose of this case as:-

154 Theft

(1) A person (the 'defendant') commits an offence if the defendant:

(a) dishonestly takes or carries away property belonging to another person, or to the defendant and another person, with the **intention of permanently depriving the other person of the property; or**

Note for subsection (1)

The Interpretation Act 2011, section 56 (b) provides that words in the singular include the plural (for example, 'person' includes 'people').

(2) For subsection (1), taking, carrying away, using or dealing with property does not include obtaining ownership or possession of, or control over, any property with the consent of the person from whom it is obtained, whether or not the consent is obtained by deception.

4. The prosecution called 7 witnesses and tendered several photographs, a sketch and the Caution Interview statement of the accused. At the end of the prosecution case, I found that the accused had a case to answer and he elected not to give any evidence. The evidence of the prosecution witnesses have therefore not been challenged, except in cross-examination.

THE EVIDENCE

5. **Prosecution Witness 1 (PW1)**, Dena Dageago was on duty as a security officer at the Government complex at Topside Meneng called State House. This consists of the office of the Department of Home Affairs next to the Meneng Primary School, the government garage on the northern or inland side. On the eastern side of and next to the garage is a piece of land on which there are many old, damaged or retired government vehicles. Next to these are some storage containers and next to that is the Able-Disable building. There is a road coming from the round island road at Meneng going uphill to State House.
6. Dena Dageago was on duty as a security officer at the State House on the night of 23/24th March 2020 when she received a call from one workmate, Tinai, at around 3-4 in the morning that 2 people had stolen motorcycle so she went and told her boss. They then went to check the containers and found the one that was used to store motorbikes was open. She identified a photograph showing the red container as the one where the motor bikes were stored.
7. In cross-examination, PW1 said she did not know how many motorbikes were in the container that night.
8. **PW2, Tinai Adimim** works as a Community Liaison Officer (CLO). On 24th March 2020, she was heading up to State House on her motor bike. She had finished volleyball training when she saw a person taking a motorbike. She did not say where or when this was. She went to drop a friend at the inland part of Meneng. She and a friend saw a motorbike lying on the side of the road leading to Joshua Kam's house. She headed to Bluerose's house to use her phone to call the police but she considered it trivial and did not call. She then changed her mind, called police and told them she would look into it. She then went with Bluerose and Rina to the motorbike and a person approached them from the bushes near the road. She told

- him to return the motorbike but he told her that it belonged to a relative. She said she knew he was lying as the motorbike had an "R" meaning it belonged to the Republic. She told him that if he did not return the motorbike, she will call the police. The man then told her, "**OK, you can return it.**" He then gave them the bike. She recognized the man as Pieta Kepae who lives in the same district, Meneng, as her. She said the motorbikes with an R registration are used by CLOs like her for work. She said the registration of the bike was R639 but when shown the photo of the bike, she corrected herself and said the registration number is R239.
9. Tinai said she knew the bike was stored in the Government container at State House in Meneng that night.
 10. In cross-examination, she said she does not know how many bikes were stored in the container.
 11. **PW3-Bluerose Jones** lives in Yaren and is unemployed. On 24th March 2020, she was with Tinai, Easterina and Raynor. They were riding 2 motorbikes. They went to drop Raynor and on the way saw 2 boys, **Pieta and Luckson**. They were "pulling" bikes. They were pulling it into the road going to Jezza Uepa's residence. They were pulling it towards the coast on the road from State House. They were pushing 2 bikes.
 12. When they returned after dropping Raynor, one bike was on the side of the road but there was no one there. Tina and Easterina were with her on another bike. They stopped where the bike was and Pieta Kepae came out of the bushes on the side of the road. She recognized him because he had lived with them before for 2 weeks. He also lives in Meneng District and is friends with her brother. She has known him since they were young and she is 24 years old now. She identified him in court as the accused.
 13. PW3 said Pieta Kepae came out of the bush and claimed the bike belonged to his family. Tinai then told him the bike belonged to the government as it had an "R" registration. Pieta told her to go down the road towards the coast as there was another bike there. She went and found the second motorbike there. It had police stickers. It was parked there and PW2 said they didn't push it up to State House because they were tired. PW2 said she took the first bike to the first security house at State House or Top Side. **This was about 4:00 in the morning.**
 14. **PW4 Joshua Batuku** is a constable in the NPF. He was part of the investigation team and took the photographs of where the bike was found, and the padlock for the container which were on the ground near the container. He did not take the lock as evidence. He took the photographs on 31st March, 2020, which is 7 days after the container was broken into. The scene was not barricaded between the two dates. He looked inside the container on 30th March and he could see some spare parts that looked like the parts of motorbikes.
 15. He interviewed the accused at the Police station. Senior Constable Alice Fritz was the recording officer. The interview was conducted in Nauruan. Questions and

answers were in Nauruan and the English translation is recorded immediately after the Nauruan version. He signed the record and tendered it as Prosecution Exhibit 11 (PE-11). He identified Pieta Kepae, the accused as the person he interviewed.

16. There are two allegations in the interview. One related to an incident which is not the subject of these charges and the accused clearly denied it. The second allegation is:

Q20: It is alleged that on Tuesday 24th of March 2020, at around 0415hrs you did break and enter a container which contains government motorcycle in it and stole a motorcycle own by government black in colour registration number plate R239. Do you understand?

A20: Understand.

Q21: Can you tell me who was with you when you stole the motorbike?

A21: Only myself.

.....

Q31: Do wish to correct, alter or add anything in this record of interview?

A31: I would like to correct Q17 that they have the wrong person. And Q20, I would like to say that I did not broke the lock of the container it already open upon my arrival.

17. **PW5—Jaxon Jeremiah** is the Government Fleet Officer. He said that government motorbikes are registered with “R” before the number and no other motorbikes can be registered with an “R.” In March 2020, there were 20 motorbikes stored in a container near the garage at State House, Meneng. He went there to count the motorbikes. The container was secured by a padlock. He said that the person who locked the container told him he put a padlock on it but this is hearsay.
18. **PW6—Paul Atsime** said that he was on duty as a security officer at State House from 10:00 pm 23 March to 7:00 am on 24th March. He was on duty when the break in occurred. At around 3:00 am, he heard noises and he went to check at 4:00 am, he found the container had been broken into. He knew it was locked because he always checked them and he did check the container that night at the start of his shift. He checked the padlock, it was about 4” long. There were bikes inside and he counted them but he has forgotten how many there were. He found out that 3 bikes were missing. All three were recovered.
19. In cross-examination, he said he said he recognized the containers in the photographs (PE-1) because he used to check it when he worked there. This witness admitted in cross-examination that he only found out about the theft when he went home and put the time of the break in at about 3 am because he heard noises then.

He was not asked to describe the noises he heard during the exam in chief or on cross.

20. In re-examination he said he was at home when he was called and told about the break in and he returned immediately and checked the container.
21. Prosecution Witness 7 (PW7)—Sgt Kirsty Karl took statements of the witnesses and took photographs PE2, PE-3 & PE-5 which she tendered.

DISCUSSION

22. The charge of burglary requires the prosecution to prove beyond reasonable doubt that (1) the accused entered the container at State House where the motorbikes were stored; (2) that he did not have the consent to enter the container; (3) that he intended to commit theft when he entered the container.
23. There is no direct evidence of the accused entering the container so we will have to consider circumstantial evidence.

Circumstantial Evidence

24. Circumstantial evidence is explained in *Shepherd v The Queen (1990)*¹ by Dawson J as:-

Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved. The inference which the jury may actually be asked to make in a case turning upon circumstantial evidence may simply be that of the guilt of the accused. However, in most if not all cases, that ultimate inference must be drawn from some intermediate factual conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference....

For example, with most crimes it is a necessary fact that the accused was present when the offence was committed. But it may be possible for a jury to conclude that the accused was guilty as a matter of inference beyond reasonable doubt from evidence of opportunity, capacity and motive without expressly identifying the intermediate fact that the accused was present when the crime was committed.

25. Later at 579-80, Dawson J said,

As I have said, the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be proved. It does not mean that every fact—every piece of evidence—relied upon to prove an element by inference must itself be proved beyond reasonable

¹ 170 CLR 573 at 579

doubt. Intent for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standards of proof, indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately.

26. Further down in his judgment, Dawson J quoted with approval the judgments of Gibbs CJ and Mason J in Chamberlain v The Queen (No.2)²:

In a case depending on circumstantial evidence, the jury should not reject the circumstances because, considered alone, no inference of guilt can be drawn from it..... it follows from what we have said that the jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, but in the light of the whole evidence, and that they can draw an inference of guilt from a combination of facts, none of which viewed alone would support that inference.

27. The accused did not adduce any evidence to counter the prosecution evidence so I accept the uncontested evidence of the prosecution which can be summarised as follows:
- a. The government kept motorbikes at a container in State House Meneng(PW5);
 - b. On 24th March, there were about 20 bikes there (PW5);
 - c. PW6 Paul Atsime said the lock on the container was intact when he started his rounds as security officer that night, 23/24 March at 10:00 pm.;
 - d. PW6 said the container was open at 4:00 am when he was called back to State House after a report that it had been broken open;
 - e. PW1 Dena Dageago said she went with her boss after the report of bikes being stolen and found the container open, confirming the evidence of PW6;
 - f. PW3, Bluerose Jones was riding on her motorbike to State House to drop Raynor when she saw 2 boys, Pieta Kepae and Luckson “pulling 2 motorbikes on the road leading to Jezza Uepa’s residence.
 - g. PW3 knows Kepae from when they were young. She is a friend of her brother and he lived for 2 weeks with them.
 - h. PW2 saw Kepae come out of the bushes near the side of the road when she returned. PW3 was with her. Kepae came to where the bike was lying on the side of the road. PW2, who is a CLO recognized the bike as belonging to the government like the one she uses for work.

² (1984) 153 CLR 521 at 535

- i. PW2 told Kepae to return the bike. He said it belonged to a relative. [This statement denies ownership by the government and we can infer that an intention not to return it.]
 - j. PW2 told him about the R registration meaning it belongs to the government and Kepae gave her the motorbike to return.
 - k. The accused admitted to police after being given his caution that he stole the motorbike alone.
 - l. Further, the accused admitted to police that he did not break the container as it was already open.
 - m. Three motor bikes were taken and all three were recovered.
 - n. One motor bike R239 was recovered from the accused, another was discovered nearby by PW3 after being directed to it by the accused.
28. The admission by the accused at k above puts him at the vicinity of the first charge of burglary. He had the opportunity. He admitted stealing the motorbike but he says the container was open when he got there. The evidence of several witnesses is that the motorbike R 239 was inside a locked container. The only inference we can draw is that the accused got into the container to steal the motorbike. He did not have consent to enter the container, and his intention in entering the container was to steal the motorbike.
29. From the totality of the evidence, as explained in *Chamberlain v The Queen (No.2)*³ and by Dawson J in *Shepherd v The Queen (1990)*⁴ the only inference we can draw is that the accused entered the container to steal and did steal a motorbike.
30. For the reasons given, I find the accused guilty of the first count of burglary.

Count 2—Theft

31. There is no doubt that the accused took away the motorbike belonging to the Government of Nauru on 24th March 2020 without any consent. The only issue is whether in doing so he intended to permanently deprive the government of the property. What the accused said to PW2, Tinai when she told him to return the bike is relevant to this issue. He said that the motorbike belonged to a relative. This is denying ownership of the bike by the government. It is also asserting (falsely) ownership by a relative. This is not an admission that he was merely taking the motorbike for a joyride. We can infer from this that the accused had the intention to permanently deprive the owner of the motorbike if he had not been caught.
32. Further, I can infer from the totality of the evidence, listed in paragraph 29 above that the accused intended to deprive the government of the motorbike when he took it. I therefore find the accused guilty as charged.

³ (1984) 153 CLR 521 at 535

⁴ 170 CLR 573 at 579

Conclusion

33. For the reasons given, I find the accused guilty of both counts as charged.


Penijamini R Lomaloma
Resident Magistrate

The seal of the District Court of Nauru is circular. It features a central emblem with a sun, a star, and a banner. The text "DISTRICT COURT OF NAURU" is written around the perimeter of the seal. There are two small stars on the left and right sides of the seal.