



IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 14 of 2020

THE REPUBLIC OF NAURU

-v-

SPEEDY HUBERT

JUDGMENT

Coram: Penijamini R. Lomaloma

Prosecution: DPP Ronald Talasasa

Defence: Ms. Francilia Akubor

Hearing: 8, 9, 13 & 20th July 2020

Judgment: 11th August 2020

CATCHWORDS: *Burglary—contrary to section 160(1)(a)(b)(c)(i) of the Crimes Act 2016;*

Damaging Property—section 201(a)(b) of Crimes Act 2016;

Identification—photoboard; no identification parade; R v Turnbull applied.

Introduction

1. The defendant was originally charged with two counts of burglary and two counts of damaging property. When the matter was set down for trial, it was discovered that the complainant in counts 2 and 4 was out of the country and her return is uncertain because of the Covid-19 bans on travel to Nauru. Counts 2 and 4 were severed and the accused discharged under section 153(2)(b)(ii) on application of the DPP.
2. The accused remains charged with the following:-

COUNT 1

Statement of Offence

Burglary: contrary to section 160(a)(b)(c)(i) of the Crimes Act 2016.

Particulars of Offence

Speedy Hubert on the 27th of March 2020 at Nauru, entered the dwelling house of Laurenata Harris with the intent to commit theft therein, and that he did not have the right to enter the dwelling house.

COUNT 3

Statement of Offence

Damaging Property: Contrary to section 201(a) and (b) of the Crimes Act 2016

Particulars of Offence

Speedy Hubert on the 27th of March 2020 at Nauru broke the lamp belonging to Laurenata Harris and he was reckless about breaking the lamp.

3. The prosecution called 7 witnesses and exhibited 3 photographs.
4. The offence of Burglary is defined in section 160 of the Crimes Act 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.

5. The evidence is not in dispute in a lot of areas except on the issue of identification.

PROSECUTION EVIDENCE

Prosecution Witness 1 (PW1) – Laurenata Harris

6. Laurenata Harris testified that she was asleep in her home in Aiwo District on the 27th of March 2020 when she was woken by the sound of her bedside lamp breaking.

- She shares the room with her 10 year old son and her female friend Kiarake Katimero, an Ikiribati national. At about 3:30 in the morning, she heard the lamp fall down from the table and woke up. She saw a boy in her room. She was shocked to see him there. She got up and he ran away with 2 bags. He ran to the lounge and she followed. He tried to go to the main door to get out but he couldn't because there was a safety lock on the door. She grabbed his back. He then turned and faced her and said he had a friend outside. She was scared but she tried to hide her fear.
7. Laurenata said the boy then gave her one of the bags he had taken from the bedroom which belonged to her son. They then went to the lounge where they sat down on 2 couches about 2 meters apart and talked. There was nothing to block her view of him. Laurenata said the boy told her to get out of the house as it belonged to ^{his} her mother. Laurenata said all four of her 3 foot long tube lights in the sitting room were turned on and she marked on a photograph that was exhibited where the boy sat and where she sat. They sat like that for about 20 minutes. Laurenata said the boy smelt strongly of alcohol. She then told her sister Kiarake in Ikiribati to call the police but she could not find the phone. Laurenata went to the bedroom to get the phone and as she passed her sister, the boy escaped. The boy escaped through the window. The louver blades had been removed earlier, presumably by the burglar and they were stacked on the floor near the window. The boy left the 2 bags behind. She then reported the matter to police at the station where she gave them a description of the boy.
 8. Laurenata said the boy was taller than her but in court they appeared about the same height. The boy was not wearing a shirt. The police then brought about 4-5 people by car individually to Laurenata at her home for her to identify if one of them was the burglar. She said none of them was the burglar. Laurenata then said that one day after Police did this, she came across the photograph on a friend's Facebook page and recognized the face of the person who went into her house. She took a screenshot and gave it to the Police.
 9. Laurenata said the police gave her a photoboard with many photos of men in it and asked her to identify the person who was in her home that night. Laurenata immediately pointed to the photograph which she recognized. It was a photo of the accused without a shirt. She said that was when she found out his name. In court, she was shown a photoboard which she recognized as the one police had shown her at the station and she immediately identified the photo of the burglar as the one on the top right. This was tendered at MFI-1(Marked for Identification 1). Later, it was tendered by Sgt Iwo Adam.
 10. Laurenata was then shown photographs taken of her house by Police. Three of these were tendered later as exhibits PE 1, 2 & 3 showing her sitting room, the louvers (PE2), the broken lamp in her bedroom (PE3).
 11. Laurenata then identified the accused in court as the boy she had seen in her house on the night of the burglary, 27th March 2020. Laurenata added that after she

- identified the accused as the boy who came to her house, she found out who his mother is and Laurenata said that she has no claim on her property.
12. In cross-examination, Laurenata said her vision is 100% despite her glasses, which she only uses for reading; that she was with the accused for nearly 20 minutes; that she was scared of him but she was more scared of the person outside; that a lot of things were going through her mind. Laurenata denied that her concentration was on the person outside but said it was always on the person in front of her.
 13. Laurenata said the screenshot she gave police was of a photo of someone "who looked like the burglar." She agreed with defence counsel that she wasn't sure; that when shown the photos by police, she immediately identified the photo of the accused; that police had not told her the name of the accused or which picture to identify; explained that she thought the intruder was taller than her because she had just woken up when she saw him; and agreed that she gave police a description of the burglar's body, face, size and that he was not wearing a shirt.
 14. Defence counsel asked the witness to cross out the photos of non-Nauruans in the photoboard, those with shirts and the only one left was the photo of the accused. There are 12 photographs in the photoboard consisting of 2 pages, each page with 6 photographs. Two of the photos are of the non-Nauruans. Ten of the photos were of young Nauruans but only the accused was shown without a shirt.
 15. Laurenata denied that she did not have sufficient time to study the intruder's face and therefore only gave police a brief description; and she denied the proposition that she relied on the picture on Facebook because he was the same person. Laurenata said she did not say the person on Facebook was the accused, only that he looked like him.
 16. In re-examination, Laurenata said she had the four tube lights on, each 4 feet long on the ceiling of the lounge and she was scanning the face of the accused for 20 minutes. She said she was scanning his face because it was the first time she had seen him; that the photo on Facebook looks like the intruder but younger; that the police brought about 5 people to her house one by one but she did not recognize any as the intruder in the house; and that the first time she recognized the intruder was when they showed her the photoboard.
 17. Laurenata said the police did not use the photo from Facebook in the photoboard. She said that the Facebook photo looks like a younger person than the intruder. She explained that she focussed on the person in the house because she "wanted to know why he came to her house and she tried to study where he is from but could not recognize his face."

Prosecution Witness 4 (PW4) – KIARAKE KATIMERO

18. PW4 is from Kiribati and came to Nauru in March. She has been in Nauru for 4 months. She lives with PW1, Laurenata Harris in Aiwo. Laurenata has a 10 year old son and they all sleep in the same room.
19. She recalls the 27th March 2020. She was asleep when Laurenata woke her up and they went to the lounge where ^{she} we saw someone in the house. Laurenata told her to get the phone and call the police but she could not locate the phone. Laurenata then told her to keep an eye on the intruder while she went to get the phone. While she was alone with the intruder, he stood up and ran out and escaped. She said she recognized the intruder because he was sitting right next to her on the lounge and all the fluorescent lights, the same as the ones in Court 2, were on and according to her, you can see the whole of the inside of the house. PW4 said there were 4 tube lights. She was about 3 meters away from the intruder and she had the opportunity to see him for about 30 minutes
20. PW4 clarified that when she was woken up, she followed Laurenata to the lounge; that the intruder and Laurenata were standing near the TV when she came out; that at one time the intruder tried to get out the door but he couldn't do so because it had 2 locks. She corroborated Laurenata's evidence about where Laurenata was seated, and where the accused was seated.
21. PW4 said she went to the police station where she was shown pictures and she identified the intruder as the person on the top right hand corner of the first page of the photoboard. She pointed at the picture because she recognized the person as she had seen that night in the lounge. She identified the accused in court as the person whom she saw in the lounge that night.
22. She said she saw the person for maybe a half hour and identified him in the police station less than a week after the incident.
23. In cross-examination, the witness said that she described the boy to police as a young boy wearing pants but without a shirt. She agreed that police showed her a photoboard with many pictures but 3 on the first page are not young; and all the persons in the photos had a shirt on except the person she identified as the accused.
24. In re-examination, PW4 said before she identified the intruder in the photoboard, she was not told by police who to point out as the person who intruded into their house that night.

Prosecution Witness 2 (PW2) – TROY JOHN CECIL

25. Troy John Cecil lives in Boe District and works at RONPHOS. He was educated to Form 6. He said he was drinking alcohol on the night of 26/27 March 2020 in his house. He was drinking with his friend and neighbour, Yakusa until another friend, Tion joined them at about 9:00 p.m. and they started drinking. He said his friend

- told him to go and pick some girls from Location so he went on his motor bike and picked up Maress. He returned with her and they continued drinking.
26. PW2 said that he, Tion, Maress, Speedy and Yakusa went to drink at Speedy's place at around midnight.
27. At around 1-2 a.m., **Troy John Cecil said Speedy went somewhere and returned after maybe half an hour.** Troy said he knows Speedy well as they are members of the same tribe. He was shown the photoboard shown to PW1 and PW4 and identified Simpson as the person in the bottom left of the first page of photos.
28. PW2 was an alibi witness for the defence but was called by the prosecution. He was not cross-examined.

Prosecution Witness 3 (PW3) – YAKUSA UDIRE

29. Yakusa is 20 years old and unemployed. He went to Nauru College. On the night of 26/27 March 2020, he was drinking at his place with Speedy and Tione. He said they started drinking at 7:00 pm and it was nearly dark. They continued drinking until they went to Speedy's place in Boe District. He said he did not remember the time but it was nearly daylight. He said nothing happened at Speedy's place as they were just drinking. He was there with Tion, Speedy, Maress and Troy. He said he does not remember if anyone left the party. He was taken through the names of his friends individually and he said none of them left the party.
30. The DPP applied for this witness to be declared hostile and I granted it. DPP then cross-examined him and tendered his statement to Police on 30th March 2020 in which he contradicted his evidence above. When asked he said his statement to police is the correct version. That statement says in part:

“At around 10 pm we went to Speedy's place continued drinking there at Speedy's place, during drinking there I didn't notice how long we stayed there, then Troy-John left us at Speedy's. We all went back to my place I did not notice the time when we got back to my place, I **slept Speedy and Tion were the only ones drinking at my place.** I woke up at 10am the following day Friday, Speedy, Tion were asleep outside my place, Police came arrested Speedy while he was still asleep, I recall Speedy was with us drinking all night and slept outside my place that is all I recall.”

31. PW3 was another alibi witness for the defence who was called by the prosecution but not cross-examined by the defence.

Prosecution Witness 5 (PW5) – TION MWANO

32. Tion Amwano is 24 years old and unemployed. He lives in Boe District. He remembers the night of 26/27 March 2020. He was drinking at Yakusa's place with Troy John, Maress, Speedy and Yakusa. They left for Speedy's place where they

continued drinking then returned to Yakusa's place. By Friday morning, all of the others had left and only he and Speedy were drinking ^{and} were still drinking in the lounge until 10:00 a.m.

33. Tion Amwano said that after they returned to Yakusa's, Speedy left them to see his father to get some money. Tion does not remember what time this was. Tion said he returned after one hour and 20 minutes with some money.
34. We returned to Yakusa's at dawn. We went to Speedy's place at about 4-5 am, until the sun came up then we returned to Yakusa's place again. We spent about 2-3 hours at Speedy's. We left Yakusa's for Speedy's about 3 or 5 in the morning.
35. Tion Amwano said that they drank 3 bottles of Vodka that night and that they were all drunk.
36. PW5 was the third alibi witness called by the prosecution but not cross-examined by the defence.

Prosecution Witness 6(PW6)—DAN BOTELANGA

37. Sgt Dan Botelanga has been in the NPF for 17 years. He took most of the photos for this investigation. He prepared and put together the photos for the photoboard. He took most of the photos from the internet and took the others from photos of suspects held at the Criminal Investigation Unit. He recognized the photos and tendered them.
38. In cross-examination, the officer said that he took a photo of the accused at the Corrections Centre when he was not wearing a shirt because when the accused was arrested, he did not have a shirt on.

Prosecution Witness 7 (PW7)—Inspector SAREIMA AREMWA

39. Sgt Sareima testified that she was included in the investigating team because the victims are females. She showed the photoboard to Laurenata (PW1) and Kiarake Katimero (PW5). She did not point out the accused or anyone else to the victims. The photoboard was shown alone to Laurenata first and then to Kiarake. Laurenata immediately identified the photo of the suspect. She did not mark it. The same photoboard was shown to Kiarake and she immediately identified the photo of Speedy Hubert as the suspect.
40. In cross-examination, Inspector Aremwa said there are no standing operating procedures (SOPs) in the Nauru Police Force for using photo identification of suspects.
41. At the end of the prosecution case, I found that there was a case to answer and ~~Lavin~~ Lavin explained the options available to the accused. After consulting his counsel, he decided to give sworn evidence. The matter was set down for continuation on 13 July but on that day, the accused elected to remain silent.
42. Submissions were ordered and oral submissions followed on 20th July.

Submissions

43. I thank both DPP and Defence Counsel for their submissions. I will cover these as they apply to the discussion below.

Discussion

44. For a conviction, the prosecution must prove beyond reasonable doubt that (1) the accused; (2) entered the home of Laurenata Harris on the night of the 27 March 2020; (3) without her consent; (4) with the intention to commit theft therein. The second charge alleges that he damaged property belonging to Laurenata Harris.

45. From the evidence, there is no doubt that some intruder entered the house of Laurenata Harris on the night in question and that the entry was without her permission; and that the intruder tried to walk away with two bags when he was stopped. I am satisfied on the evidence that the intruder committed burglary and damaged property at the home of Laurenata Harris.

46. The only issue is whether it was the accused ^{did} did it.

Identification

The leading authority on identification is R v Turnbull¹, where Widgery LCJ:

"First, whenever the case against an accused depends wholly or substantially on one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as, for example, by passing traffic or a press of people? Had the witness seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent observation to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Finally he should remind the jury of any specific weakness which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

¹ [1977] 63 Criminal Appeal R 132

47. I have warned myself of the dangers involved in the identification of an accused from the evidence of one or two witnesses who had never seen the accused before. They could be mistaken in their identification.
48. Applying the tests set out in *Turnbull* above, to the evidence of Laurenata Harris, I find that she observed the intruder for about 20 minutes while seated about 2 meters away from him with very good lighting provided by four 3-foot tube lights on the ceiling of her lounge. I can infer that a person in her situation could have been initially shocked but she settled down and was talking to him for 20 minutes. I can infer that in that time, a person would study the face of the intruder so she could recognize him if she were to see him again. Laurenata saw a picture that looked like the intruder on Facebook but younger the day after and she took it to the Police. Her memory of the intruder's face was still fresh in her mind. Laurenata had identified the intruder before the police brought the photoboard for her.
49. Kiarake Katimero saw the intruder for 30 minutes in the same conditions as Laurenata. She identified the burglary without hesitation when she was shown the photoboard by police the day after she saw him. Her evidence is highly probative and corroborates that of Laurenata on the identification of the intruder.

Dock Identification

50. Both witnesses identified the accused in court as the person who intruded into their home on the morning in question. *R v Horsham JJ ex p Bukhari*² concerned the discretion of committing magistrates to exclude evidence but, at 297, Forbes J also pointed out:

"... the Court of Appeal in Turnbull gave guidance on identification evidence. That was concerned with evidence of what I might term "initial sighting" and the quality of that evidence.

Dock identification raises a different point: the reliability of the identification of the suspect as the person seen in the initial sighting. ... but the courts had, for a very long time, taken the view that dock identification itself is undesirable. See, for instance, Cartwright [1914] 10 Crim App R 219 and the more recent case of Caird [1970] CrimLR 656. ... The discretion, of course, of the judge at the trial – as I say, not a discretion open to the examining justices – is ... to reject the evidence or refuse to admit it, on the grounds that its prejudicial effect outweighs its probative value. ... the court's duty will, in my view, always be to exercise its discretion in appropriate cases to exclude identification evidence which is more prejudicial than probative and, in accordance with

² [1981] 74 Crim App R 291

Turnbull, to warn juries of the dangers inherent in the evidence of identification."

51. Both witnesses identified the accused in court as the intruder they saw at their home less than 4 months after they were burgled. Their memories are unlikely to have been eroded by such a short period of time, especially when the circumstances in which they first observed the intruder is so memorable. The word probative used in the quotation above means "tending to prove" and having warned myself of the dangers that their identification could have been mistaken, I am satisfied that their identification of the accused both from the photoboard and in court has considerable probative value that it was the accused who intruded into their home on the night of 27th March 2020.

The Prejudice to the Accused

52. Defence Counsel raised several situations where there was prejudice to the accused. The first is the way that police conducted the photoboard identification. This consisted of two pages containing a total of 12 photographs. Out of the 12 photographs, 2 were of non-Nauruans taken from the internet. Of the remaining 10, one had a beard and was obviously older than the others. Of the 12, 11 had shirts or vests except the accused. This is certainly prejudicial, as it could be seen as suggesting to the witness that the person without a shirt was the accused. Counsel relied on R v Blick [2000] NSWCCA 61 (14 March 2000). In this case, the victim said the accused had a red goatee. He made a statement to police who then came across more evidence implicating the accused the accused was identified in a photoboard where he was the only person who had a red goatee. On appeal, the court referred to the NZ case of R v Russell:

"it goes without saying that precautions must be taken to ensure that no prompting, suggestion or hint is given to the witness that any particular member of the group is the suspect. For example, it would be unfair and improper to show to a witness, before the identification parade was held, a single photograph of a person who was said to be the suspect, and it would be unsafe to act on evidence of identification given in those circumstances³."

53. The suspect had a red goatee and the victim identified the victim as the person who robbed him. The Court excluded the evidence based on section 137 of the Evidence Act 1995 which made it mandatory to exclude such evidence. The position at common law is different: the judge or magistrate has discretion to admit the evidence by weighing the probative value of the evidence against the prejudice

³ (1977) 2 NZLR 20 at 27

against the accused.⁴ There is no Criminal Evidence Act in Nauru and so the common law applies here.

54. Recognition of someone depends on facial features which are not affected by the clothes one is wearing or not wearing. Laurenata saw a photograph on Facebook which she said looked like the intruder but younger. There is no evidence that that recognition is based on the clothes being worn. She “recognised” the face before the police asked her to look at the photoboard.

Alibi


55. Section 148 of the Criminal Procedure Act 1972 deals with alibi notices. The defence is required to file a notice of alibi within the prescribed period. In the Supreme Court, this is the period of 7 days after the information is filed. The prescribed period in the District Court is not defined. However, it should be 7 days after the charge is filed in the District Court. Time is of the essence in filing an alibi notice as it gives the police time to locate and obtain statements of alibi witnesses while the matters are still fresh in their mind.
56. In this case, the defence filed a notice of alibi and named 3 witnesses as alibi witnesses. The prosecutor summoned and called these witnesses at trial. The defence did not cross-examine any of the 3 at all. They are witnesses for the defence and the DPP should let the defence call them and then cross-examine them. This would have allowed the DPP to probe the witnesses and better explore the weaknesses in their evidence.
57. Troy John Cecil said the accused was drinking with him and Tion Amwano, Yakusa and the girl when the accused went somewhere and returned after half an hour. Tion Amwano said that after they returned to Yakusa’s, Speedy left them to see his father to get some money. Tion does not remember what time this was. Tion said he returned after one hour and 20 minutes with some money. The evidence of the 3 witnesses as to time is so unreliable and one can expect that to happen when they drank 3 bottles of vodka.
58. The evidence of Yakusa is damning for the accused. He has lied in his evidence in chief that none of the people he was drinking with, including Speedy ever left the party at any one stage. This is contrary to the evidence of Troy John Cecil and Tion Amwano. It also contradicts his statement to the Police of 30th March 2020 where he admits that Speedy and Tion kept drinking after he had gone to sleep.
59. Why would Yakusa change his statement and assert no one left the party when he was not the last the leave? The only inference we can draw from this is that he is trying to give a false alibi to his friend, Speedy Hubert.

⁴ R v Horsham JJ ex p Bukhari [1981] 74 Crim App R 291

60. From the evidence of Troy John Cecil and Tion Amwano it is clear that the accused Speedy Hubert had the opportunity to have committed the offences he is charged with and return to the drinking party with his friends.

Conclusions

61. I have warned myself of the dangers of convicting the accused based on the correctness of the identification of the victim, as they can be mistaken.
62. The probative value of the identification evidence provided by Laurenata is overwhelming. This is corroborated by the evidence of Kiarake Katimero. I have taken into account the prejudice to the accused caused by the way the photoboard pictures were selected and the way it was conducted; I have also taken into account the danger of convicting an accused contrary to alibi evidence but I am convinced beyond reasonable doubt that the accused, Speedy Hubert was the intruder who entered the house of Laurenata Harris on 27th March 2020. The entry was without consent of the owner. Speedy Hubert entered the house with intent to steal and did steal 2 bags but he was caught.
63. In the premises, I am satisfied that the prosecution has proved each element of the offence of Burglary and I find the accused guilty of it.
64. While he was in the house of Laurenata, the accused broke a lamp belonging to Laurenata Harris. I am satisfied that the prosecution has proved beyond reasonable doubt all the elements of damaging property and I therefore find the accused guilty of it also.


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Penijamini R Lomaloma
Resident Magistrate

