

BETWEEN : REX - Prosecution;

AND : SEINI MA'AFU MOHULAMU - Accused.  
(Fanga)

Dates of hearing: 23, 24 & 25 February 1999

Date of Judgment: 25 February 1999

Counsel appearing: Ms Simiki for Crown, Mr Fifita for the Accused

ORAL JUDGMENT OF FINNIGAN J

The accused is charged that in or about the 1<sup>st</sup> or 2<sup>nd</sup> week of May 1997 she received property to the value of T\$6,850.00 from Toafa Valu, knowing or believing that the said property to be stolen.

The Crown ~~the accused~~ accepts the burden of proving beyond reasonable doubt that the accused is guilty of that offence, i.e. that each ingredient of that offence existed, and all existed at the same time.

The accused is innocent before and throughout the trial, and remains innocent until the Crown has proved her guilty of the offence charged. There has been no obligation on the accused at any time, even during the police investigation, to say anything at all to the police or to the court.

I have heard excellent submissions from both counsel, and shall decide the issue by reference to those submissions. All of the submissions are part of the case however some of the submissions I shall not refer to, this is because it is not necessary for decision of the verdict.

Evidence was given by 8 witnesses, 6 for the Crown and 2 for the accused. It is necessary to start by considering the evidence, and deciding what that evidence proves.

First Crown witness was Tangikina Taumoepeau. This witness proved that some Tongan traditional goods belonged to her father and some belonged to her mother, and these were dried out after hurricane Hina, which she said occurred in February 1997. The accused

and another witness Toafa Valu and a third person Mele Latailakepa helped. Later these goods she said were discovered to be missing, and she concluded they had been stolen between February and August 1997. It was inference rather than her direct evidence that the goods that went missing were the same goods as were previously dried, neither more nor less, but from her evidence I am not sure. She described the goods that were dried, but did not give a list of the goods that went missing. Her evidence of the goods that were dried is unreliable, because she gave it not from her own memory but from a list which was a copy of the list that she said was in "our statements to the police". In cross-examination she said the list had been made by crown counsel and given to her just before she gave her evidence. By any view, her evidence of the goods that were dried is the worst kind of hearsay. Her evidence of the value of the goods was given in the same list. It is no more than a repetition, if the list is correct, of statements of value made by some person to the police at some time. Those claims of value prove nothing.

The next Crown witness was Toafa Valu. This witness pleaded guilty to theft of goods, said by the Crown to be the same goods that it intends to prove were received by the accused. The indictment against this witness was produced in evidence. The goods allegedly stolen by this witness were not specified in the indictment. Neither did the witness specify clearly in her evidence what were the goods she allegedly stole. This is of little value to the Crown case. It was from the evidence of this witness that the Crown attempted to show that the value of what the accused allegedly received was the same as that allegedly stolen by the witness. But the witness had no idea of their value. She pleaded guilty on the indictment, but her admission for the purposes of her own case can never bind the accused or be evidence against any other person.

About this witness overall also I have some doubt, because of the history of the relationship between her and the accused. Her evidence of her theft of goods from the house of Tangikina Taumoepeau is evidence that the theft was directed and supervised by the accused, with whom she was at that time living in friendly circumstances. They clearly are not friends now. She is in any event clearly an accomplice.

Next was the evidence of Nanasi Wai. She was witness to some things done by the accused with certain Tongan traditional goods. She did state that these events occurred in April to May 1997, which is the time that certain Tongan traditional goods were brought to the accused 's house by the witness Toafa Valu, and she did give a list from memory of Tongan traditional goods which she said she helped the accused prepare for sending to USA at that time. However the connection is in time only, and there is no way of connecting those goods with the rest of the evidence.

Next is the evidence of 'Akanesi Fusi Valu. This witness related events of father's day, a Sunday in May 1997. That is the time of the events in issue, but her evidence is that she was given a mat by the accused, which she produced to the court. This mat was not shown to have any relationship to the Tongan traditional goods in issue, indeed the witness Toafa Valu said positively it was not one of the mats she stole. If that is true, the mat cannot be in issue in this trial.

Next is the evidence of LCpl Helepiko. This evidence is of limited value to the Crown, except for some matters of necessary corroboration. He questioned the accused and charged her and took from her what is called a confession statement. It is a point in the crown's favour that he let her write all her own statements, but none of those statements amount to an admission of guilt. However, there is substantial corroboration of the Crown's evidence in some of the statements that the accused made. It was submitted that the failure by the accused to challenge the values of the goods allegedly received amounts to proof against her that the values were as claimed in the charge laid against her by LCpl Helepiko. That could never be so. There was no obligation on the accused to correct the police charge if it was wrong. Even if she had objected to the values, there was no evidence to suggest she was able or qualified to value the items.

I disregard the evidence of WPC Tu'ipulotu entirely. She said she had a good recollection of what occurred during the police interview with the accused, but her account of how the questions and answers were recorded was clearly wrong, because she was unaware of the unusual fact that the accused had written all her own statements. She stated specifically that it was LCpl Helepiko who had written them. In that her evidence is unreliable, and I find that the rest of her evidence must be unreliable also.

For the reasons stated thus far therefore, I would have difficulty convicting the accused of the offence charged, because of difficulty in particularising what was allegedly stolen and what was allegedly received, and what was the value of what, if anything, has been proved to have been received. There is however, as I shall shortly show, evidence from the accused herself that may lead to a conclusion that receiving did occur, of some property.

Before finally deciding, I am bound to consider the question of corroboration. This was a topic addressed by Ms Simiki on behalf of the Crown, but neither counsel addressed the effect of s 126 of the Evidence Act cap 15. That provision seems to me to apply in the present case. It is as follows:

"126. An accused person shall not be convicted upon the testimony of an accomplice unless it is corroborated in some material particular by other evidence."

That is the principle from *Archbold* to which Ms Simiki referred me, but it is statutory.

At the end of the Crown case I ruled there was a case to answer, because there was evidence which, if accepted amounted to proof of the charge (i.e. the evidence of Toafa Valu) and there seemed to be evidence which if accepted, could amount to independent corroboration (i.e. the evidence of the accused's so-called confession statement, in which she said she had been too trusting of Toafa Valu). However, when I apply the test of proof beyond reasonable doubt, the evidence falls short of providing sufficient independent corroboration of the evidence of Toafa Valu. As it happens, the accused gave evidence before me and provided more evidence than was available at the end of the

Crown case, which amounted to corroboration of Toafa Valu's the account. In her evidence she said she was actually present when Toafa Valu brought goods over the fence from PT's property in what clearly were suspicious circumstances, and she gave evidence that she then accepted some of these goods and disposed of them. By giving this evidence she provided what previously had been missing, good corroboration of the evidence of her the accomplice.

But with that evidence she also provided an explanation. She said she believed Toafa Valu had colour of right to the goods she brought to her house, because Toafa Valu had given Tongan traditional goods to her on three separate occasions, there being in total more than what she had seen Toafa Valu put over the fence. She said that Toafa Valu told her she had been given the goods as part of her activities with fortune-telling, and she brought a witness who heard Toafa Valu say this on one of the occasions that the accused spoke of. This evidence may be true. I cannot reject it out of hand, particularly as it is supported by an independent witness. That witness withstood cross-examination on whether she was giving false evidence because she felt sorry for the accused. This evidence raises in my mind a doubt about the validity of the corroborative evidence. In the end, I find myself with evidence that Toafa Valu stole some Tongan traditional goods from Pelikani Taumoepeau's house, and that the accused saw some if not all of that theft. I find that as a matter of law, the evidence of Toafa Valu must be independently corroborated, and that the evidence available as corroboration is the evidence of the accused herself, together with circumstantial evidence of possession and disposal of some Tongan traditional goods at the relevant time. I find that, because of the explanations of the accused, that evidence is not conclusive as corroboration.

For all these reasons, I return a verdict of Not Guilty.

Before concluding, I acknowledge the difficulty faced by the Crown in proving its case, caused by the absence of two material witnesses. Prima facie that was caused by the failure of the Court to serve the witnesses when requested by the Crown to do so. On the other hand, both witnesses are shown to be outside Tongatapu, one in Vava'u and one in New Zealand, so the final cause of their absence is unclear.

NUKU'ALOFA, 25<sup>th</sup> February 1999



*D. Inigo*  
JUDGE