

BETWEEN : *R E X* : Prosecution

A N D : 1. *TU'IPULOTU 'ULUPANO*
2. *TAMALE 'OTUNUKU*
3. *'ANAU LOLOHEA*
4. *'ATUNAIISA KALI* : Accused.

BEFORE THE HON. CHIEF JUSTICE WARD

COUNSEL : *Mr S Tapueluelu for prosecution*
: *Mr S Tu'utafaiva for first, second and third accused*
: *Fourth accused in person*

Date of Hearing : *20, 21, & 22 September 1999*
Date of Judgement : *24 September 1999*

JUDGMENT OF WARD CJ

During the night of 17 July 1997, the premises of the Tonga Electric Power Board in Nuku'alofa were broken into and the safe taken. The wages of the staff had been prepared for distribution the following day and were all in the safe. They amounted to \$10,346.17. The safe was later found on a beach where it had been opened and the contents taken.

The offenders in that case have been tried and the prosecution case is that the charges in this case arise from that original offence. 'Ulupano, 'Otunuku and Kali are all charged with attempting to interfere with the course of justice, contrary to section 65 of the Criminal Offences Act. It is suggested that they were all involved in the disposal of an axe, which the prosecution suggests was used in the theft of the safe, with the intention of impeding or frustrating the police investigation into the TEPB offence.¹ Kali has also been charged with receiving \$1,030.00 in notes and \$94.72 in coins of the money taken from the safe. Lolohea is charged with possession of ammunition that

he had stolen and passed on to one of the men who committed the original offence.

The case depends entirely on statements made by the accused during interviews and in written statements to the police. None of the accused chose to give evidence on oath and Kali confined himself to a short unsworn statement from the dock. I remind myself that such statements are evidence only against the maker and cannot be evidence against the other accused. Although the case against the three men accused of attempting to interfere with the course of justice is in the nature of a conspiracy, these statements were not made in furtherance of that conspiracy and so are still not admissible against the others.

Kali was the first of these accused questioned by the police. He was interviewed on 31 July 1997 about the money that had been recovered by the police from his home. He said that he had noticed that 'Isileli Kali and Sunia Mailau had been using a lot of money and so he had gone to 'Isi's room and found the coins in a milk powder tin. He took them and put them into a box, throwing away the tin. He then went to Sunia's house and found the notes hidden there. He took those also and buried them. He told the police that he had heard of the robbery on the radio and suspected Sunia and 'Isi of having obtained the money through crime but that he did not know where or how it was carried out.

However, later in the same interview he was asked whether he has seen any weapon in either Sunia's or 'Isi's place. The interview continued:

"A- No

Q- An axe?

A- He put it in the ceiling of our hut. I asked him about it on the day that he left for Fiji and he said not to touch it.

Q- Where is that axe now?

A- It was a small iron axe with a blue leather handle specified in the search warrant. I took it down from the ceiling after the raid and gave it to Pulotu 'Ulupano to throw away.

Q- Why did you want to have it thrown away?

A- I was afraid when 'Ahotau and Sunia were arrested and I knew that it was the axe used by 'Isi and Sunia for the robbery.

Q- When you noticed that 'Isi and Sunia had large amounts of money with them or when 'Isi put the axe in the ceiling forbidding anyone to touch it or when the robbery was announced on the radio, did you become suspicious of what 'Isi and Sunia may have done?

A- I became suspicious when 'Isi, after having noticed the amount of money they carried, hid the axe in the ceiling. That's why I opened the box and also took the money...."

The accused made a short unsworn statement in which he said that he did not know the money was stolen. He said he hid it and when the police turned up he told them about it.

I have absolutely no doubt that this accused believed that money was stolen at the time he received it. His answers show that his suspicions were aroused first and he only then went and took the money. There is no direct evidence from the prosecution that it was stolen but I am satisfied that the circumstances this accused described prove beyond reasonable doubt that it was in fact stolen during the TEPB robbery. He is convicted on the first count.

He was again interviewed on 7 August 1997 and asked more about the axe:

"Q- What did you say to Pulutu 'Ulupano about the axe on Friday 25 July at your place?

A- I took the axe from where I hid it and gave it to Pulutu to go and throw away in town so no one would find out about it

Q- Did Pulutu know why you gave him the axe to hide?

A- I told him it was the axe that was used in the armed robbery of the TEPB and to go and throw it."

There is no direct evidence from the prosecution that this was the axe used in the robbery. Again, I am satisfied beyond reasonable doubt from the

account Kali gave to the police that it was hidden by 'Isi in the way the accused described, at the time he described which was shortly after the robbery and that it was in some way involved in the robbery. Kali clearly also knew that as his answers show. I am satisfied beyond any doubt that he passed the axe to 'Ulupano in order to prevent it being found by the police. That is an attempt to interfere with the course of justice and he is convicted on the second count also.

'Ulupano and 'Otunuku were seen by the police on 18 August and interviewed separately. 'Ulupano was asked:

“Q- When did you find out about that robbery?

A- I first heard it on the radio then the police raided 'Ahotau's place and arrested Sunia Mailau. By that time 'Isi had already gone to Fiji and that's when I was sure that it was them two who carried out the robbery.

Q- Were you involved in anything else or knew about something?

A- I knew about the axe

Q- Tell me about it.

A- When the police raided Ahotau Kali's place, they returned with Sunia together with the goods. On that night Naisa Kali gave me a small axe and told me to throw it into the swamp. He said that it was used by Sunia and 'Isi to rob the TEPB's safe.

Q- Did you throw it away?

A- I took it and left it outside Sunia's house then I went back and told Sunia that I had thrown it into the swamp.”

He then explained how he had given it to 'Otunuku, told him about it and, as they walked past the swamp, he told Otunuku to throw it into the swamp, which he did. The prosecution called evidence of how the police went to the swamp with this accused and recovered the axe.

In his written statement 'Ulupano he said he had not thrown it in the swamp himself because he was afraid to do so.

Counsel for this defendant submits that on the evidence, the prosecution has failed to prove to the required standard that the axe referred to was used in the theft of the safe. I accept that fact has not been proved. What has been proved against this accused beyond reasonable doubt is that the axe he was dealing with was clearly something to do with the offence. The mens rea of this offence is the intent to interfere with the course of justice. I am satisfied beyond any doubt that, when he took that axe, he knew about the robbery and he believed it was the axe used in the robbery. His answers also satisfy me that it was, in fact, connected with the robbery in some way. Knowing that, he took steps to dispose of it in the swamp. I have no doubt at all that he did so with the intention of preventing it being found by the police during their investigations into the robbery. That is an attempt to interfere with the course of justice and he is convicted as charged.

When 'Otunuku was interviewed, he explained how he heard about the robbery on the radio and that a security officer had been held up with a gun and an axe. Later he heard the police had arrested 'Ahotau Kali and Sunia Mailau and realized it was Sunia and 'Ahotau's boys who robbed the safe. He was asked:

"Q- Where did you go on that Friday night?

A- I finished work at about 6.30pm and I walked to Salesi's house to do some shopping then I walked back home. Pulotu was right behind me and I saw that he was carrying an axe. He said to me to keep on walking while he ran to throw the axe in the swamp. I stopped him and took the axe from him. We walked together and he said to give him the axe so that he could throw it away and I told him not to because it could be of use to my job - construction of the church building. He insisted that I give it back so I threw it and at the same time he tried to stop me. He told me it was the axe used by 'Isi and Sunia to rob the TEPB's safe.

Q- What happened after that?

A- I was shocked when he told me and we went our separate ways.

Q- Why did you throw the axe when you knew that it would be of use to your work?

A- I was angry because I asked him if I could have it and he said no."

He was asked why he did not tell a police officer, Tevita, who lived near him about it and he said he was scared he would have been arrested. In his written statement he said he regretted not telling Tevita.

As with each accused, I am bound by the evidence in his own interview and statement. He told the police that he knew an axe had been used in the robbery. That information came from the radio but the court has no evidence of when it was broadcast and, in particular, whether it was before or after the Friday night in which he threw the axe away.

He admits being the person who physically threw the axe into the swamp and he also stated that he was told by 'Ulupano that it was the axe used by 'Isi and Sunia in the robbery. However, it is not clear whether that was said before or after he threw the axe. His reason for throwing it, according to his account to the police, was because he was angry 'Ulupano would not let him have it. Before I can convict I must be satisfied beyond reasonable doubt that he knew at the time he threw the axe that it was connected with the robbery or the police investigation. His answers could suggest it but they are ambiguous. I am not satisfied that has been proved to the required standard for a criminal trial. There is no other evidence to assist beyond his statements to the police. The fact he failed to notify the police after he knew the significance of the axe does not affect the issue. He is charged with attempting to interfere with the police inquiry by concealing the axe and there is insufficient evidence to satisfy me that he had the necessary intent at the time he carried out that act. He is acquitted.

I now pass to Lolohea. He is charged with possession of nine rounds of .22 ammunition without a licence, contrary to section 4 of the Arms and Ammunition Act. He was interviewed on 11 August and asked about the ammunition. He explained that he stole seven rounds from the house of the person with whom he lived. He had been asked to get it by Sunia and was told that, if he did, Sunia would give him a new pair of soccer boots. After

he had stolen it, he gave it to Sunia. He realised that Sunia had no licence to possess a gun and that the ammunition was to be used for an unlawful purpose but believed it was to shoot a pig.

I have no doubt at all that he had that ammunition in his possession and that he had no licence to do so. Counsel suggests that the evil to which this section is directed is to prevent people from possessing ammunition without a licence and that there must be some element of permanent or long term possession and an element of danger involved. I cannot accept that submission. There is no dispute the accused had the ammunition in his possession. He knew he had it, it was in his sole custody and he had the control of it sufficiently to pass it on to Sunia. His admission only relates to seven rounds and he is convicted of possession of that amount.



K. W. Wood

NUKU'ALOFA: 24 September, 1999

CHIEF JUSTICE