

THE CROWN

V

TEVITA 'ELI

MAMATA KOHINOA

BEFORE THE HON MR. JUSTICE SHUSTER
MS.ATIOLA FOR THE CROWN
MR. TU'UTAFAVIA FOR BOTH ACCUSED
HEARING DATES 18th & 19th APRIL - 20th MAY 2011
JUDGMENT 08th JUNE 2011 @ 14.00

EXTEMPORANEOUS JUDGMENT

This is an extemporaneous judgment in respect of two criminal cases CR 19-20 /2010, in which two defendants have been jointly charged with a single count of theft of a number of yams to a total value of \$700.00 - An offence contrary to Section 143 & 145 (b) of COA [Cap 18]

Both defendants were arraigned on 23rd February 2010 before Ford CJ and the record shows at arraignment both defendants elected to be tried by a judge and jury. The defendants pleaded not guilty to the single count of theft - as is their legal right.

The record indicates both defendants subsequently changed their elections – for a trial by a judge and jury - to a trial by a judge sitting alone on 17th March 2010 and on that date a trial date was fixed for 26th August 2010 before Ford CJ.

For various reasons, the initial trial date of 26th August 2010 before Ford CJ had to be vacated and the trial was subsequently re set for hearing on 18th April 2011, before me

The trial commenced proper on that date and because of the unavailability of a single, but material witness, the court concluded the hearing of the oral evidence in this case on 20th May 2011 after the completion of the Vav'au circuit.

On the 20th May 2011 the court ordered written submissions were to be filed within one week by both the prosecution and defence counsel, with judgment reserved to Friday 03rd June 2011 at 14.00, on that date due to a heavy case load, judgment was reserved to Wednesday 08th June 2011 at 14.00.

This court confirms that no written submissions have been received from either counsel to today's date 07th June 2011 at 14.00.

INDICTMENT

- **THEFT** - contrary to section 143 & 145 (b) of the Criminal Offences Act [Capt 18]

- Mamata Kohinoa of Ha'ateiho, on or about 10th October 2009 at Ha'ateiho, together with Tevita 'Eli you did dishonestly take without any colour of right from Latu VAKA the following property 35 yams valued at \$700.00, and the total value of that property is \$700 and you took the property with an intention to deprive the owner permanently of those goods, and you also intended to convert that property for the use of others, without the consent of Latu VAKA

The court heard sworn evidence from a total of five witnesses for the prosecution who gave evidence in support of the prosecution's case.

Both defendants elected to give sworn evidence and they also called a witness in their defence, as of course is their legal right.

The court has had sight of six exhibits - the police Record of Interview the Charge Statements and the alleged Confessions of both defendants which documents were admitted in evidence, by consent.

THE PROSECUTION'S CASE

The prosecution's case is that on or about Saturday 10th October 2009, the defendants stole 35 yams as per the allegation contained in the indictment in this case and that the Crown says those 35 yams were worth - \$700.00 TOP.

The prosecution in their opening address said that the alleged victim in this case Mr. Latu Vaka belonged to what I shall describe as a co-operative group of farmers, and that each farmer had the legitimate access to a shared piece of land, on which they had planted a number of yams, which they intended to harvest upon maturity.

In October 2009 the vast majority of the yams had been harvested but some half a row of yams remained in the field that Saturday, un-harvested. Those yams are the ones the Crown says are the subject of this alleged crime.

The Crown claims the two defendants went to the land and they harvested the remaining 35 [valuable] yams which the crown says the defendants took and they carried away and which they converted for their own use when they ate the yams on the following day, for their Sunday lunch.

The defence case is this they say that the two defendants each had a claim of right - to the remaining yams left in the field because they claim they had each been given permission by the son of the owner of the land, and that having been given permission by the son of the land owner - they did not steal the property, as has been alleged by the Crown here in this indictment. They say that they are both innocent.

SPECIFIC AVERMENTS

The prosecution via its indictment has specifically averred that the two defendants on the date in question – stole 35 yams - thus to prove its case the prosecution must prove that in fact 35 yams were stolen. They have not done so.

By placing a value on those yams and the prosecution says the value of the 35 stolen yams is TOP\$700.00 that must also be proved by the prosecution to the courts satisfaction.

The prosecution brought no independent evidence of say a market stall holder to testify the cost of yams both wholesale and retail on 10th October 2009. Prices can go up as well as go down.

The prosecution also avers the alleged 35 stolen yams belonged to the victim Latu VAKA – PW1 that also must be proved to the courts satisfaction. PW1 says the yams belong to him DW3 says they belong to him who is telling the truth?

These aspects are clearly in dispute, because the defence claims that the defendants were in fact given permission to take yams from the allotment, by the defence witness DW3 Police Sergeant Nauto VEIKINE

It is well known that - part of the essential element to the charge of theft is

That the prosecution must make the court sure the defendants - were in fact acting dishonestly.

In this case the defence denies the defendants were dishonest

They claim the defendants both had permission to take a number of yams from the witness DW3 and they did just that – he was the first defendant's employer the son of the land owner.

Bearing all that in mind, in relation to this particular case then the court must decide two questions:

1. Firstly - was what the defendant[s] did - dishonest by the ordinary standards of reasonable and honest people? In this regard, the court must form its own judgment of what those standards are in the community here - in Tonga.
2. Secondly - must the defendant have realized that what he was doing, would be regarded as dishonest, by the standards of reasonable and honest people in Tonga?

If the answers to both questions are – YES then the element of dishonesty is proved.

If the court is not sure – then the element of dishonesty have not been proved then the defendant[s] are **Not Guilty** of the offence charged.

LEADING CASES

- **R v SMART 1983 VR 265 at 295 (a decision of the Supreme Court)** In determining whether the prosecution has proved the defendant was acting dishonestly (it) must first of all decide whether according to the ordinary standards of reasonable and honest people - what was done was dishonest in most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it; and it will be obvious that the defendant himself knew that he was acting dishonestly.
- **R V GHOSH 1982 2 ALLER 689:-** Is the well known test for Dishonesty, it states; "It is dishonest for a defendant to act in a way

which he knows ordinary people consider dishonest; even if he himself asserts, or he genuinely believes he is morally justified in acting as he did."

- **MACHENT v QUINN 1970 2ALLER 255 DC** that case establishes that it is not necessary to prove all the articles or values mentioned in the indictment to have been stolen; - if it is proved that the defendant stole any one of them.
- See also **R v Parker 53 Cr App R 289 CA** per Lord Donaldson at page 229 **however** the jury must be agreed on which particular item **or value** was stolen. Per - Archbold - 2009 21-7

ANALYSIS OF THE EVIDENCE

The court heard from a number of prosecution witnesses and also from the defendants who chose to give evidence on oath and the court also heard evidence from a defence witness Police Sergeant NAUTO VEIKUNE who I now call - DW3.

The last witness - DW3' sworn evidence, in my respectful view indicates quite clearly to this court, that the two defendants were NOT GUILTY of committing - this alleged crime.

In the Courts respectful view DW3's evidence essentially completely exonerates these two accused, for all the following reasons.

- DW3 indicated that he was at the material time [and for a long time before] a long time employer of the two defendants
- The evidence revealed both defendants had worked for the witness DW3, working on his family plantation for a number of years - they were both in paid employment, paid by DW3.
- DW3 indicated to the court in evidence, which I fully accept that he was present at the harvest of yams, together with the defendants and the alleged victim, on Saturday 10th October 2009 - until the evening
- DW3 told this court - on oath - that at a point in time on Saturday 10th October 2009 - that he had given permission for the two defendants to take a number of small yams because he told the court those yams

were too small to give as a traditional gift of thanksgiving to his - father, who was the traditional land owner

- DW3 told the court the yams were taken from the plantation by the two defendants the witness went on to emphasize in cross examination that the yams were too small to be given as a traditional gift for his father, the landowner and the defendants could make use of them.
- The defendants also gave evidence on oath in their ROI and CS and CS they had made clear admissions to the police that they taken away and that they - ate a meal of yams on the next day the Sunday - for lunch
- The defendants gave evidence on the size of the yams which they took from DW3's plantation and they also gave evidence of the approximate value of a small 12-18 inch yam bought on the market - to this court. I accept their evidence as truthful.
- I fully accept the evidence of the defendants that the yams they took away on Saturday 10th October 2009 were small yams measuring about a foot to eighteen inches long and that they easily fitted into a sack as the defendants both described.
- I also accept the defendants evidence on oath that the yams were also eaten by the defendant's immediate family members on Sunday 11th October 2009
- That said I cannot see how- by any stretch of the imagination how the complainant can honestly say 35 yams amounted to a net worth of \$700.00TOP as alleged by the complainant or how \$700.00 worth in yams could be eaten by the defendant's two relatively small families - in one single day.

CONCLUSION

Bearing in mind DW3 gave sworn evidence to the effect that he gave the two defendants permission to take the proceeds of a gift due to be made to his father - home and for the defendant's to use as they wished

Then because I fully accept that evidence - which I accept in its entirety – that clears these two defendants of any alleged acts of dishonesty.

The prosecution in my respectful view has failed to prove that the defendants stole [a] 35 yams or [b] that the alleged stolen yams were worth a total value \$70.00 [c] or that the alleged victim the plaintiff owned the yams - as has been specifically averred in this indictment.

ACCORDINGLY

- Both defendants are acquitted and discharged.
- Bail conditions no longer apply.

DATED 08TH JUNE 2011

J U D G E