IN THE SUPREME COURT OF TONGA **NO.CR.29/99**
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

REX

-V-

LOPISENI SOAKAI

BEFORE THE HON JUSTICE FINNIGAN

Counsel: Mr Kefu for Crown,
Mr Fifita for 'Aho,
Mr Veikoso for Soakai & 'Apikotoa

Dates of hearing: 26, 29, 30 March 1999
Date of Judgment: 31 March 1999

VERDICT OF FINNIGAN, J

There are 3 accused, charged jointly. It is possible to deal with all 3 as one because of the similarity in the evidence.

The charge is abetment of theft, ss 8, 143 & 145 (b) of the Criminal Offences Act cap 18. The particular theft is theft of certain items from The Yacht Club on 8/8/98.

The onus is on the Crown. The ingredients to be proved are in Ss 8, 143 &145 of cap 18.

Each accused remains innocent throughout the trial, until and unless I find any one or more of them proved beyond reasonable doubt to have abetted the theft by other people of certain goods from the Yacht Club.

FACTS

What was stolen? the evidence of the Crown – that of Siaosi Afitu Kupu - is not reliable. He stated certain things went missing, in a list which he wrote, and which was produced as Exh A. I accept this list was made after the theft with which this case is concerned.

but cannot follow the process by which the list was made up. It seems to be the difference between two stocktakes, about 24 hrs apart, but I cannot tell how much of the reduced stock at the second stocktake is due to sales in the intervening period, or for that matter to any other cause, such as any possible other removal of stock, authorised or not. For evidence of what was stolen, I rely on the evidence of the thieves themselves, who gave evidence, and the 3 accused.

From the evidence of all 11 witnesses, including the 3 accused, I find the facts to be as follows. Two or three people who have appeared before the court and pleaded guilty to theft or abetment of theft stole beer, spirits, cigarettes, snacks and a tape player, perhaps other things also, from the Yacht Club. They left these at some bushes near the club and called the 3 accused to help carry them. All 3 helped carry the goods to the nearby cemetery where each of them drank some of the stolen drink, then they helped carry the rest to the home of one of the thieves, where each of the 3 accused drank some more of the stolen drinks.

THE DEFENCE

Those facts are the basis of the charge against each. Each of the accused said in evidence that he did not know that the goods were stolen. I reject the evidence of each in turn after considering the explanations of each. None of the 3 accused showed how they could escape knowing what was clear from the circumstances – the goods which they saw on the side of the road late on a Saturday night, including partly empty bottles and an open box of beer, were stolen goods. One claimed he was too drunk to realise that, but his memory of what happened was clear, and I must find him responsible for what he did. For Sione 'Aho, Mr Fifita submits there is no evidence that he commanded incited encouraged or procured, the theft of the goods from the club by the thieves. For the other two accused Mr Veikoso makes the same submission.

As a secondary defence, Mr Fifita submits that the written statements of his accused client should be rejected, pursuant to the proviso in s22 of cap 18.

As further secondary defences, Mr Veikoso makes some interesting submissions of law, but I must reject each of these. First he submits that the act of theft is complete upon the merest moving of goods with the required criminal intent, and that his 2 accused clients came upon the stolen goods after the offence was complete. This, in his submission, they could not abet a completed crime. This submission fails on the facts. It was part of the crime as committed, that the thieves not only intended to remove the goods permanently from their owner but actually did so. In order to do so, and complete the theft which they were committing, they carried the goods some distance away, and having done that, they consumed the part which was able to be drunk and eaten, thus depriving the owner permanently. It was in the carrying away and consuming that they were still committing the crime of theft, and in that they were assisted and encouraged by each of the 3 accused.

Next, Mr Veikoso submits that what the Crown proved by its evidence was that the accused committed the crime of receiving, under s 148 of cap 18. He submits that as the Crown did not charge this offence, even in the alternative, it cannot obtain a conviction on that charge now. He relies upon s 15 of cap 11 and s 13 of the Constitution, cap 2. I find cap 11 of no help on an indictment. S13 of cap 2 was amended by Act No 23/1990 to permit the very thing that Mr Veikoso has submitted cannot happen. The statutory authority for convicting on a charge which is proved but which is not in the indictment is s 42(3) of cap 18. If I were satisfied that the crime proved was receiving, then my duty as a judge would be to enter convictions for receiving against all 3.

Next, Mr Veikoso submits that the accused may have been proved actually to have committed theft by themselves, by taking the goods after they had been stolen by the thieves. He makes the same submission, that they cannot be convicted if they have not been charged. The same law applies to that submission, and if I were satisfied that the evidence proved theft, then it would be my duty to enter convictions on that charge.

I turn to the submission that the written statements made by each accused should be rejected. I have not found it necessary to rely on that evidence, the facts speak for themselves, and there is nothing in those statements which throws doubt on the obvious inference from what occurred. However, for completeness, I shall deal with the statements. It is accepted by both counsel that all the written statements of all 3 accused were made voluntarily. However, I am greatly concerned by the course of the police investigation. I find that the investigation was carried out in an attempt to comply with the general law about the liberty of the citizen, but in my view, the legal rights of these 3 accused to their liberty were infringed. They were not protected by the Magistrate as they were intended by the law to be. The evidence of the police officer is that Soakai was apprehended on the night of Sunday 4 October 1998, and was taken before a Magistrate on 5 October, "for an order to investigate". He was detained in custody by order of the Magistrate "for routine moves" for 14 days and was released on 19 October. His interview took place on 11 October, commencing at 0155 hrs and ending at 0350hrs. 'Aho was apprehended also on 4 October, and was taken before the Magistrate on 5 October and detained by the Magistrate's order in custody. He was interviewed on 11/12 October. His interview started at 2220 hrs and ended at 0059 hrs. It seems he was released before Soakai. 'Apikotoa was apprehended on 5 October. He was not interviewed until 18 October, at 1010 hrs till 1245 hrs. By the night of 18 October 'Aho had been released, and the other two were taken by the police to the scene for a re-enactment.

It is quite wrong for either the police or a Magistrate to consider the role of a Magistrate as permitting the police to hold citizens in custody for the sole purpose of permitting the police to carry out "routine moves". There must be a reason shown by the police for the need to detain a suspect during their enquiries. It is grossly wrong for the police to be authorised by a Magistrate to hold a suspect for up to 14 days for interview, without special reason being shown for that. The careful work of Sgt Helepiko shows that in the present case, the whole interview of each took less than 3 hours. The interviews were straightforward, with each of the accused writing his own answers to the questions put.

The lengthy remand in custody of each accused was excessive and unfair. In addition, the timing of the interviews of 2 of the accused at about midnight and beyond was not shown to be necessary or fair. I have not found it necessary to rely on these statements at all, but I reject them as evidence in any case pursuant to the proviso to s 22 of the Evidence Act, cap 15. Despite the careful work done by Sgt Helepiko in respect of the interviews, and their generally voluntary nature, they were obtained in circumstances that are now well known as unacceptable to the courts.

THE VERDICTS

The simple task undertaken by the Crown was to establish beyond reasonable doubt that each of the 3 accused abetted the theft of beer spirits and other goods by helping the thieves with their theft after the goods were removed from the Yacht Club. Particularly by helping carry the goods away and by helping drink some of the goods that were drinkable. In my opinion those two acts, or either one of them, if proved to have been done with knowledge that the goods were stolen, are abetment, because instead of hindering the thieves, they were helping the thieves. Helping is encouraging and inciting the thieves to continue with their crime. Even though the ingredients of theft were already complete, this particular theft was still going on.

It has been clearly proved to me that each of these accused in turn was well able to know that these goods which he saw were stolen, and had no reason to say he could have doubted it at the time, or that he was entitled to believe otherwise. I have no doubt that each in turn knew that what he was carrying and what he drank was something that had been stolen from somebody. Each must be convicted, and I enter convictions accordingly.

The crime of which each is convicted relates to fewer items than those listed in the indictments, because the evidence fell short. I am confident from the evidence of the 3 accused and of their 3 accomplices that what was stolen and carried away was beer and spirits, and that it had a total value well in excess of $500. The conviction for each is for abetment of theft of beer and spirits to a value greater than $500.

SUPREME COURT TONGA

NUKU'ALOFA, 31 March 1999

JUDGE