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**IN THE COURT OF APPEAL  
CRIMINAL JURISDICTION  
NUKU'ALOFA REGISTRY**

**AC 1 of 2020  
(CR 7 of 2019)**

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**BETWEEN:**

**'EIKI TU'IVAKANO - Appellant**

**AND**

**REX - Respondent**

**Coram:** Moore J  
Blanchard J  
White J

**Counsel:** Mr. W. C. Edwards SC with Mr. V. Latu for the Appellant  
Mr. J. Lutui with Mr. T. 'Aho and Mrs T Vainikolo for the Respondent

**Hearing:** 20 October 2020

**Judgment:** 6 November 2020

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## JUDGMENT OF THE COURT

1 The appellant stood trial on an amended indictment dated 7 February 2020 before the Lord Chief Justice and a jury charged with 10 offences: acceptance of bribes, money laundering, making a false statement for the purpose of obtaining a passport, perjury, possession of an arm without a licence, and possession of ammunition without a licence. In the fourth week of the trial the Crown entered a *nolle prosequi* in respect of counts 1-6 in the amended indictment, being the counts alleging the offences of acceptance of bribes and money laundering. The appellant pleaded guilty to count 9 of the indictment, being possession of an arm without a licence contrary to s 4(1) and (2)(b) of the *Arms and Ammunition Act*.

2 On 9 March 2020 the appellant was convicted of the offences of:

- a) making a false statement for the purpose of obtaining a passport, contrary to s 21(1)(a) of the *Passport Act* (count 7);
- b) perjury, contrary to s 63 of the *Criminal Offences Act* (count 8);
- d) possession of ammunition without a licence, contrary to s 4(1) and (2)(b) of the *Arms and Ammunition Act* (count 10).

3 Counts 7, 8 and 10 were in the following terms:

### “(Count 7)”

Tu’ivakano of Nukunuku, on or about 17 July 2015, at Nuku’alofa, with the purpose of obtaining a passport for Hua Guo and Xing Liu, and with intent to deceive the Immigration Division of the Ministry of Foreign Affairs, you did write a letter to the Immigration Division of the Ministry of Foreign Affairs, stating that Hua Guo and Xing Liu were naturalised as Tongans on 29<sup>th</sup> October 2014, and you had reasonable cause to believe that statement is misleading.

### “(Count 8)”

Lord Tu’ivakano of Nukunuku, on or about 21 December 2015, in Nuku’alofa, you did make an oath in an affidavit a material statement to your knowledge, when you in paragraphs 6 and 7 of that affidavit stated that ‘Mr Huo Guo and Ms Xing Liu were naturalised during my tenure as the Minister of Foreign Affairs of the Ministry’ and ‘after naturalisation Tongan passports were then issued to these two’, and you knew these statements were false.

...

**(Count 10)**

Lord Tu’ivakano of Nukunuku, on or about 1 March 2018, at Nuku’alofa, you did possess 212 pieces of ammunition without a licence for that ammunition.”

- 4 The appellant appeals from his convictions on counts 7, 8 and 10. His appeal lies of right on grounds which involve a question of law alone, or otherwise with leave of the Court of Appeal or a certificate of the judge who tried him that it is a fit case for appeal (*Court of Appeal Act*, s 16(a) and (b)). The Lord Chief Justice has certified that in respect of the appeal against conviction based on questions of mixed law and fact, the case is a fit case for appeal.
- 5 For the reasons which follow, the appeal against conviction on counts 7 and 8 should be allowed, the convictions quashed, and verdicts of acquittal entered. The appeal against conviction on count 10 should be dismissed.
- 6 Count 7 alleged an offence against s 21(1)(a) of the *Passport Act*. That section provides:

**“21 Offences**

- (1) Any person who —
- (a) for the purpose of obtaining for himself or for any other person, any passport or certificate of identity, or other advantage under this Act with intent to deceive, makes or causes to be made any declaration, return or statement which he knows or has reasonable cause to believe to be false or misleading,

...

shall be guilty of an offence against this Act.”

- 7 The letter of 17 July 2015 the subject of count 7 was signed by the appellant in his then capacity as Speaker of Parliament. It was addressed to “Immigration Officer, Tonga Immigration Office, Ministry of Foreign Affairs”. The letter stated:

“Dear Sir,  
I wish to confirm that during my tenure as Prime Minister 2010-2014 Mr. Hua Guo and Ms Xing Liu were naturalized as Tongans on the 29 October 2014. Mr. Singkei Liu and Ms. Xing Liu, have lost their passports twice and my staff during my time as Prime Minister issued the second passport and this is the third time they have lost their passport due to theft.

I should be most grateful if the Immigration Tonga could kindly facilitate Hua Guo and Xing Liu with their passports to enable them to travel abroad to import building materials to complete their business that was used to be Shooters Nite Club on Vuna Road.

Should you have any requirements please feel free to contact my office.

Yours sincerely,

[signed]  
Lord Tu'ivakano  
*Hon. Speaker of Parliament*

8 Count 8 charged the appellant with the offence of perjury contrary to s 63 of the *Criminal Offences Act*. Section 63 relevantly provides:

**“63 Perjury**

- (1) Perjury is the making by any person upon oath or affirmation, either in a judicial proceeding or in any affidavit or solemn declaration, of any material statement relating to a matter of fact, opinion, belief or knowledge which the person making such statement knows to be false.
- (2) Every proceeding shall be deemed to be judicial within the meaning of subsection (1) which is held before any Court or before any person having power to take evidence on oath or affirmation.”

9 The affidavit the subject of count 8 was made by the appellant on 21 December 2015. From its content it appears to have been made in connection with proceedings commenced in the Magistrates Court by the appellant in his capacity as Speaker of the Legislative Assembly against the Deputy Police Commissioner, seeking to challenge the issue and execution of a search warrant or warrants. Paragraphs 6 and 7 of that affidavit that are the subject of the charge of perjury in count 8 were as follows:

- “6. I recall that Mr Hua Guo and Ms Xing Liu were naturalised during my tenure as Minister of Foreign Affairs of the Ministry.
7. After naturalisation Tongan passports were then issued to these two.”

10 It does not appear that the Crown provided particulars as to why it alleged that the letter of 17 July 2015, the subject of count 7, was misleading, or why it alleged that the statements the subject of count 8 contained in the appellant's affidavit of 21 December 2015 were false. The reference to “Mr Hua Guo” and “Ms Xing Liu” was an error in that Hua Guo is female and Xing Liu is

male. It is not this fact on which the Crown relies upon for count 7, nor count 8.

11 The Crown prepared a document entitled "Summary of Facts: Lord Tu'ivakano" which was a summary of the facts the Crown relied upon or contended for in respect of the various alleged offences with which the appellant was charged. So far as relevant to counts 7 and 8, that document stated:

"(21) On 14 January 2013 passport applications of Chinese nationals were lodged with Immigration. The passport applications included applications for one Singkei Lou and Shanoi Kam.

(22) The passport application for Singkei Lou claimed that he held a previous Tongan passport, passport number B141515. Satua Tu'akoi confirmed the identity of the applicant in the application. In support of the application was an affidavit from 'Ileana Taulua attaching a copy of the previous passport.

(23) The passport application for Shanoi Kam claimed that she held a previous Tongan passport, passport number B141516. Satua Tu'akoi confirmed the identity of the applicant in the application. In support of the application was an affidavit from 'Ileana Taulua attaching a copy of the previous passport. Subsequently, attached to the application was a memorandum from Suka Mangisi to 'Ouita Kaho and Tupou Vaipulu confirming that the Accused had directed for the passport to be issued.

(24) The Immigration records showed that both Singkei Lou and Shanoi Kam were never naturalized as Tongan Subjects to entitle them to apply for a Tongan passport. The Immigration passport register also showed that Singkei Lou and Shanoi Kam had never been issued previous Tongan passports. In fact the Immigration passport register show that no Tongan passports had been issued with the numbers B141515 and B141516.

(25) Also on the same day, Tongan passports, number R402990 was issued to Singkei Lou, and passport number R402991 was issued to Shanoi Kam.

...

(71) On 29 October 2014, Mr. Singkei Lou and Mrs. Shanoi Kam took their oaths of allegiance and a certificate of naturalization was issued to them on the same day, after being signed by the Accused.

...

(87) On or about 8 July 2015, Immigration received passport applications for Xing Chun Liu and Hua Guo. The applications were given to Viliami Lolohea, OIC Immigration by one 'Onitulei Manu.

- (88) They attached an affidavit to their application stating that they were naturalized Tongan Subjects and also copies of their Chinese passports.
- (89) Viliami Lolohea reviewed the applications and discovered that Xing Chun Liu and Hua Guo had previously applied and were issued Tongan passports under the names Singkei Lou and Shanoi Kam.
- (90) Upon further investigation it was discovered that Hua Guo travelled to Tonga for the first time on 1 February 2013 with a Chinese passport with the name Hua Guo. She departed Tonga on 5 February 2013 with a Tongan passport issued on 14 January 2013, under the name Shanoi Kam. That Tongan passport was issued on 14 January 2013, a month before the applicant arrived in Tonga for the first time.
- (91) On 17 July 2015, the Accused wrote a letter in support of Hua Guo and Xing Chun Liu's passport application. In this letter he confirmed that during his tenure as Prime Minister in 2010 – 2014, Hua Guo and Xing Liu were naturalized as Tongans on the 29 October 2014.
- (92) Viliami Lolohea interviewed Xing Chun Liu on 6 August 2015 regarding his passport application. During the interview, Liu confirmed that he first came to Tonga in February 2013 and that on this visit he received a Tongan passport issued in January 2013.
- (93) Tongan passports were never issued to Hua Guo and Xing Chun Liu in relation to the passport application they lodged.
- (94) On 21 December 2015 the Accused made a sworn affidavit. In that affidavit he stated that from December 2010 – December 2014 he was the Prime Minister of Tonga. He was also the Minister for Foreign Affairs and the Minister responsible for Naturalization.
- (95) In that affidavit, Lord Tu'ivakano attested in paragraph 6 that 'Mr Huo Guo and Ms Xing Liu were naturalised during your tenure as the Minister of Foreign Affairs', but this is a materially false statement.
- (96) Lord Tu'ivakano also attested in paragraph [7] in the same affidavit that, in relation to Mr Huo Guo and Ms Xing Liu 'after naturalisation and there were Tongan passports issued to these two'.
- (97) A police investigation into the affidavit revealed these attestations which were materially false."

12 By applications dated 1 April 2015 Ms Hua Guo and Mr Xing Chun Liu applied for the issue of Tongan passports attaching in support of that application in each case a letter from an acting assistant police commissioner, Tavita Fifita, that their Tongan passport had been reported as lost. Evidently, the letter of 17 July 2015 that was the subject of count 7, was issued in connection with those applications. As is stated in para 89 of the Crown's document entitled "Summary of Facts" quoted above, it was the Crown's case that they had previously applied for and had been issued with Tongan passports under different names, namely, Singkei Lou (in the case of Xing Chun Liu) and Shanoi Kam (in the case of Hua Guo).

- 13 This was common ground. The appellant relied upon the facts that naturalisation certificates had been issued in 2014 to the two individuals, but under the names of Shanoi Kam and Singkei Lou, and that passports had previously been issued to them in those names. Because Shanoi Kam and Singkei Lou were the same individuals known as Hua Guo and Xing Chun Liu, the appellant said that the letter of 17 July 2015 and the impugned paragraphs of the affidavit of 21 December 2015 were true.
- 14 It was not part of the Crown's case that certificates of naturalisation issued to Singkei Lou and to Shanoi Kam on 29 October 2014 were invalid or that oaths of allegiance were not taken by them on that day. It was not disputed that passports had been previously issued to them in those names.
- 15 The passport applications in the names of Hua Guo and Xing Chun Liu dated 1 April 2015 were received by Mr Viliami Lolohea and placed in his desk. Mr Lolohea was employed in the Ministry of Foreign Affairs and had oversight of the passport and naturalisation division and was acting officer in charge of the immigration division. The reason he held the passports in his desk was that the applications did not contain an explanation or a reason to show that the applicants already held Tongan passports. He typed each applicant's name into the Tonga Immigration Management System ("TIMS"). It contained no information that the applicants had been naturalised. A Tongan by the name of Andre Manu came to the office as representative of the applicants seeking to obtain approval of their applications. It was Mr Lolohea's position that he could not approve the applications because there were no records showing that the applicants had been naturalised as Tongans and there were no records on TIMS that suggested that the applicants had been issued with Tongan passports. Mr Manu was insistent that the applicants had been naturalised and that senior officers of the Ministry had worked on issuing certificates of naturalisation. He showed Mr Lolohea two receipts for the issue of passports in the names of Singkei Lou and Shanoi Kam and said that they were the same two persons as in the applications. Mr Lolohea looked at photographs on the applications and on the records on the database which included photographs and concluded that they were the same people, but was

concerned that they were using different names and the database showed different dates of birth. He suspected that the applicants had been guilty of identity fraud, that is, that they had used a false name or date of birth to obtain a government document.

16 Mr Lolohea checked the applicants' Chinese passports and their travel movements into and out of Tonga. He interviewed Mr Xing Liu on 6 August 2015. He concluded that Mr Xing was using both the name Singkei Lou and Xing Liu, that his real name and passport was Xing Liu, and he was a Chinese citizen. Notwithstanding what appear to be significant differences between a photograph attached to the front page of Xing Chun Liu's application for a Tongan passport dated 1 April 2015 and the photograph appearing on the front page of the application made for a Tongan passport in the name of Singkei Lou dated 8 January 2013, he concluded that they were the same individual. In this connection the application of 1 April 2015 included a copy of Mr Xing's Chinese passport, the photograph in which shows a close similarity to the photograph in the passport application in the name of Singkei Lou dated 14 January 2013.

17 The applicants paid the fees for the passport applications on 8 July 2015. Mr Lolohea said that Andre Manu handed to him the letter from the appellant dated 17 July 2015.

18 Mr Lolohea gave the following evidence regarding the letter of 17 July:

"Pros By just looking at the letter and the first sentence that I've just read to you.

Wit Yes.

Pros According to all the information and document you had what do you say about the first sentence?

Wit Regarding the first sentence it was checked in TIMS however there were no details of any naturalization or passports issued to these two names.

Pros So what does that mean to you?

Wit To my understanding this information is not true.

Pros We will then move on to the second sentence, by looking at the second sentence on the first paragraph with regards to the information and the work that you had carried out what do you say about this second sentence?



- Wit I do not understand why the names Singkei Lou and Xing Liu were both stated where Ms. Xing Liu was stated however the name Singkei Lou that is the name in which we believed which was false. However as stated in the first sentence there is no information but when it comes to the second sentence there is still no information.
- Pros No he said in his answer I do not understand why both these names were mentioned and I'm asking him to say why he did not understand it or why did it not make sense to him.
- Wit The reason for that because the name Xing Liu and Hua Guo those are the names shown on the Chinese passport in which we believe those are the names that must've been used. However the names Singkei Lou that should've gone together with Shanoi Kam and there is no information to say that Singkei Lou and Shanoi Kam is also Hua Guo and Xing Liu."

19 Thus, the Crown case as adduced through this witness was that the letter from the appellant of 17 July 2015 was misleading, either because:

- (a) there were no details of any naturalisation or passports issued in the names of Hua Guo and Xing Liu; or
- (b) the name Singkei Lou was believed (by the immigration department) to be a false name; and
- (c) there was no information to say that Singkei Lou and Shanoi Kam were also Hua Guo and Xing Liu.

20 But the summary of facts asserted that they were the same persons and the witness said the same. The appellant was not charged with having issued certificates of naturalisation to Hua Guo and Xing Liu on 29 October 2014 under false names.

21 Mr Lolohea was not misled by the letter of 17 July 2015 into believing that any naturalisation certificate or passport had been issued in the names of Hua Guo or Xing Liu. He said that when he received the letter of 17 July 2015 he had already known about the differences.

22 However, it is not essential in order to show that a statement is misleading to also show that someone has been misled by the statement.

23 Mr Mai'li Limoni worked in the serious crime unit with the Tonga police in the passport taskforce. He referred to the statement in paragraphs 6 and 7 of the appellant's affidavit of 21 December 2015 that was the subject of count 8. He referred to certificates of naturalisation and oaths of allegiance said to have been given to and taken by Singkei Lou and Shanoi Kam on 29 October 2014. He gave the following evidence:

"Pros My question is, what is the relationship between Mr. Singkei Lou and Shanoi Kam to Mr. Hua Guo and Xing Liu do they have any relationship?

Wit The only thing I know about this regarding the exhibit D1 and D2 Singkei Lou and Shanoi Kam certificate oath of allegiance and certificate of naturalization were done at 2014 and Mr. Hua Guo and Ms Xing Liu later on applied for a passport in 2015.

Pros So they are different people?

Wit No, these individual different names are one but to my understanding their real names are Mr. Hua Guo and Ms. Xing Liu but their oath of allegiance and certificate of naturalization where [sic] issued under the name Singkei Lou and Shanoi Kam."

24 In cross-examination he was asked by counsel for the appellant why he stated that what appeared in the affidavit was wrong. His answer was:

"Because as stated here that Mr Hua Guo and Xing Liu were naturalize Tonga in 29 October but as shown in the oath of allegiance and certificate of naturalization it is under the name Singkei Lou and Shanoi Kam so that is why that is false because the name Hua Guo and Xing Liu they are not the same name shown on the oath of allegiance and certificate of naturalization."

25 In the Crown's address to the jury counsel stated:

"The accused knew that Singkei Lou and Shanoi Kam had been naturalised on 29 October 2014, not Hua Guo and Xing Liu."

26 Counsel also stated, referring to the letter of 17 July 2015:

"Had the accused stated that he recalls that Hua Guo and Xing Liu were naturalised as Tongans on 29 October 2014 under the names of Shanoi Kam and Singkei Lou, there would be no issue. However, that is not what he said."

27 Thus, the Crown's case was that the affidavit was false (to the knowledge of the appellant) and the letter of 17 July 2015 was misleading because those documents did not disclose that Hua Guo and Xing Liu had been naturalised

as Tongans under different names and passports had been issued to them under those same different names.

### **Count 7**

- 28 In relation to count 7, the context in which the appellant wrote the letter of 17 July 2015 was clearly to support Hua Guo's and Xing Liu's application for the issue of passports on the basis that they had previously been granted passports which they said had been lost.
- 29 Given that the Immigration Office had, and would be expected to have, records of the names in which passports had previously been issued, it is doubtful that any implication would arise from a statement that passports had been issued to Hua Guo and Xing Liu that the passports had been issued in those names. However, in the context of the letter, the statement that Hua Guo and Xing Liu had been naturalised as Tongans on 29 October 2014 could imply that they had been naturalised in those names.
- 30 The letter referred to Mr Singkei Lou as having lost his passport. The reference in the letter to Singkei Lou suggests that the person who prepared the letter assumed that the Department of Immigration would have some knowledge of him, which it did. Mr Manu asked the appellant to provide the letter. Mr Manu had previously told Mr Lolohea that Hua Guo and Xing Liu had been naturalised under other names.
- 31 No issue was formulated by counsel for the Crown or the accused to be left for the jury's consideration that the letter was misleading by implying that Hua Guo and Xing Liu had been naturalised under those names. If that were the only issue it might be appropriate to order a new trial.
- 32 But that is not the only issue. The Crown had the onus of establishing beyond reasonable doubt that in writing the letter the appellant intended to deceive a relevant immigration officer at the Tonga Immigration Office. There was no direct evidence that this was the appellant's intention nor other evidence from which this intention could be inferred.

- 33 The reference to Singkei Lou in the letter is inconsistent with any intention to deceive. If the appellant had intended by the first sentence of the letter to deceive the Immigration Office by implying that Hua Guo and Xing Liu had been naturalised under those names, it is inconceivable that, in the same letter, he would have made a reference to Singkei Lou that would put the Immigration Office on notice that a passport had been issued to Singkei Lou when, on examination of photographs, he could be seen to be the same man as Xing Liu.
- 34 The letter was not carefully crafted, as would be expected, if the appellant signed the letter with intent to deceive. The mixing up of the genders of Hua Guo and Xing Liu illustrated this.
- 35 Nor was there any evidence that the appellant had any motive to deceive any officer of the Immigration Office. The Crown submitted that whether the appellant's reason for writing the letter was merely to assist Hua Guo and Singkei Lou, or whether there was a sinister reason, or some other unidentified but reasonable reason, or no reason, the offence was committed by his having reasonable cause to believe that the letter was misleading and an intent to deceive. That is so, but it does not answer the question of why the appellant would want to deceive the Immigration Office. No sinister motive was established and none was suggested to the appellant in cross-examination. It is true that motive is not an element of the offence, but absence of motive is highly material to whether intent to deceive could or should be inferred.
- 36 On appeal the Crown submitted that, acting reasonably, the jury could have concluded that the appellant was aware that naturalisation certificates had been issued to Hua Guo and Xing Liu under other names. He had asked staff members to make inquiries of the Prime Minister's office and it could be inferred that as a result of those inquiries he was given that information. In their applications for a passport those individuals had left blank the box required to be ticked for establishing the applicants' Tongan nationality. They had not attached to their applications the naturalisation certificates issued to

them in the names of Shanoi Kam and Singkei Lou. The Crown submitted that the jury could reasonably conclude that the letter of 17 July 2015 was provided by the appellant at Mr Manu's request as a substitute for naturalisation certificates and, accordingly, find an intent to deceive.

37 But the Crown accepted that there was no evidence that the appellant knew that Hua Guo and Xing Liu had not attached naturalisation certificates to their passport applications. Nor was that put to the appellant in cross-examination. The appellant said in response to questions from the Bench that he expected the information in the letter would be checked in the Immigration Office. There is nothing implausible in that statement. It would also be expected that the Immigration Office would insist on provision of the naturalisation certificate as that was a requirement of the prescribed form (Passport Regulations cl 4(b)(iii)).

38 The appellant gave evidence that the two people referred to in the letter of 17 July 2015 came with Mr Manu to him seeking assistance and when he looked at them, he recalled that they were the same two people to whom he had administered oaths of allegiance on 29 October 2014. He said:

“... the truth is there was no misleading in this fact and I believed these were the two that I carried on with their oath of allegiance.”

39 He said that he recalled by their appearance that they were the two to whom he had administered their oath.

40 The Crown did not put to the appellant in cross-examination that he intended the Immigration Office to think that naturalisation certificates had been issued to Hua Guo and Xing Liu in those names, or that, in any other way, he intended to deceive the Immigration Office.

41 The appellant's consistent position was that he could not remember the names of the two individuals, but that he recognised them on sight as being the same people to whom he had administered the oath of allegiance on 29 October 2014. He said that the names Hua Guo and Xing Liu were the

names that were given to him by Mr Manu. The letter was drafted by the “Clerk of House” at the time, a Ms Gloria Pole’au. He directed his assistants to check the Prime Ministerial records. He acknowledged that there might have been some change to names.

42 To establish that there was an intent to deceive, it would have been necessary for the Crown to establish that the appellant intended to conceal the fact that Hua Guo and Xing Liu had previously been naturalised under other names. The Crown did not establish that that was the appellant’s intent.

43 Section 17(1) of the *Court of Appeal Act* provides:

**“17 Determination of appeals in ordinary cases**

(1) The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the Court of Appeal may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal, if they consider that no substantial miscarriage of justice has occurred.”

44 In *Heamani Lopeti v Rex* [2019] TOCA 5 this Court held at [19] that:

“In terms of s.17(1) of the [Court of Appeal Act], the correct legal ground relating to sufficiency of evidence is that the verdict is unreasonable having regard to the evidence. A verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused is guilty: *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [5].”

45 In relation to similarly worded provisions in Australia the High Court of Australia said in *M v The Queen* (1994) 181 CLR 487 at 494-5; [1994] HCA 63:

“It is only where a jury’s advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained

by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence [*Chamberlain v. The Queen [No. 2]* (1984), 153 C.L.R., at pp. 618-619; *Chidiac v. The Queen* (1991), 171 C.L.R. 432, at pp. 443-444]. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty [*Chidiac v. The Queen* (1991), 171 C.L.R. 432, at pp. 443, 451, 458, 461-462].”

46 The High Court of Australia has more recently emphasised that:

“The assessment of the weight to be accorded to a witness' evidence by reference to the manner in which it was given by the witness has always been, and remains, the province of the jury. ... their Honours in *M* were remarking upon the functional or 'constitutional' demarcation between the province of the jury and the province of the appellate court.” (*Pell v The Queen* [2020] HCA 12; (2020) 94 ALJR 394 at [38]).

47 This Court has recognised this demarcation between the jury and the appellate court in *Kapeli v R* [2002] Tonga LR 235, stressing that it is insufficient for this Court simply to disagree with the verdict of the jury in order for a conviction to be set aside (at [23] citing *R v Ramage* [1985] 1 NZLR 392 at 393).

48 As noted at [4], an appeal also lies under s 16(1) of the *Court of Appeal Act* on a ground which involves a question of law alone. Whether there is evidence capable of supporting a conviction is a question of law (*Daniel v State of Trinidad and Tobago* [2014] 1 AC 1290; [2014] UKPC 3 at [48]).

49 The notice of appeal asserted that the jury's verdicts on counts 7, 8 and 10 were unreasonable and not supported by the evidence (thus invoking s 17 of the *Court of Appeal Act*), rather than that there was no evidence that the appellant had the intention to deceive. We therefore proceed on the basis of s 17. Giving full weight to the jury's advantage in seeing the witnesses and assessing their credibility, the evidence does not support a conclusion that the appellant had that intent. The appellant denied that intent ([38] above). The

jury must be taken to have rejected his credibility. But the rejection of the appellant's credit does not establish beyond reasonable doubt that the appellant did intend to deceive the Immigration Office.

50 This is not a case of error which does not lead to a substantial miscarriage of justice (*Court of Appeal Act* s 17(1)). The appellant was convicted of an offence of which there was no evidence and of which he ought to have been acquitted.

51 The conviction on count 7 should be quashed and a verdict of acquittal substituted.

#### **Count 8**

52 To establish the count of perjury (count 8) the Crown had to establish beyond reasonable doubt that the statements made in the affidavit (paragraphs 6 and 7 quoted at [9] above) were false and that the appellant knew that they were false. The Lord Chief Justice instructed the jury that the statements were material. That direction is not challenged.

53 Section 63(1) does not include within the definition of perjury the making of a statement which the maker does not believe to be true. It follows that for the offence to be committed, the impugned statement must be false and the accused must know that the statement is false. It also follows that the statement must be false in the meaning that the maker of the statement intended to convey or knew would be conveyed.

54 In the Crown's address to the jury counsel said that "there is no question that the statements in paragraphs 6 and 7 of the accused's affidavit are false." But there was no explanation as to why that was so. Indeed, it was the Crown's case that the statements in the affidavit were literally true. The individuals Hua Guo and Xing Liu were naturalised during the appellant's tenure as Minister for Foreign Affairs and Tongan passports were issued to them. Unless those statements carried the implication that Hua Guo and Xing Liu were naturalised and Tongan passports *were issued to them in those names,*



then the statements were not false. Even if that implication arose, the statements were not false to the knowledge of the appellant, unless he intended to convey that implication or knew that the implication would be conveyed.

55 It is apparent from the balance of the affidavit that it was made in support of an application by the appellant in his capacity as Speaker of the Legislative Assembly to set aside a search warrant or search warrants authorising the search and seizure of “the belongings of the Legislative Assembly” (para 13(c)). There was no evidence, and no submission was made to the jury, that the context in which the affidavit was made showed that the impugned statements would have been understood to convey, or would have been intended by the appellant to convey, that Hua Guo and Xing Liu were naturalised and had been issued with passports in those names.

56 The appellant’s evidence-in-chief was to the effect that he recalled administering the oath of allegiance to the two individuals and recognised them when they came with Andre Manu for his assistance. He was not shaken on that evidence.

57 In his address to the jury, Mr Edwards SC for the appellant emphasised the acceptance by the Crown’s witnesses that Singkei Lou and Xing Liu were the same person as was Hua Guo and Shanoi Kam. Mr Edwards said:

“The police knew this very well, that these two were the same people, but yet they still went on and charged the accused ... The prosecution has [fallen] short in proving ... that the accused had lied in his affidavit.”

58 Counsel then said it was nonetheless up to the jury to decide whether the accused knew that the statement in the affidavit was false.

59 It is clear from counsel’s address and cross-examination of the Crown’s witnesses that the appellant had put in issue that the impugned statements were false.

60 In his summing up to the jury the Lord Chief Justice stated that the element of the charge of perjury which appeared to be in issue was whether the appellant, when he swore the affidavit, knew that the statements at paragraphs 6 and 7 were false. He said to the jury that they could bear in mind evidence that there had been no records of any Privy Council Decision evidencing the naturalisation of Hua Guo or Xing Liu. He reminded the jury that:

“The accused maintained under cross-examination his belief that the statement in paragraph 6 of the affidavit is true because that was the couple he saw the day he issued the certificates of naturalisation and oath of allegiance in October 2014.”

61 The Lord Chief Justice told the jury that their task was to determine whether they were satisfied that what was stated in paragraphs 6 and 7 of the affidavit was untrue and whether the accused knew that when he swore the affidavit. If the jury considered that the statements were untrue then it was for them to decide whether the appellant deliberately lied or made a genuine mistake.

62 The impugned statements in the appellant's affidavit were literally true. The Crown did not identify the basis upon which it contended that the impugned statements were false. It is evident that it contended that the statements were false because they carried an implication that Hua Guo and Xing Liu were naturalised and were issued with passports in those names, but it did not say how that implication arose. There was no evidence that the appellant knew that that implication would be conveyed or intended that it should be conveyed.

63 As with count 7, the conviction on count 8 was not challenged under s 16(a) of the *Court of Appeal Act* but under s 17. This also is not a case of error which does not lead to a substantial miscarriage of justice (*Court of Appeal Act* s 17(1)). For the above reasons, the conviction cannot be supported having regard to the evidence. The conviction should be quashed and a verdict of acquittal substituted.

## Count 10

64 Count 10 alleged an offence against s 4(1) and s 4(2)(b) of the *Arms and Ammunition Act*. The section provides:

### **"4 Possession of arms and ammunition prohibited except under licence**

(1) No person shall possess, use or carry any arm or ammunition except under a licence in respect of each arm and such ammunition so possessed, used or carried and in accordance with the prescribed conditions of such licence.

(2) Any person who shall possess, use or carry any arm or ammunition without such licence shall be guilty of an offence and shall be liable on conviction in respect of every such arm or the total amount of ammunition so possessed, used or carried —

...

(b) if the offence was committed elsewhere, to imprisonment for a term not exceeding 5 years"

65 Mr Limoni gave evidence that he executed a search warrant at the appellant's residence, but before the search was conducted:

"... Lord Tu'ivakano told us that he has arms and ammunition but he does not have license to this arms and told where it is. About the place where we took the firearm from and the ammunition is where Lord Tuivakano told us that and led us to a room where a white cupboard and the gun was stored inside the cupboard. And I went there together with Fusikata and Polutele and also with the defendant. When we searched this cupboard we did not see any firearm in it, and then Lord Tu'ivakano informed us to check the vehicle Agnes 2 to search the vehicle for the firearm which was parked at the garage outside. So we went to the vehicle and found the firearm and the ammunitions regarding to this case in the boot of the vehicle."

66 Mr Limoni said that the police found a .22 rifle and .22 ammunition. He said:

"So when I found the ammunition there was a big box this big box contains of three other boxes inside and those three small boxes there were 50 bullet each in one small box. Another small box outside of the big box which also had 50 bullets in it. And there was also a plastic bag that had five bullets in it, and there were 7 bullets inside the magazine of this point 22."

67 Thus, the evidence on the Crown's case was that the appellant informed the police where ammunition could be found, being in the boot of a vehicle at the appellant's residence.

68 The appellant did not dispute this. He said that the ammunition belonged to his son, who held the rank of Major in the Tongan Army. The appellant said that his son had left the ammunition in a green bag which was found by the police. He did not contradict Mr Limoni's evidence that he had directed the police as to where the ammunition could be found.

69 The appellant admitted his knowledge of the whereabouts of the ammunition. He gave the following evidence:

"Pros Tu'ivakano when the officer Raymond found the firearm and the ammunition was found at the boot of the vehicle is that correct?

Wit Yes.

Pros And the ammunition was placed beside the firearm?

Wit Yes.

Pros So you did know that the ammunition was placed beside the firearm?

Wit Yes."

70 In response to questions from the Bench the appellant said:

"Ct ...Lord Tu'ivakano who owned the vehicle?

Wit Mr. Sika.

Ct Who is Mr. Sika a relative to you?

Wit He is a close friend of the family Sir.

Ct Why was your rifle in Mr. Sika's vehicle?

Wit Your Honour I also belong to a clay shooting association and normally we go behind villa and we have clay shooting on Wednesday but my son took the 22 and normally they train with the King and also the son of the security but he is also the training officer for the recruit in the army.

Ct What was Mr. Sika[s] vehicle doing in your property that day the police came?

Wit Because we went clay shooting and because I didn't have a vehicle I dropped it off at his residence and then I brought the car because my village people were coming over to a cleanup at my house after the Gita cyclone.

Ct So you and Mr. Sika went shooting that day?

Wit I think on a Wednesday Sir but not that day because I came on the car because I was using the vehicle.

Ct Who put the rifle in Mr. Sika vehicle?

Wit I believe my son did it because when he came I said just to put it in the boot and then I will take it inside because he was on another (inaudible).

Ct Was the riffle [sic] and ammunition in the boot of Mr. Sika [sic] car when you dropped him off that day and drove back to your place?

Wit I didn't know if there was a 22 but I know there were bullets in there. ...

...

Ct And did you see your son put the rifle and the ammunition in the boot that day?

Wit I know he put it there I was doing some other work so just put it there and I will put it after but unfortunately when he left it was still there because the boot of the car because it was locked."

71 The appellant's son, Major Siaso Kiu Tau'i Vailahi Ngalumotutulu Kaho, confirmed that the ammunition found was his and had been inserted inside a green bag.

72 As the Lord Chief Justice correctly informed the jury, whether the appellant had possession of the ammunition did not depend upon who was the owner of the ammunition.

73 It was clear from Mr Limoni's evidence and the appellant's own evidence that the appellant knew that ammunition had been placed in the boot of the car. Although the car was not owned by the appellant, it was a car he was using. It was open to the jury to find that the appellant had control of the car and knew that ammunition had been placed within it. It was open to the jury to find that he had possession of the ammunition. He could have told his son to remove it, but did not.

74 The appeal from the conviction on count 10 should be dismissed.

### Orders

75 For these reasons we make the following orders:

- (1) Appeal allowed in part.
- (2) Set aside the appellant's convictions on 9 March 2020 on counts 7 and 8 of the Amended Indictment dated 7 February 2020 and in their place enter judgments and verdicts of acquittal on those counts.
- (3) Dismiss the appellant's appeal from his conviction on 9 March 2020 on count 10 of the Amended Indictment.



MOORE J



BLANCHARD J



WHITE J

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