

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

**AC 12 of 2012
[CR294 of 2011]**

BETWEEN: 'AISEA TO'A

- Appellant

AND : REX

- Respondent

**Coram : Salmon J
Moore J
Handley J**

**Counsel : Mr. To'a in Person
Mr. Kefu (Solicitor General) for the
Respondent**

Date of hearing : 8 October 2012

Date of judgment : 12 October 2012

JUDGMENT OF THE COURT

- [1] The appellant was convicted after trial before a judge alone of obtaining money by false pretence contrary to s 164 of the *Criminal Offences Act* [CAP 18]. He was fined \$750. The appeal is against conviction only.
- [2] Mr. To'a appeared in person to conduct his appeal although he told us that he had been assisted in the preparation of his submissions by Mr. Fifita who represented him at trial.
- [3] His grounds of appeal were that the trial judge erred in fact and law in requesting the defence not to require a prosecution witness, Joeli Kalou to return for further cross examination and that there was no evidence that the appellant paid for a container with Vete's metal in it.
- [4] He later added a further ground of appeal to the effect that the complainant, Asia Pacific Engineering Ltd, did not lose any money because it was paid for the metal.

BRIEF FACTS

- [5] Mr. To'a is a scrap metal dealer. In April 2011, he entered into a contract with Asia Pacific Engineering Ltd to sell scrap metal belonging to him to Asia Pacific for \$1000 per container.
- [6] The Crown alleged that included in one of the containers was metal belonging to Vete Holdings Ltd which Mr. To'a knew he was not authorised to sell. The false pretence alleged was that he sold that metal to Asia Pacific on the basis that it was his to sell.

THE APPELLANT'S SUBMISSION

- [7] Mr. To'a maintained to us as he did in the court below that all the scrap sold to Asia Pacific belonged to him.
- [8] The allegation concerning the further cross-examination of Joeli Kalou arose in the following way. Mr. Kalou is a director of Asia Pacific. He was called by the Crown and gave his evidence on the second day of the trial which was a Friday. During cross-examination, he was questioned about a bill of lading which had been produced earlier in the trial. It concerned two containers of scrap metal shipped on the 2 May 2011. He expressed uncertainty as to whether the bill of lading was the one relevant to the shipment, the subject of the charge, and said he would like to check it against records in his office. The judge noted that the hearing would be continuing on Monday and the witness agreed to return then with the material from his office.
- [9] Cross-examination continued and was completed except for any questions arising from additional material Mr. Kalou was able to provide.
- [10] When the hearing resumed on Monday, Mr. Kalou was unable to attend due to illness. The judge had by that time formed the view that not a great deal turned on the bill of lading and his judgment records that the defence indicated that Kalou would not be required to give further evidence at the hearing. Before us, Mr. To'a helpfully provided us with copies of the relevant bill of lading and we were also able to conclude that it was not an essential part of the Crown's proof of the offence charged nor could we ascertain that it assisted the defence.
- [11] Mr. To'a submitted to us that the concession from defence counsel was obtained when counsel was not well and at the end

of the hearing. Mr. Kefu was able to provide us with a record of the progress of the hearing which showed that after defence counsel had agreed to Mr. Kalou not returning, the defence called evidence from Mr. To'a and another witness. That was followed by counsel's addresses. We do not accept Mr. To'a's suggestion that his counsel's concession was made as a result of illness.

[12] Mr. To'a submitted that had Mr. Kalou been recalled, he would have requested production of a letter from Mr. Vete which he had given to Mr. Kalou. However he acknowledged that no request for this had been made earlier at the trial.


[13] Apart from these issues, Mr. To'a's submission to us consisted of protestations of his innocence and a suggestion that the accusation against him had arisen as a result of a dispute between Vete and Asia Pacific. Insofar as such matters were relevant, they were issues to be brought before and determined by the trial judge.

[14] The judge made findings of fact and credibility adverse to Mr. To'a and on the basis of those findings, determined that the elements of the offence charged had been proved beyond reasonable doubt. The appellant has not persuaded us that the judge was in error in any of the findings he made. We accept his credibility findings. In particular, he found as a fact that Mr. To'a had been paid by Asia Pacific for the container (contrary to Mr. To'a's claim) which held the metal which did not belong to him. We have not been persuaded that the procedures followed at the trial have resulted in any unfairness to the appellant.

[15] For those reasons, the appeal is dismissed.



Salmon J



Moore J



Handley J