

Ms Mafi

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

AC 19 of 2009

BETWEEN : SIOSAIA KAMI - Appellant

AND : REX - Respondent

**Coram : Ford P
Burchett J
Salmon J**

**Counsel : *Mr C. Edwards and Mr M. Paasi for
the Appellant*
*Ms. Mafi and Ms. Finau for the
Respondent***

Date of hearing : 7 July 2009.

Date of judgment : 10 July 2009.

JUDGMENT OF THE COURT

Introduction

[1] After a three-day jury trial in January 2009, the appellant was convicted on one count of obtaining goods by false pretences contrary to section 164 of the Criminal Offences Act (Cap 18). On 15 April 2009 he was sentenced by Shuster J. to 3 years imprisonment with the last 6 months suspended (indefinitely). He was also ordered to repay \$24,929.17 within 12 months by way of compensation or serve another 12 months in addition to the 2 1/2 year sentence. He has appealed against both his conviction and sentence.

[2] The particulars in the indictment alleged:

"In November 2006 at Ma'ufanga you obtained for yourself goods by false pretence from TCF Store when you obtained from Maka Taulango, an employee of TCF, the following goods, telling him that you intended to run a restaurant and that you would repay him fortnightly, - 149 cartons of mutton -- valued at \$18,476.17 - 107 cartons of chicken - valued at \$6,453.00."

[3] The appellant does not deny that he obtained the goods in question and that he has still not paid for them. He claims that the reason he was unable to pay for the goods was because of the riots that occurred in Nuku'alofa on 16 November 2006. He acknowledges that he still owes the money and that he would be liable for the debt in a civil court. He denies, however, that he committed any criminal act. In particular, he denies the allegation in the indictment that he had obtained the goods from the complainant, Maka, by falsely representing that he intended to run a restaurant. The defence case was that the appellant had acquired the goods pursuant to a credit purchase arrangement he had entered into with Maka which they had been operating under for some time.

The facts

[4] Maka worked as a delivery truck driver for the TCF Store. He said in evidence that between 3 - 9 November 2006 the appellant "took goods". He elaborated by saying that on 3 November 2006 he took a total of 149 cartons of mutton and 95 cartons of chicken. The

indictment talks about "107 cartons of chicken". It is not clear from the transcript when the remaining 12 cartons were taken by the appellant but presumably it was on or prior to 9 November 2006. Maka said that the total value of the goods supplied came to \$24,929.17. At the beginning of his evidence Maka said that the goods were "taken from his delivery truck" but later he said that they were "taken mainly from the TCF warehouse." In his examination in chief, the witness was asked by the prosecutor: "What was the main reason you gave these goods to Saia (the appellant) on credit?" Maka answered: "It was like this, we made (sic) arrangement with Saia and expected him to pay back within two weeks, for this was not the first time I have done this with Saia."

[5] The transcript of evidence then records the following exchange between Crown counsel and the witness:

"Pros: What was Saia's intentions to these goods?"

1st Wit: The information he gave me was he was opening a restaurant with a shop they had at the airport with one Sione Faupula. There was also another restaurant operated in 'Eua. That was the information Saia gave me.

Pros: Was the information given true?

1st Wit: 'Yes'.

Pros: Maka you mentioned earlier that you had worked previously with Saia on credit transactions.

1st Wit: Yes.

Pros: How long were you having working relations with Saia before this incident?

1st Wit: More than six months.

Pros: And what was the value of the goods taken previously prior to this incident?

1st Wit: It had exceeded \$10,000.

Pros: And was he able to pay for those goods?

1st Wit: Yes."

[emphasis added]

[6] Maka explained that he had not been permitted by TCF to "carry out this purchase credit" transaction with the appellant and he had been dismissed by TCF when the goods were not paid for. It was Maka who made the complaint to the police, without the knowledge of TCF, and so throughout this judgment he shall be referred to either by his name or as "the complainant".

[7] Maka was more than a delivery driver. In cross-examination he

explained that his job was to sell TCF goods and the profit would go to the company. His salary would depend upon the profit made. He agreed that over the 6 months prior to this particular transaction the appellant had been buying goods on credit from him and they had all been paid for. He said that he had trusted the appellant because he had previously worked with him and he had paid off his debts. He also agreed that the explanation the appellant had given for not being able to pay off the goods on the occasion in question was that the riots in Nuku'alofa on 16 November 2006 had resulted in the destruction and damage of many buildings and businesses. The witness acknowledged in evidence that he was aware the appellant had been operating a restaurant at Fua'amotu Airport at the time. In re-examination Maka also acknowledged that the appellant's father and grandfather had had "working relations" with TCF in the past.

The police evidence

[8] The prosecution called no other witness to speak about the business relationship between Maka and the appellant but evidence was given by Detective Sergeant Vi of the Nuku'alofa Police Station who was the police investigating officer. He produced the "Record of Interview" which recorded the statement taken by the police from the appellant, the "Written Statement of Charges" form and a "Voluntary Statement".

[9] In his record of interview dated 2 February 2007 (Exhibit 3), the 26 year old appellant explained that he was a reporter for a newspaper and he also looked after a family restaurant and shop business situated at Fua'amotu Airport. He said that he held a diploma in business management. The restaurant was registered under the appellant's father's name but he (the appellant) had looked after it in 2006 because the father was in Australia. The appellant said that he had used the same method of obtaining TCF goods on credit "for many years" and this was the first time that he had not been able to pay the debt on time. He explained that the arrangement he had with Maka was that he would be given the goods on credit and he would pay for them on the Thursday of the second week after delivery. The appellant said in his statement that as the first delivery had been on 3 November, "payment should have been made on Thursday 16 November but because of the events of the day I ceased making the payments."

[10] The officer also asked the appellant whether it was because of the plans he had talked to Maka about in relation to his restaurant business that Maka had entrusted the goods to him. The appellant answered, "No, I had worked with Maka for a long time and he and the company trusted me, regardless of what the goods would amount to and it had gotten to that situation before and the amount was paid off." He then went on to explain how some of the TCF mutton and chicken deliveries were for his restaurant and some had been sold "to various businesses that had asked me for these goods and they would pay me later." After the events of the 16/11 he had only been able to pay off \$500 of the debt.

[11] In the Written Statement of Charges form (Exhibit 4), in answer to the charge of obtaining goods under false pretences, the appellant had written: "Yes, the above statement is true and it all arises from my problem of not paying off my debt." In the Voluntary Statement (Exhibit 5) the appellant had written:

"Yes, all the statements about the goods I took are correct. The problem arose out of my not making payments on time. But the arrangement I had with Maka, I did not anticipate any problems in my making my payment. It is my wish that Maka's job is reinstated and that I pay off all my debt."

Grounds of appeal

[12] The principal ground of appeal is that the trial judge misdirected the jury on the law applicable to obtaining by false pretences in that he had failed to put to the jury the defence which was that the complainant and the appellant had been in a business relationship of wholesaler and retailer "over a long period of time where credit was allowed."

[13] The appellant also claims that the judge erred in law in admitting "hearsay evidence" given by Police Officer Vi; in failing to allow appellant's counsel the opportunity to make submissions in support of his no case application at the end of the Crown case and in questioning the appellant in the presence of the jury about his decision not to give evidence.

Principal ground of appeal

[14] The appellant alleges that the trial Judge misdirected the jury on the law applicable to obtaining by false pretences. A "false pretence" is not defined in the Criminal Offences Act but it is a representation, either by words or otherwise, which is false. The appellant was charged under section 164 of the Criminal Offences Act which relates to obtaining money, valuable security or other thing by false pretence. That is to be distinguished from section 166 which creates the offence of incurring any debt or liability or obtaining credit by means of false pretence or fraud.

[15] The appellant did not give or call evidence but, as noted, the essence of his defence was that the transaction in question was not a crime but simply part of an ongoing business relationship between himself and the complainant whereby he had been able to obtain goods on credit. In the past he had always been able to pay for the goods on time but, on this occasion, because of the 16/11 riots, he had not been able to pay. The appellant submitted that nowhere in his summing up did the trial judge put this defence to the jury.

[16] There appeared to be ample evidence to support the defence the appellant sought to rely upon and, in this regard, we refer to the evidence of the complainant in [4] and [5] above. Before us, counsel for the appellant submitted that the passage we have cited in [5] "goes to the heart of the case" because there Maka confirmed that the information the appellant had given him was true whereas in order to make out a charge of false pretences, the prosecution had to establish that the representation made by the appellant to Maka was false.

[17] There are only two occasions in the summing up where the judge made reference to the defence case. In the first, he said:

"The defendant's case. The defendant elected to remain silent and of course is (sic) his legal right. By his counsel's closing submissions had (sic) stated that he was not fraudulent. However contained in the evidence before you is firstly his record of interview, his reply to charge and his confession statement. He said he made a business transaction with PW1 but the events of 16/11 interceded and he was unable to pay back his debt. He said he wanted to do so. And in his confession he felt sorry for the victim PW1. However, defence counsel told you that PW1 deserve (sic) to lose his job. Now members of the jury it is a matter for you to who (sic) you believe."

[18] In another passage, the judge said:

"On the other hand, the defence ask you to give the defendant the benefit of the doubt and to acquit him. Now court (sic) is not entitled to speculate but it may draw inferences. I have addressed you on the law and on certain aspects of the evidence. Further this has been a very short trial with few issues. Members of the jury there may be evidence in which a court may say when taken together will lead you to the sure conclusion it was a defendant who committed the crime. But the defendant maintained his silence and that cannot be subject of any criticism because that is the defendant's legal right. Contrary to what defence counsel told you in his closing submissions, my duty to remind you that the law says that it is immaterial that the accused personally intended to repay the money and he bona fide and reasonably believed that he would be able to repay it."

[19] Nowhere in the summing up is any reference made to the previous credit purchase dealings between the appellant and the complainant which preceded the November 2006 transaction. The requirement in section 13 (3) of the Supreme Court Act (Cap 10) for the judge to sum up the evidence and explain to the jury the law that bears upon the case requires a fair summation of the case presented by both sides. The charge in the indictment was that the appellant obtained the goods by falsely representing to Maka that he "intended to run a restaurant" and that he would repay him fortnightly. The defence was that he obtained the goods not by making any representation to Maka about his restaurant business but simply on credit because that had been the business arrangement they have been operating under for more than six months.

[20] There is a particular passage in the summing up which, if correctly transcribed, is confusing and is likely to have misled the jury. The judge referred to the appellant's written statements to the police and, in relation to the Voluntary Statement (Exhibit 5) which he incorrectly described as a "confession". He said this:

"If for whatever reason you are not sure whether the confession was made or not sure whether it was true then you must disregard it. If on the other hand you are sure both (sic) was true then you may rely upon it even if it was or may have been made by oppression or by improper circumstances. In this particular case the evidence reveals that the defendant wrote in his own handwriting all the answers to the police questions which totalled 28 questions in all. And he handed over his reply to the charges as he did in his confession. In a Tongan case it was held a confession alone can be sufficient to justify conviction where the jury is

satisfied that the confession is reliable and true."

[21] Not only does that statement offend against section 21 of the Evidence Act (Cap 15) which provides that a confession is not admissible in evidence unless it is given voluntarily, but it presupposes that the Voluntary Statement in question (see [11]) above was, in fact, a "confession" i.e. a confession to the commission of the crime of obtaining by false pretences under section 164 of the Criminal Offences Act. On the face of it, however, all the appellant had admitted to was that he took the goods in question and that he had not anticipated any problems in making payment for them in terms of the arrangement he had with Maka, but problems did arise (the 16/11 riots) and he was not able to make payment on time. ". There was no admission made by the appellant in his Voluntary Statement that he obtained the goods by making a representation to the complainant that he knew was false. That is the essential element of the offence which the Crown had to prove beyond reasonable doubt in order to obtain a conviction.

[22] So, what the judge directed the jury in relation to the Voluntary Statement was that it was a "confession" and that in Tongan law "a confession alone can be sufficient to justify a conviction where the jury is satisfied that the confession is reliable and true". The "Tongan case" the judge was referring to was no doubt **R v Fa'aoso** [1996] Tonga LR 36, 39 where Hampton C.J. in a rape case in which the complainant did not give evidence held that a confession in itself may be sufficient evidence to justify a conviction provided that the court applies the "stringent test" which is, "that where effectively, the only evidence is of something the accused has said, that something must be convincingly proved and in itself must be cogent and satisfactory evidence."

[23] In the present case, what the appellant said in his Voluntary Statement cannot be described as cogent and satisfactory evidence of an admission that he obtained the goods by means of a false pretence. He did not admit to making a false representation to the complainant. But the proposition the judge put to the jury in his summing up was that all the jury had to conclude in order to justify a conviction was that what the appellant had said in his Voluntary Statement was "reliable and true". Even the appellant would no doubt have accepted that what he had said in his Voluntary Statement was "reliable and true" but the point is that nowhere in his statement did he make any

admission of having acquired the goods by making a false representation. In other words, the judge's direction to the jury was a misdirection because it misrepresented what the appellant had actually said in his Voluntary Statement.

Other grounds of appeal

[24] In the view that we have taken of the appellant's first ground of appeal, it is unnecessary for us to deal at any length with the other grounds relied upon. Suffice it to say that in relation to the second ground of appeal Crown counsel conceded, quite properly in our view, that the judge had wrongly allowed Police Officer Vi to give certain hearsay evidence which was material to the issue of whether or not the appellant had made a false representation.

[25] Crown counsel, again quite properly, conceded that the appellant must succeed on his third ground of appeal. That related to a submission of no case to answer which the appellant's counsel endeavoured to make at the end of the Crown case. We were told from the Bar that counsel was not given the opportunity to present any submissions in support of his no case application but the judge summarily dismissed his application with the comment that there was indeed a case to answer.

[26] The fourth ground of appeal related to comments made by the trial judge on the failure of the accused to give evidence and we wish to say something more about this. Before us, counsel for both parties agreed that at the end of the prosecution evidence in the court below, Mr Paasi informed the trial judge that the defence would not be calling evidence and he then asked for a ten-minute break before making his final address to the jury. The transcript records the following exchange that then took place between defence counsel, the court and the accused:

"D/C: "Yes, I'm asking for a brief adjournment of 10 minutes before I make submissions.

Ct: Well no I have to explain to the accused his rights especially if you're making submissions of no case to answer. I'll explain the rights, so come here and stand up please, the accused."

(Counsel were in agreement that at that point, in the presence of the jury, the appellant was required to enter the witness box). The transcript

continues:

"D/C: Can I have 10 minutes please?

Ct: I have to explain his rights Mr Paasi under the law. He has certain rights under the law and I have to explain that to him. And these are your rights. You can go into the witness box and give evidence as the other witnesses have done. If you do that you will be led in evidence by your lawyer, the prosecution may ask you questions and so can I. Do you understand that right as I have explained it to you?

Acc: Yes.

Ct: You have a right to remain silent because the prosecution bring this case and they must prove it beyond reasonable doubt so that the court is sure you committed that offence. Do you understand that right to remain silent?

Acc: Yes.

Ct: You have a right to give a statement from the well of the court and not on oath. If you do that nobody can ask you any questions on that. Do you understand that right as I have explained it to you?

Acc: Yes.

Ct: You also have a right to call any witnesses in your defence though the court does not have to adjourn for you to bring them if they are not here today, do you understand that right?

Acc: Yes.

Ct: Now those are your rights as I have explained them to you. You are entitled to consult with your solicitor and I will give you 10 minutes to do that but it is your election at the end and not the election of the lawyer. Do you understand that?

Acc: Yes Sir.

Ct: Thank you I'll be back at half past 10. May the jury retire. Thank you."

(The court then adjourned and when it resumed 10 minutes later the exchange continued)

Ct: Witness box (sic) to give evidence or do you wish to remain silent? Have you any witnesses to bring and what is your view today?

Acc: I wish to remain silent.

Ct: And you have no witnesses to bring in your defence?

Acc: No.

Ct: Okay, would you go back and sit in the back please? Do the party need time to prepare closing submissions?

P/C: Your Honour I'm ready.

Ct: You're ready Mr Paasi, what about (TAPE ENDS)."

[27] In his grounds of appeal under this head, the appellant alleges that the judge's action in calling him to the witness stand and questioning him in the presence of the jury about his decision not to give evidence, after his counsel had specifically told the court that the

defence would not be calling any evidence, adversely affected the credibility of the accused himself and his counsel.

[28] As was stated by Lawton LJ in **R v Mutch** [1973] 1 All ER 178, 181:

Judges who are minded to comment on an accused's absence from the witness box should remember, first, Lord Oaksey's comment in **Waugh v R** [1950] AC 203 at 211:

*"It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment" and, secondly, that in nearly all cases in which a comment is thought necessary the form of comment should be that which Lord Parker C.J. described in **R v Bathurst** [1968] 1 All ER 1175 at 1178, as the accepted form, namely, that --*

"the accused is not bound to give evidence, that he can sit back and see if the prosecution had proved the case, and that, while the jury had been deprived of the opportunity of hearing his story tested in cross-examination, the one thing that they must not do is to assume that he is guilty because he has not gone into the witness box."

[29] In **R v Davison** [1972] 3 All ER 1121, 1126, Browne J., delivering the judgment of the court, said:

"We do not in this case propose to lay down any general principle of hard and fast rule as to what can and cannot be said, but in our view, one vital distinction between what can and cannot be said is whether or not it was made clear to the jury, in the course of making the comment on failure to give evidence, that the duty to prove the case was still on the prosecution and that the defendant was not bound to give evidence."

[30] The transcript reveals that in the course of his relatively brief summing up the judge referred on three occasions to the failure of the appellant to give evidence. His comments are recorded as follows:

"The defendant has chosen not to give evidence or to call witnesses that is his legal right and you must not hold that against him.

*... .
The defendant's case. The defendant elected to remain silent and of course (this) is his legal right.*

*....
But the defendant maintained his silence and that cannot be subject of any criticism because that is the defendant's legal right."*

[31] Crown counsel accepted that the action of the trial judge in requiring the appellant to go into the witness box while he (the judge) explained his rights was "not the usual practice" in relation to criminal cases in the Kingdom. We agree with that observation and the practice should not be followed in future where an accused is represented by counsel. The directions given by the judge were unnecessary in this case as the accused was legally represented and counsel had already conveyed to the court his client's election not to call evidence. We accept the submission that the exchange recorded in [26] above was likely to have undermined counsel's credibility in the eyes of the jury.


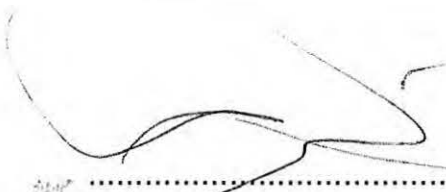
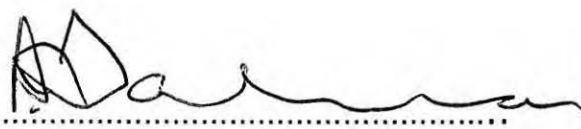
[32] The other point of concern is that on none of the three occasions referred to in [30] where the judge referred in the course of his summing up to the appellant's decision not to give evidence, were the jury reminded of the requirement in **Mutch** and **Davison** (supra) that the duty was still on the prosecution to prove the case and that they must not assume that the appellant was guilty because he had not gone into the witness box.

Conclusions

[33] For the reasons stated, we have reached the conclusion that the appeal must succeed on all grounds. The jury's verdict, which we were told was delivered after a retirement of less than two minutes, was unsafe and must be set aside.

[34] We have given careful consideration as to whether we should direct a verdict of acquittal to be entered or order a new trial. If we were to order a new trial, it is difficult to see how the prosecution could present a stronger case. At the end of the day it would still be bound by the very significant admission the complainant made in his examination in chief, namely, that the information he had been given by the appellant in relation to his restaurant operation was true. Against such an admission, we think any prosecution seeking to establish that the appellant had made a false representation in what he told the complainant about the running of his restaurant would be doomed to fail.

[35] We are satisfied that a substantial miscarriage of justice has occurred. The appellant's conviction is quashed and a verdict of acquittal is entered accordingly.


.....
Ford P
.....
Burchett J
.....
Salmon J