

**IN THE SUPREME COURT OF TONGA  
APPELLATE JURISDICTION  
NUKU'ALOFA REGISTRY**

AM 7 of 2019 *Scan, email, uplo  
+ file.*  
*R 11/11/19.*

**BETWEEN:**                         **MO'UI LAISENI**  
- Appellant

**AND :**                                 **PITA FALEFO'OU**  
- Respondent

**BEFORE HON. JUSTICE NIU**

**Counsel :**                         **Mr. To'imoana Taufacteau for appellant.**  
**Mr. P. Falefo'ou for himself as respondent.**

**Hearing :**                         **8 October 2019 at Neiafu, Vava'u**

**Ruling :**                             **10 October 2019**

**RULING ON APPEAL**

[1] This is an appeal against the conviction of the appellant in the Magistrate Court on a charge of obtaining by false pretence under S.164 of the Criminal Offence Act, and against his sentence, which was that he be on probation for 2 years and that he pay compensation of \$7,000 to the prosecutor within one month in default of which he is to serve an imprisonment sentence of three months, and that he is to pay the lawyer fees of \$300 and court costs of \$21 within one month.

### The charge

- [2] The appellant was charged that between October 2016 and February 2017 he obtained money on false statement contrary to S.164 of the Criminal Offences Act in that he obtained money on false statement contrary to S.164 of the Criminal Offences Act in that he obtained \$7,000 from (the prosecutor) Pita Falefo'ou by making false statement to him that he would uproot and give him kava (to that value).

### The evidence

- [3] The respondent gave evidence, as I have gathered from the transcript of the trial, that the appellant came to him and asked for \$1,000 and that he would pay him back by uprooting his kava for him later. He said he gave him the money on 10/10/16 and he wrote it down in his book, and that on 10/11/16 he came with uprooted kava worth \$1000 and paid it off, and that on 17/11/16, he came again and asked for \$2,000 and said that he would uproot more kava for him. He said he gave him the \$2,000 and on 20/11/2016 the appellant brought uprooted kava worth \$1000, and it continued like that as shown in his book as follows:

<u>Mo'ui Laiseni (Leimatu'a)</u>			
Cash	\$1,000	—————>	20/10/16
	\$1,000	Uprooted kava	10/11/16
Cash	\$2,000	—————>	17/11/16
	<u>\$1,000</u>	Uprooted kava	20/11/16
	\$1,000		
Cash	<u>\$1,000</u>	—————>	25/11/16
	\$2,000		
	<u>\$1,000</u>	uprooted kava	02/12/16
	\$1,000		
Cash	<u>\$2,000</u>	—————>	9/12/16
	\$3,000		
	<u>\$ 500</u>	uprooted kava	12/12/16
	\$2,500		

Cash	<u>\$2,000</u>	—————>	17/12/16
Cash	<u>\$ 100</u>	—————>	27/12/16
	\$4,600		
	<u>\$1,500</u>	uprooted kava	05/01/17
	\$3,100		
Cash	<u>\$1,000</u>	—————>	13/01/17
	\$4,100		
Cash	<u>\$1,500</u>	—————>	20/01/17
	\$5,600		
	<u>\$1,000</u>	uprooted kava	27/01/17
	\$4,600		
	<u>\$ 600</u>	uprooted kava	01/02/17
	\$4,000		
Cash	<u>\$2,000</u>	—————>	08/02/17
	\$6,000		
	<u>\$ 500</u>	uprooted kava	11/02/17
	\$5,500		
Cash	<u>\$1,500</u>	—————>	15/02/17
	\$7,000		
	<u>\$1,000</u>	uprooted kava	25/02/17
	\$6,000		
Cash	<u>\$2,000</u>	—————>	28/02/17
	\$8,000		
	<u>\$1,000</u>	deducted	
	<u>\$7,000</u>	(Total)	

[4] He said that thereafter (28/02/17) the appellant did not bring any more kava and sometimes later, he asked the appellant's father, Tongia, for some kava and the father

gave him kava and he paid him \$3,000 for it and he decided to deduct \$1,000 from the appellant's debt as a favour to the father, leaving the balance of the debt of the appellant of \$7,000. He said he went to see the appellant and the appellant told him that he would sell his watermelons to try and pay off his debt but he never did.

[5] In his evidence, the appellant said that it was true that he took the money from the respondent and that he had not given him the kava for it but that his father had told him that he had paid off his debt to the respondent for him and he did not worry about it anymore.

[6] The appellant's father, Tongia, gave evidence for the appellant and he stated that he had given kava to the respondent to credit towards the appellant's debt. He also stated that he did tell the respondent not to accept any more request of the appellant for a loan because he had no kava. In respect of the evidence that kava was given to credit the appellant's debt, the respondent stated in his evidence that no kava was given to him for that purpose. He said that he had simply deducted \$1,000 from the appellant's debt because he was grateful to the appellant's father for having accepted his request to sell him kava for \$3,000 and he told the father that that was what he did.

#### **Magistrate's decision**

[7] The decision of the Magistrate outlined the above evidence but his reason for his decision was brief. He said:

“12. I have listened to the evidence of the Plaintiff that the defendant came to his home and asked for money and that he would uproot kava to pay for it.

- The Plaintiff parted with his money upon his belief that the statement of the defendant was true.
- It has turned out that the statement of the defendant was a basketful of lies because he did not bring any kava.
- And the defendant himself told me in his evidence it was true that he had not brought any kava to pay for the Plaintiff's money.

13. I hold that the Plaintiff has been able to prove the charge and I order that the defendant is guilty.”

- [8] Accordingly, the reason which the Magistrate gave for his finding that the appellant was lying (a basketful of lies) was “because he did not bring any kava”. He thereby held that appellant was guilty of obtaining by false pretence because the appellant did not, after he had obtained the money, bring the promised kava.

### The Law

- [9] With respects to the Magistrate, that is not the law. The law is that the offence must be found to have been committed at the time that the false pretence, that is the false statement, was made and the money or property was handed over to him, as a result of the false statement. The false statement must be of an alleged existing fact and not of a promise or an undertaking to do a future act: *R v Meleate Mapapalangi* (CR71/2016) unreported; *Green v R* (1949) 70CLR 353; *R v Dent* [1955] 2 All ER 806.
- [10] However, that is not the end of this matter. If the evidence however shows that the appellant falsely represented to the respondent an alleged existing fact at the time that he asked for the money, on each occasion as stated in the respondent’s record of the transactions, then the conviction may still be upheld.
- [11] The respondent stated that he had given the money to the appellant because of the representation that the appellant had conveyed to him that he had a crop of kava. That was a representation of an existing fact. If the appellant did not in fact have such a kava plot, that is, a kava plot with sufficient kava to pay for the money he asked for, the representation would be a false pretence and if he was given the money, he would have thereby obtained it by false pretence.
- [12] In the evidence of the appellant’s father, Tongia, he stated that he had told the respondent (when the appellant was no longer giving the respondent the promised kava) that the appellant did not have any kava crop. That statement was not disputed or denied by the appellant. If that was true, and I do not see any reason to doubt it, especially when it is a statement made by a father against the interests of his son, the evidence may be accepted as fact.
- [13] The statement of the father may correctly be said to be the state of the crops at time the statement was made, that is, after the representation had already been made and the money had already been given to the appellant, and the appellant had long defaulted to

deliver any more kava. So that it may not be helpful in deciding whether or not there was no kava crop at the time each sum was taken by the appellant. If the appellant never had any kava crop at all, then he would have certainly falsely represented to the respondent that he had a kava crop, and he was rightly convicted because he was making a false statement of “an existing fact”, namely that he had a kava crop.

[14] However, I consider that the evidence established that the appellant may have had a kava crop at the time the initial loan was taken because the record of the respondent showed the “uprooting” and delivery of kava in payment of the loans taken. So that there was no offence committed or false pretence given because he was not misstating an existing fact that he had a kava crop, and, more importantly, that it was sufficient to be uprooted and delivered to pay for the loans taken. But subsequently the kava that the appellant had was no longer enough to pay for the loans, and that the appellant knew that, but he continued to take out more and more money when he must have known that he no longer had enough kava to pay all that money back.

[15] I find that that was so by adding up all the loans and all the kava payments from 9/12/2016 to 28/02/2017 as follows:

<b>Date</b>	<b>Cash borrowed</b>	<b>Date</b>	<b>kava delivered</b>
9/12/16	\$2,000	12/12/16	\$ 500
17/12/16	2,000		
27/12/16	100		
		5/1/17	\$1,500
13/1/17	1,000		
20/1/17	1,500		
		27/1/17	1,000
		1/2/17	600
8/2/17	2,000		
		11/2/17	500
15/2/17	1,500		

		25/2/17	1,000
28/2/17	2,000		
<b>Total</b>	<b>\$12,100</b>	<b>Total</b>	<b>\$5,100</b>

[16] I find that that clearly shows that whereas the appellant's kava crop was dwindling to nothing, he was borrowing more and more, so that he knowingly borrowed twice as much as he had kava to pay with. I accept he then offered to sell his watermelons because he no longer had any kava, just as his father has said in his evidence. He borrowed \$12,100 when he knew he had only \$5,100 worth of kava. He thereby falsely represented to the respondent that he had kava, enough kava, to pay when he did not have, existing on his land, enough kava at the time he took each loan the total outstanding remainder of which is \$7,000.

[17] I therefore find, on the evidence adduced at the trial before the Magistrate, that the appellant was rightly convicted of the charge of obtaining by false pretence.

#### **Compensation**

[18] I find however that the order made for compensation of \$7,000 exceeds the maximum amount of \$5,000 allowed by the amendment made to S.25 by Act 19 of 2012. Accordingly, I order that the sum to be paid as compensation is \$5,000 and not \$7,000. All other orders of the Magistrate's Court shall stand.

[19] I order that the appeal is otherwise dismissed with costs to the respondent. I direct that the respondent shall file and serve a copy of his costs upon the appellant and both parties attend before me at **9am Monday morning 14 October 2019** to fix the costs of the respondent, unless agreed beforehand.

NEIAFU: 10 October 2019



*[Handwritten Signature]*  
Niu J  
JUDGE

*[Faint stamp or text]*