

One witness, a boy aged about 11, 'Amosa Finau, stated at about 2 am he had gone outside to go to the toilet and he had seen from his house which is right behind Pactrade someone walk out of the back of the Pactrade store holding a box in his hands. That person crossed over to the other side of the road and got inside a silver car and drove off fast. He saw only one person. He suggested the person was tall. The accused it is to be noted are all of small to average build. There was no evidence given to suggest that any of the accused had a silver coloured car.

[4] Sundreshan Pillai gave evidence that he was doing contract redecoration work, painting and carpenter, for Pactrade and had hired as casual labour the three accused, and he added two others during the relevant period. During that period, the safe had to be removed from its ordinary position which was concealed by furniture. He said he had gone home from work around 6pm the evening before the theft which probably took place in the early hours of the morning of the 5th March 2016. Another employer, a man named Joseph, had locked all the doors of the office and the accused persons had also left.

[5] The only evidence linking the accused with the break in and theft was a person by the name of Sau Longani. He had been on remand for theft when he gave evidence that Mr Liive in the presence of the other defendants when on remand at the Central Police station had all been together in Longani's cell when Mr Liive had recounted to him how the robbery had occurred which accorded with the evidence that had been given by Mr Pillai. Longani said that on or about the day before he was released he had met Joseph, an employee of Pactrade, at the Central Police station. He told Joseph, whom he was acquainted with, what Liive had told him. Joseph, he said, asked him to make a statement. After he was released from custody by the Magistrate

the next day, he and Joseph returned to the station where, on the 14th March 2016, he was interviewed by Detective Moala'eua and made a statement implicating the defendants.

[6] I had asked to be informed of any arrangements that might have been entered into with the witness and any criminal history he might have early in the trial after I had learned of the nature of the evidence that would be led. Plainly, an unrepresented accused would be at a serious disadvantage in testing the credibility of a witness of this kind. The Crown informed me that he had no convictions and had been released with no charges laid in relation to the theft matter for which he had been remanded. The Crown also informed me that there had been an arrangement referred to by the witness as "a deal" entered into between he and Joseph that the latter would pay him \$300.00 to give evidence against the accused person. In his statement, he admitted that Joseph had taken him back home and had given him a hundred dollars after he had made his statement, and had said that he would give him two hundred after the trial. He said he had not seen Joseph since then. To Ms Akau'ola's credit she had the good sense to re-interview the witness in the presence of the Officer in charge and took a signed statement from Longani, concerning this arrangement. Joseph was overseas and did not give evidence.

[7] When the accused came to give his evidence, I asked him about his arrangement. He said he had wanted to help Joseph because he was a friend. He said after he had made his statement, Joseph had given him a hundred dollars, and had then left. I asked the question was there any arrangement between he and Joseph that there was more money to be given. His answer was that there was no arrangement for any money it was only he, the witness, who told Joseph that he would offer his help.

[8] Shortly after, I adjourned the case because it was nearing the end of the day and I called for the written statements the witness had made; the first, on the 14th March 2016, concerning allegedly what Mr Liive had told him, and the second on the 26th September, 2016, after the trial had started relating to the arrangement or deal he said he had with Joseph. When the trial resumed the next day, I put to the witness what he had told the Court namely that there had been no arrangement between he and Joseph as compared with what he had told the police in his statement. Somewhat grudgingly, I thought, he admitted that what he had said about there being no arrangement was untrue.

[9] I was also concerned that in his evidence he had said that Mr Liive had told him that the car they had used was silver in colour. Earlier in evidence, the witness 'Aмоса Finau had said that the man he saw leaving the Pactrade business had got into a silver motor vehicle. The witness had not mentioned the colour of the vehicle in his statement to the police on the 14th March, 2016. I was concerned that somehow he had been apprised of this and had embellished his evidence. He said he appreciated at the time of signing his statement that it was incomplete in this regard and given police this information. Detective Moala'eua in his evidence to the Prosecutor later confirmed he had signed the statement after it was read out to him. I was concerned also on this aspect of his evidence, he was unreliable.

[10] Liive put in issue the fact he had told the witness anything in his cross-examination. Detective Moala'eua told the Court that fraternising in cells by prisoners was not allowed although he stated that it could happen.

[11] The evidence of prison informants concerning admissions by other prisoners must be treated by the Courts with particular

care. Australian cases have emphasised this. In *R v Herring* (1995) 74 A Crim R71, Kirby P said of the leading Australian decision of *Pollitt v The Queen* (1992) 174 CLR 558 in the High Court on this issue.

"Pollitt has behind it the substantial experience of the Courts concerning the acute dangers of the evidence of prison informants".

In *Herring*, Blanch J in the New South Wales Court of Criminal Appeal adopted the Pollitt approach which had been considered also by the Court in *Clough* (1992) 28 NSWLR 396; 64 A Crim R 451;

"The direction to be given must be moulded to fit the circumstances of the particular case, and not follow any set formula. It should, however, include warnings;

- (a) That the experience of the courts over the years has demonstrated that the evidence of such witnesses is potentially unreliable, together with the explanation as to why that is so;
- (b) That it is for that reason necessary to scrutinize the evidence of the particular witness in question with great care; that, in the absence of substantial confirmation provided by independent evidence that the confession was in fact made , it is dangerous to convict upon the evidence of that witness;
- (c) That in the absence of substantial confirmation provided by independent evidence that the confession was in fact made , it is dangerous to convict upon the evidence of that witness;

(d) That such independent evidence is unlikely to be provided by a fellow prisoner , because he is likely to be motivated to concoct his evidence for the same reasons; and

(e) That, having regard to the potential unreliability of the evidence there is a risk of a miscarriage of justice if too much importance is attached to it".

[12] Pollitt is an authority which was said in Herring to be expressive of the common law. In my view, this approach and these guidelines are appropriate also for Tonga. There is no independent confirmation that admissions were made to Mr Longani and, in any event, I find his evidence unreliable for the reasons I have given, that is his lie concerning the existence of an arrangement with Joseph and his apparent embellishment concerning the colour of the car, which in any event was not linked with the accused. There is no other evidence upon which a conviction could be entered against any of the accused.

Verdicts

[13] Accordingly, I acquit each of the accused in relation to both counts in the indictment and discharge all three of them from the indictment.



A handwritten signature in black ink, appearing to read "Cato", is written over the printed name.

C. B. Cato

DATED: 28 SEPTEMBER 2016

ACTING CHIEF JUSTICE