



[3] During the course of the hearing, it emerged that the affidavit had been sworn to enable him to make a claim to the moneys in the bank account from the bank. This had not been successful and shortly after the accused had filed an application by letter to the Supreme Court on the 19<sup>th</sup> May 2011 for authorization to claim and use that money. This application was made under the Probate Act, and was, I am told essentially a claim under section 12 for letters of administration of the estate. In this application, he had also described himself as "Kaitu'u 'I Pangai Finau, heir to all the lands and property of my father, Laulotu Finau, who has passed away on the 2<sup>nd</sup> April 2011". It would seem clear that his father had died much earlier in fact than the 2<sup>nd</sup> of April 2011 as recited in the affidavit. Indeed, the accused in evidence had not been able to give the date of his death and seemed rather uncertain as to when this had arisen. It seems likely, however, that his father had died sometime in 2009 or 2010.

[4] The evidence established to my satisfaction that Solomone, the accused's eldest brother and the first in line to his father, Laulotu's estate, had died without issue and as such the heir under Tonga's succession law of primogeniture was Fetaliaki Finau, who was the second male child, and not the accused, who was the third male child. Solomone Finau had died in about July, 2010. I am satisfied, however, that Fetaliaki had lived in America for many years, had never returned to Tonga, and had made no claim to any of his father's estate in Tonga. He had no children. At the time of the swearing of the affidavit, it would appear that the only male members of the family still living in Tonga was the accused and one other younger brother, Valamalua. The complainant, who was the fourth son, had left Tonga in 2009 for New Zealand and had returned in 2015, being an overstayer. There was, I heard a dispute between the accused and the complainant concerning the latter living on an allotment

registered in the name of the accused's son in Matafonua about which I heard little. In about 15<sup>th</sup> August 2016, however, the complainant brought to the attention of the police the affidavit sworn by the accused and shortly after, on the 22<sup>nd</sup> August 2016, the accused was interviewed by police.

[5] At the time of the swearing of the affidavit, in or about 15<sup>th</sup> April 2011, I am satisfied that, as the accused said in his statement in answer to charges, Fetaliaki had lived overseas for many years and had waived any exercise of any rights he might have to be heir after this father had died. No evidence was led to contradict the assertions that the accused made further to police that he had met with Fetaliaki at his elder brother Solomone's funeral which took place in 2010, and that Fetaliaki had told him he did not intend to go back to Tonga, had no children or wife and he understood had waived any claim to property in Tonga. I am satisfied that Fetaliaki made no claim for either land or other property of his father in Tonga, and had never evinced any intention to do so. At the time the affidavit had been sworn by the accused Fetaliaki was still alive.

[6] It was the accused's case that he did not knowingly swear a false affidavit and that he honestly believed that he was the heir to the land and property of this father because Fetaliaki had no intention of taking up any property. At an earlier time, the suggestion, according to the accused, was that at his father's insistence Fetaliaki should take up the allotment at Matafonua which he did not do. Apparently, this had been registered in the accused's son's name. When he came to make application for any remaining land or the money in the bank account, the accused asserted he was able to do so because, as the next male in line living in Tonga, he was the heir to what remained. During the course of his evidence he indicated also that he believed, as the eldest son living in Tonga and because he had born much of

the family expense, he became the heir to his father's property in Tonga.

- [7] In a claim first filed in 2010 and it seems continued in 2012 the accused made claim to some land in Fatai that had formed part of a taxation allotment belonging to his father. This had not been claimed within the statutory time period of 12 months from his elder brother Solomone's death by the lawful heir Fetaliaki, and had reverted to the estate holder. A claim for this land, I was informed, could be made by any member of the family and was usually favourably entertained by the Minister if the heir did not claim it, and thus the land would remain within the family. I was told that the accused had applied for this land as he was entitled to do but that it has not been granted as of today.
- [8] The father had apparently not left a will, so that under section 11 of the Probate Act from the death of the intestate until administration his personal property had been vested in the Court. Under section 12, if within three years of the date of being vested in the Court no claimant or other person has been found to be the next of kin to the deceased or to have established a right to the property, the proceeds of the estate became the property of the Crown and are paid into general revenue. The accused would have been entitled to claim the money in equal shares with his siblings still alive or their grandchildren under clause 12 of the First schedule to the Act. It would seem his claim was made shortly after the affidavit had been sworn and although this was not produced to the Court the letter produced in evidence to the Court for authorization to claim and use that money was submitted in the name of the accused in or about the 19<sup>th</sup> May 2011 as the son and heir to the lands and property of his father who had passed away on the 2<sup>nd</sup> April 2011.

[9] The accused was interviewed about this matter on the 22<sup>nd</sup> August 2016, after a complaint had been made by his younger brother to the police concerning his affidavit a few days before. The accused then gave as a reason that he swore the affidavit because he was trying to get lands back which had been lost. In fact there were two portions of land one at Fatai and another at Matafenua, as I have said, that had reverted to the estate holder. The affidavit, I am satisfied, was not advanced in support of any application for land. However, in relation to the Fatai application, I am satisfied that the accused had represented that he was the heir to his father's property in Tonga. In another part of his record of interview, he said;

"The reason why I had sworn the affidavit was because the second heir was not here and it has been forty years since he has been in America and he has never come here".

[10] In his record of interview, he had acknowledged that the heir to his father's property was Fetalaiki. In a subsequent statement in answer to a charge of perjury, he maintained, however, that he did not have any thoughts like that. In a further voluntary statement, he said under caution.

"I had signed because my elder brother had been in America for 43 years and we met in America for my elder brother, Solomone Finau's funeral, and Hua Fetaliaki told me that he will not go back to Tonga and he had no children or a wife therefore I understood that my brother had waived everything and I was working on two lands that were lost. And when I say I am, it is understood that there is no one else to take back our lands. No one else had the right over the money but me and my younger brother Valamalua that I shared with any my younger brother".

[11] The accused gave evidence and, although not altogether clear at times, I considered that his testimony was essentially consistent with what he had told the police. He admitted however, on more

than one occasion that he knew his brother was the heir. His affidavit, he said, had been sworn on the basis that his brother had remained in the United States for many years and had made no claim to any of the land or property in Tonga. As such, as the next son who was alive and living in Tonga, he believed that he was the heir. He justified this belief also by the fact that he was the eldest brother living in Tonga and had spent money on family matters since his return to Tonga from New Zealand.

[12] This was a belief which was wrong. Fetaliaki was, according to the law of succession and primogeniture, in Tonga still the lawful heir even though he may have made no claim for any of the property in Tonga. The accused was not the heir in law, although this did not prevent him from claiming land that had reverted to the estate holder and he had a valid claim at least for part of the the money on deposit under the Probate Act.

[12] The central issue in the case as Mr Tu'utafaiva pointed out was whether he had knowingly made a materially false statement that he was the heir to his father's property in his affidavit. I consider there was a further issue in this case however, and one I alerted counsel to, which was closely related to the issue of whether a false statement had been knowingly or wilfully made. If I were satisfied that the accused had possibly sworn the affidavit in a genuine but mistaken belief that he was entitled to regard himself as the heir to his father's estate, in the circumstances as they had developed to the point where he swore the affidavit, then was he entitled to an acquittal? Although the law is not completely clear in this area, there is authority that a genuine mistake of civil law may negative mens rea. Thus, in R v Smith [1974] QB 354 the Court of Appeal quashed a conviction for criminal damage where the appellant had removed speakers he believed were his own but in fact belonged as fixtures to his landlord because he had attached

them to the wall in his rented flat. Although he was aware of the facts that made the property the landlord's namely he had attached them to the wall, he was not aware that by his actions they belonged to his landlord and consequently he was not entitled to remove them. The Court of Appeal considered that the gravamen was the destruction or damage of property that was known or suspected by the appellant to belong to another, and on this the appellant wrongly believed he was the owner. Simester and Sullivan "Criminal Law", 2<sup>nd</sup> ed 2003, Oxford and Portland Oregon, at page 556, comment;

"Another way of categorizing the appropriate ruling in Smith is to say that a mistake of civil law was in issue and questions of civil law are equivalent to questions of fact"

Although, as these commentators point out, the cases are not altogether consistent in this area, I consider that I am required to address this issue as it pertains to the accused's belief and whether the statement complained about in his affidavit was wilfully or knowingly false at the time it was made.

[14] Whilst at times, the accused meandered and was sometimes uncertain in his recall of events such as the date of his father's death, causing his counsel some irritation and I had certain difficulty at times in following his evidence and accordingly had intervened more often than I would have liked, I have paid close attention to his claim that he honestly believed, for the reasons he gave, that he was at the time of signing the affidavit the heir to his father's property in Tonga. He had, as Mr Tu'utafaiva said, given his explanation to the police several years after swearing the affidavit, when first interviewed about the matter, without it seems any advance warning, and so it was not an explanation that could be seen as opportunistically advanced at trial for the first time. Whilst it is true that stating he was the heir

may have given his claim to the land the appearance of greater substance and likewise the claim to the money, he was, as the next surviving son in a strong position in any event to claim the reverted land from the Minister, and in the absence of any other claimant also make a strong claim to at least part of the money. I was informed that in fact the Court paid out the money to him under a grant of administration. He gave evidence that he had shared the money with his younger brother and other relatives and I have no reason to doubt this. Whilst it may be that he advanced the affidavit to strengthen his claims to the bank to the money's distribution, for which he was not successful, and likewise made a similar assertion to the Minister in his application for the land which remains in abeyance, and also in his correspondence with this Court concerning probate, I am left in a state of doubt as to, when he made out his affidavit, his claim to be the heir in Tonga of his father's property was beyond reasonable doubt knowingly false. There was no suggestion he had taken legal advice on the question. Nor had he been given advice that he could not describe himself as his father's heir, even in circumstances where Fetaliaki had been living overseas for a long period and had not evinced any desire to claim property in Tonga, or had waived any interest in property, as he said. I heard no evidence that he was a well educated man having worked for a saw mill in New Zealand. Nor did he strike me as a man who was plainly deceptive. I also note, as I have said that, in any event, he had strong claims to both the land in reversion and the money or at least some of it, which was a small sum anyway. This would lessen any motive to deliberately create a false impression concerning his status as heir. Nor did I find his explanation in all the circumstances to be so unreasonable or disingenuous that it had to be false and mere suspicion that this could well be so is not sufficient basis for conviction. Accordingly, I cannot find beyond a reasonable doubt as the prosecution submitted was the case, that the statement

he made although false and materially so, was one that he knew was false at the time he swore out the affidavit.

[15] Accordingly, I acquit the accused of the charge of perjury, and he is discharged.



C. B. Cato  
**JUDGE**

**DATED: 21 JUNE 2017**