

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

*See file & updated*

**CR-97 of 2016**

*[Signature]*  
*12/12/17*

**BETWEEN: R E X - Prosecution**

**AND: SELEMANA FONUA - Defendant**

**BEFORE THE HON. JUSTICE CATO**

**RULING ON PRIMA FACIE CASE**

1. Mrs Tupou for the accused, Selemana Fanua, made an application essentially that I should discharge the accused on both counts at the conclusion of the prosecution case. The leading case on approach to prima facie case is the approach of the Court of Appeal in R v Galbraith 73 Cr App 124(CA) where it was said;

"(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty - the judge will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous nature for example because of inherent weakness or vagueness, or because it is inconsistent with other evidence. (a) Where the Judge concludes that the prosecution, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case. (b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury, and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty then the judge should allow the matter to be tried by the jury.

2. Mrs Tupou contended that I should not allow the case to go further because the Crown had not produced signed spreadsheets of workers time and wages but unsigned copies.

*Recd 12/17*  
*[Signature]*

There had been evidence that the spreadsheets had been signed before Tanoa (Fiji) would approve and pay Tanoa (Tonga) a sum to cover the amount referred to being the balance of the sum of the wages owing to employees in the spreadsheet. After that money was received, Tanoa (Tonga) would then cash a cheque for the amount and use the proceeds to pay wages. The prosecution case against the accused was that she, being in charge of the payroll, had created a modified or second payroll spreadsheet that when printed out included her own name and further, there were additional names in the spreadsheet that did not appear in the labourer's attendance book which was the basis, the prosecution, contended for the spreadsheet. The Crown case was that the accused had falsified the spreadsheet and had taken the additional money which was represented in the altered spreadsheet that had been sent to Fiji.

3. There was an issue that arose out of this discussion and indeed had been alluded to by me during the course of the trial. The Prosecution had adduced cheque butts corresponding in about 14 instances with the amount of wages set out in the spreadsheet alleged to have been falsified. The Prosecution submitted that this established that Fiji had approved the payment in the spreadsheet which represented an inflated sum in wages. In quite a number of cases, there was no cheque butt corresponding with the allegedly false spreadsheet, and I queried whether, in those cases, there was any evidence that Fiji had in fact acted on this spreadsheet even assuming that it was false or had approved it, and sent money to Tonga for the payment of wages. Mr Aho acknowledged that this was a problem for the Prosecution and indicated he would not proceed on those transactions which led to the amount of the theft being significantly reduced. I consider that, although he may have argued that it was all part of a pattern, he was right to adopt this approach. There was other evidence given by witnesses to the effect that when payment for wages was obtained the accused would take some of the money and in one instance put this in her bag. There was another occasion when she was said to have asked for money to be delivered by the wages clerk to a bar in Nuku'alofa. The issue of whether there is a prima facie case directs me to consider all the evidence considered at its highest for the Crown.
4. I do not agree with Mrs Tupou that the Crown case was inherently deficient because the Crown did not produce the original signed spreadsheet which may have been signed by a Mr Hunt who was in charge of the refit for Tanoa and a director of

the Tongan company, or the accused who worked under him as the payroll officer with various assistants. I consider that there is a prima facie case circumstantially represented by a pattern of spreadsheets for weekly wages that contained the name of the accused and various ghost names that did not appear in the Register. I do not agree that the case is so inherently deficient that it should be dismissed at this stage. I do not see that the production of the original spreadsheets signed by a representative of Tanoa (Tonga) is required. Even if signed by Mr. Hunt rather than the accused, the Crown case was that he relied upon the accused as a trusted employee of long standing to present a document to him for signing that was accurate. The spreadsheets produced in evidence plainly contained the same content as the document that was signed for Fiji because the cheque drawn in Tonga was for the same amount as the balance in the spreadsheet. In that sense, the copies produced in evidence albeit that they did not carry a signature were in my view true copies of the originals sent to Fiji.

5. I pause here to say that there had been a problem for the Crown in that the original documents seem to have gone missing. Mr Hunt said they had been given to the police and the Crown indicated they had gone missing. Another witness thought they had been returned. Mr Hunt said there had been a search for them. I am satisfied that what was produced to me in photocopy form and testified to by various witnesses were true copies of original documents and in the modern age should be admitted in lieu of the originals which I am satisfied had gone missing, and I am satisfied that they are no longer in the possession of the accused. See Garton v Hunter [1969]1 All ER 451, at 453 per Lord Denning MR;

" That old rule has gone by the board long ago. If an original document is available in ones hands, one must produce it. One cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We must admit all relevant evidence. The goodness or the badness of it goes only to weight. "

And see, further approving this statement Kajala v Noble (1982) 75 Crim App R 149, at 152 per Ackner LJ

6. The best evidence rule, important though it may have been in the case of documents prior to the advent of the photocopier, should not in my view inhibit the Crown from proceeding on the documents that it produced in this case, where they have been

lost, or are no longer in the possession of the complainant, in any event unless real prejudice could be said to occur affecting a fair trial. I cannot see that this is the case here. I note Archbold (2016) para 9-98, says that the rule only applies to a private document, in any event and I have some reservation whether these documents namely spreadsheets, cheque butts and attendance Register relating to a company's payroll could be said to be private documents, in that sense. This, however, has not been a factor in my decision that the prosecution is in order to rely on copies. Although Mrs Tupou had said that this was a general objection in preliminary stages she did not press this at the hearing, aside from submitting that the signed spreadsheets should have been produced in evidence. For reasons given, I reject this submission. I do not think that the non production of the signed spreadsheets could be said to have caused her client any prejudice, or affected the Prosecution case relating to the accused's alleged falsifications and resulting theft. The fact that they had been signed by Mr Hunt or in some cases the accused before being passed on to Fiji is in my view irrelevant. The Prosecution case was that they were the product of deception by the accused, a trusted employee, before they were signed and passed on to Tanoa ( Fiji). The copies produced in evidence are plainly true copies and the spreadsheets that are relevant coincide with the cheque amounts, indicating they were coincident with the spreadsheets received by Tanoa Fiji.

7. She also argued that the proceedings should be terminated because various pieces of paper said to contain information concerning workers or hours and one witness said given to the accused were not produced in evidence. The prosecution case against the accused involved a pattern of deceit involving a number of transactions. On the evidence that I have seen, I consider that there is a case to answer, as I have said and the importance of non produced information may become apparent in due course, but, as the evidence stands, there is, in my view, a prima facie case for the accused to answer albeit in a reduced sum. She contended that copies of cheques produced could be forged. These are arguments more appropriate to the weight of evidence and whether the Crown can be said to have discharged the onus it bears beyond a reasonable doubt.
8. Mrs Tupou also questioned the indictment when in the charge of theft it mentioned use of another. This is in accord with the way in which the crime of theft is worded and I see no issue with this. In any event, it could be the subject of amendment. The

indictment may be amended to reflect the reduced quantum the Crown now accepts is appropriate.



*Cato*

C. B. Cato

**JUDGE**

**DATED : 7 DECEMBER 2017**