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

CR 188 of 2020

REX
-v-
TONGA SOANE

VERDICT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Counsel: Mr J. Lutui DPP with Mr F. Samani for the Prosecution
Mr V. Mo'ale for the Accused
Trial: 1 to 3 February 2021
Verdict: 25 February 2021

The charges

1. The accused is charged with four counts of uttering counterfeit currency.
2. Section 61 of the *Criminal Offences Act* provides:

61 Uttering counterfeit currency

Every person who shall utter any currency resembling or apparently intended to resemble any of the current currency of the Kingdom of Tonga or of any foreign state or country, knowing such currency to be counterfeit, shall be liable to imprisonment for any period not exceeding 5 years.

3. The elements of the charges to be proven by the Prosecution beyond reasonable doubt are:
 - (a) the accused;
 - (b) uttered;
 - (c) currency resembling currency of the Kingdom of Tonga;

- (d) knowing such currency to be counterfeit.
4. The particulars of each count may be summarised as follows: late on the evening of 6 December 2019 and during the early hours of 7 December 2019, the accused knowingly gave the following amounts of counterfeit currency:
- (a) \$50 to Sulieti Koloamatangi for fuel at the Telekava Service Station;
 - (b) \$350 to the Reload Bar;
 - (c) \$300 to Mo'unga Palu for the hire of her taxi; and
 - (d) a further \$300 to Mo'unga Palu to drink alcohol with the accused.
5. The witness, Mo'unga Palu, was not available to give evidence because she has since emigrated to New Zealand and, as at the date of the trial, could not be located. As a result, the Prosecution withdrew count 4. The continuation of count 3 will be explained below.

Evidence

6. The Prosecution called five witnesses. At the conclusion of their evidence, the Accused elected not to give or call any evidence.

Detective Liekina Fifita

7. Detective Liekina Fifita has served in the police force for 27 years. He was the investigating officer in this matter.
8. On 9 December 2019, he received a complaint which had been lodged by Mo'unga Palu, a taxi driver at Hufanga base, about having received \$600 in counterfeit money from the Accused on the morning of 7 December 2019. Of that sum, \$300 was for the hire of the taxi and the accused paid \$300 to Mo'unga to drink alcohol with him.
9. The detective then went to the taxi base and spoke with Mo'unga Palu. Not long after he had returned to the police station, he received a call from 'Elenoa Taiala,

the manager of the taxi base. She told him that the accused was at the taxi base arguing over the counterfeit money which had been alleged against him in a Facebook post that was uploaded on the morning of 7 December 2019.

10. Detective Fifita attended the taxi base and spoke with both the accused and Mo'unga and requested that they provide statements at the police station. During their conversation at the station, the accused insisted that the money he had given the taxi driver was genuine currency and that he had no idea the money was fake. The accused also told the detective that he did not want to have any debts to anyone and that he therefore wished to (re)pay the \$300 to the taxi service for the hire of the taxi.
11. A search by warrant was conducted at the accused's property. Police did not find any counterfeit notes or equipment for making counterfeit notes. At that stage, only one complaint had been lodged. However, Fifita continued his investigation whereupon another complaint was lodged, this time, by Sulieti Kolomatangi, who worked at the Telekava petrol station, that on the night in question, the accused gave her a counterfeit \$50 note for fuel. According to Detective Fifita, Sulieti gave that \$50 note to the person at the police station who first recorded her complaint and, as I understood the evidence, that was later handed on to Detective Fifita for investigation.
12. During Detective Fifita's investigation, Tevita Kolokihakaufisi, an employee of the National Reserve Bank of Tonga provided the Detective with a copy of a report on counterfeit notes from Jessie Cocker, Acting Governor of the Reserve Bank to the Commissioner of Police, dated 16 December 2019 **[Exhibit P1]**. The report contained a table setting out details of various denominations which the author described as being counterfeit. Row 5 of the table detailed that on 10 December 2019, the Reserve Bank received a total of nine \$50 notes and two \$100 notes. Those notes were described as having been received from "BSP (Customer deposits from Reload Bar, Payless Store, Pausa Telekava, Chinese shop at Ma'ufanga)". Of the \$50 notes examined, eight all had the same serial number: C417603. The features of the notes by which they were identified as counterfeit were described as missing genuine watermark, missing genuine security thread and a wider more solid

thread showing images of the National medal, missing genuine registration of cross and missing ultraviolet fluorescence, star cross located at the upper left-hand side and the serial numbers, and they were of incorrect size. Attached to the report were a number of counterfeit notes. Tevita Kolokihakaufisi told the Detective that seven of the \$50 dollar notes were from the Reload Bar and one \$50 note was from the petrol station.

13. Detective Fifita then went to the Reload Bar and spoke with Talavao Pohiva. They discussed the Bar's proceeds from the previous weekend that were deposited into the BSP bank. Talavao explained that on the night of 6 December 2019, she served the accused on several occasions. She recalled him because the next day, she saw posts on Facebook with photographs of the accused stating that he had been using fake money.
14. On 8 January, 2020, having determined that he had sufficient evidence, Detective arrested the accused. He was taken to the police station where he was interviewed.
15. During his first interview, commencing 1:30 PM that day, in relation to count 1, the complaint from Sulieti Koloamatangi about the \$50 note paid by the accused at the petrol station **[Exhibit P2]**, the accused stated, relevantly:
 - (a) he runs his own business, a home for the elderly;
 - (b) he denied giving Sulieti a \$50 note and said:

"the \$30 I gave her was a real note"... "I believe that the note I gave her was real and I did not fill in \$50. I think I only filled in \$30 or \$40";
 - (c) when asked again how much money he gave as payment for the petrol, the accused said

"\$30, it was a \$20 and a \$10".
16. During his second interview commencing 2:20 PM the same day, in relation to count 2, the \$350 paid to the Reload Bar **[Exhibit P3]**, the accused stated, relevantly:

- (a) he denied giving the bar \$350 in counterfeit \$50 notes;
- (b) when asked about his whereabouts on the night in question, the accused said:

"I was at home before I left to my aunt's place (mother's sister) at Hala 'Unga. I left her place to Telekava petrol station to refill my vehicle before I went to Nauti Ruby's Bar at Ma'ufanga, I went inside the bar and bought myself two beers, I finished those two beers before I left to Reload Bar around 10:30 PM."

- (c) when he entered the Reload Bar, he went upstairs and drank there before going downstairs and continuing to drink there;
- (d) he purchased about six or seven beers at the Bar;
- (e) when asked how much money he spent at the Bar, he said:

"I do not recall how much I spent but I purchased my beers with a \$50, \$20 and a \$10"

- (f) he said he did not recall the girl in the bar asking for loose change for his purchases because she was running out of change because of his three purchases from her which, it was put, were only by \$50 notes;
- (g) he repeated that he used \$20 and \$10 notes for his purchases as well; and
- (h) he believed that the notes he used for his purchases at the Bar were genuine.

17. On 10 January 2020, the accused was further interviewed in relation to what became counts 3 and 4, the \$300 paid for the hire of the taxi and \$300 paid to the taxi driver for her to drink alcohol with him. Relevantly, he stated:

- (a) the \$300 in \$100 notes he gave to Mo'unga Palu for her to drink with him and the \$300 he gave her in \$100 notes as payment for her taxi was all "*real money*";
- (b) when asked again about his whereabouts on the night in question, the accused said:

"I was at Tali'eva Bar until the bar closed. I left in my van afterwards to Longolongo to buy some food from the Chinese takeaway opposite Longolongo Police Station, however, I arrived and found the place closed, I left and stopped by Hufanga Taxi Base and asked for one of the taxis to follow me to 'Unga Road so I can park my van there... The taxi followed and I stopped at the Talahiva Restaurant to purchase food (Nuggets), I got off and gave to the cashier \$100 note for the payment of my nuggets, this led to an argument between myself, the cashier and another girl that was inside, because they told me that the money I gave them was counterfeit. I took the money back and left... I (then) left to my aunt's place on 'Unga Road and parked my vehicle there, the taxi picked me up where I asked to go to Fua'amotu, I asked the taxi driver if she knows of a liquor store that is still open, and I was told Hala Tu'i, so we drove there and bought one bottle of liquor. we also stopped by the Chinese store in the intersection in Longolongo to buy Coke, water and cups before we drove off to Fua'amotu. We cruised around Hala Liku, we crossed from Haveluliku to Tatakamotonga, then returned to town..."

- (c) he again denied that the money he gave Mo'unga was counterfeit and repeated that the notes he gave her were genuine.
18. All the answers the accused gave in each of the three records of interview were signed by him.
19. Detective Fifita then produced the notes the subject of the charges. They all formed **Exhibit P5**, and comprised:
- P5.1: the \$50 note from the petrol station which bore serial number C417603;
- P5.2: seven \$50 notes from the Reload Bar also bearing the same serial number C417603;
- P5.3: three \$100 notes received from Mo'unga Palu which she told the Detective the accused gave her to drink with him, one of which bore the serial number A439034 and the other two bore the number A395583; and
- P5.4: three \$100 notes received from 'Elenoa Tu'utafaiva (nee Taiala), the telephonist at the taxi base, one of which bore the serial number A439034 and the other two bore the number A395583.
20. Finally, Detective Fifita said that the accused told him he wanted to "pay back" the \$50 to the petrol station, the \$350 to the Reload Bar and \$300 to the taxi base for

the hire of the taxi because he “did not wish to have any debts to anyone”. He confirmed that the accused had done so.

Sulieti Koloamatangi

21. On 6 December 2019, Sulieti Koloamatangi was working as a supervisor at the Telekava Service Station at Kolomotu'a. Sulieti was usually in charge of collecting the money before closing up and depositing it into the bank, but on this night, she worked outside to help fill gas while another worker was inside counting the money received that day. Around 10:00pm, just before closing up the station, the accused drove in from Kolomotu'a Road to fill up his silver Voxy van. Sulieti knew the accused from previous encounters when he delivered food and he had introduced himself. He was also friends with one of her uncles. She identified the accused in court.
22. The accused handed Sulieti a \$50 note and told her to fill the vehicle with that amount. She noticed that he took the note carefully out of a bundle of about thirty such notes which he had taken out of a black bag. After she filled the vehicle, the accused drove off. Sulieti realised almost immediately just from how the note felt in her hand that it was not genuine. From her work experience of touching and counting money every day, she knew the difference between genuine and counterfeit money. She also described the note as lighter in colour with no plastic coatings. It was smoother with a different texture and it was made up of two pieces of paper stuck together.
23. Sulieta went back inside and showed the other worker the note. She called the police and was told to come to the station when she had the opportunity to make a statement. She waited until her employer (who was in Australia at the time) was informed and confirmed with her to proceed with reporting the matter to the police. She gave her statement to police on 11 December 2019. Prior to lodging her complaint, Sulieta kept the counterfeit note in a safe at her house. She had the only key to the safe. She said that after she lodged her complaint, the police collected the \$50 counterfeit note from her.

24. During cross-examination, Sulieta said that she was then responsible for depositing the service station's takings with the BSP bank. But she confirmed that she did not deposit any counterfeit notes with the bank.
25. Sulieta was shown exhibit P5.1. She felt the note and confirmed it as having the same features as the note the accused gave her. She said that she gave the note to Detective Fifita.

Talavao Pohiva

26. On the night in question, Talavao Pohiva was managing the downstairs bar at the Reload Bar. She was working as the cashier. It was a busy Friday night. Talavao recalled the accused because he was older than the usual younger age group that frequented the bar on weekends. She recalled that on three separate occasions, the accused gave her a \$50 note to purchase a single beer. She found this odd because she expected him to pay out of the change she gave him from the first \$50. On the third occasion, Talavao told the Accused she was out of change and asked him to give her the change she had previously given him for the other two beers he had bought. She believed the accused then went to the upstairs bar. She recalled that at the end of the night, the accused approached her and told her how much he appreciated her customer service and then handed her a piece of paper with his name and phone number on it. She threw it away.
27. The next morning, Talavao woke to see a Facebook post with a photograph in which she and others were tagged. The photograph showed the accused and the text stated to the effect that if anyone saw him, they should contact the police because he was going around with false money and tricking or lying to women by trying to get their attention with false money.
28. The following Monday, Talavao's manager, 'Epi Mahoni, told her that the bank had called about \$350 worth of counterfeit \$50 notes among the cash that had been deposited from the Bar's takings. Talavao then remembered the accused and the

Facebook post that had gone viral and 'put the pieces together'. The manager told her to go to the police station and file a report.

29. Talavao also identified the accused in court.
30. Under cross-examination, Talavao said that during her time working at Reload, nothing like this had ever happened before. It was not only the Facebook post which made her think of the accused but also the fact that he was not a regular customer and he stood out in the crowd because he was much older than the other customers. The bar closed between 11:30 PM and 12 midnight that night. The bar was so busy that she did not have any opportunity to look carefully at any of the \$50 notes the accused gave her. She did not then think that any of those notes were counterfeit because she did not look carefully at them. Apart from registering their denomination, she simply put them straight in the cashbox with each sale. While she did not recall how many \$50 notes she received that night overall, she said that usually on a Friday night, sales were between \$2,000 and \$3,000 and about half of that was usually in \$50 notes.

'Ufi 'Alofi

31. On the night in question, 'Ufi 'Alofi was employed as a waitress at the Talahiva Restaurant. Around midnight, she served the accused who ordered four serves lamb curry and one lu sipi. He paid her with a crumpled \$100 note. When she unfolded it, 'Ufi noticed that the note was slightly smaller than the other notes in the cash register. She also noticed that in the place where a normal note had a silver circle, the note the accused gave her had a black circle and that there was a gap between two leaves of paper making up the note which exposed white paper on the inside. 'Ufi showed the note to her sister who was a cook at the Talahiva.
32. Upon realizing that the note was counterfeit, 'Ufi told the accused the note was 'fake money' and returned it to him. She said that the accused calmly told her that the previous store he had been to must have given it to him. 'Ufi said she was able to

remember the events of that evening because it was the first time she had ever come across a customer paying with a counterfeit note.

33. During her evidence, 'Ufi referred to the accused by name. She explained that she learned his name from the Hufanga taxi base which is owned by her nephew. A Hufanga taxi picked up the accused from the Talahiva. Later, 'Eseta ('Elenoa) from the taxi base called her and asked whether someone had come and used fake money at the restaurant because the same person came to the taxi base and used fake money there.
34. 'Ufi also identified the accused in court.
35. The witness was then shown exhibit P5.4, in particular, one of the \$100 notes which was splitting at one edge showing it was formed from two pieces of paper with a white interior. 'Ufi confirmed that that note was similar to the one the accused gave her. She also identified the black oval section where a 'silver shiny circle' is to be found on a genuine \$100 note.
36. During cross-examination, Mr Moale put to 'Ufi that she argued with the accused because after he waited for a while for his food, she gave him the wrong order. 'Ufi denied that allegation.

'Elenoa Taiala

37. 'Elenoa Taiala manages the Hufanga taxi base. She gave evidence that at between midnight on 6 December 2019 and 12:30 a.m. on the 7th, the accused attended the base and asked for a taxi to follow him to take his vehicle home. 'Elenoa then directed one of her drivers, Mo'unga Palu, to follow the accused.
38. After a few minutes, 'Elenoa called Mo'unga to follow up on their whereabouts. Mo'unga informed 'Elenoa that they had parked the accused's van at 'Unga Road. A few minutes later, she called again. Mo'unga told her that they were driving around the cross-section at Longolongo heading to the Talahiva Restaurant and then they would head to Fua'amotu. About 10 to 20 minutes later, 'Elenoa called Mo'unga

again who informed her that they were on their way to Fua'amotu. About half an hour later, Mo'unga reported to 'Elenoa that they were at Fua'amotu.

39. During a later call, Mo'unga told 'Elenoa that they were heading to Niutoua because the accused had asked her to drive around while he "finished his bottle". 'Elenoa then asked to speak to the accused. She told him that if he wanted to use the taxi driver and vehicle for the night, then they would not charge him the taxi rate, but as a tour. The accused agreed and asked how much. 'Elenoa said it would be \$250 for the "whole tour".
40. 'Elenoa kept following up until the morning when Mo'unga reported that they were back at 'Unga Road. 'Elenoa could hear the accused in the background disputing the amount he was being charged. She told Mo'unga to bring the accused to the station so they could talk because they had an agreement. After a while, the vehicle arrived but only Mo'unga was in it. She presented \$300 made up of three \$100 notes to 'Elenoa. 'Elenoa could see that it was fake money. She held the notes up to the light and saw that they did not have the markings of genuine notes. She also started ripping one edge of the notes and could see two copies of the money attached to each other. She told Mo'unga that the notes were fake and for her to take them and report the matter to the police.
41. The following Monday morning, when 'Elenoa was opening the taxi station, the accused called her and apologized for the money he used to pay them. He told her he did not know that it was fake money from "the way it looked". 'Elenoa told the accused that she believed he did know it was fake because Mo'unga had told her that when they went to the Talahiva, the accused was told that his money there was fake and it was returned to him. 'Elenoa had also spoken to 'Ufi about the fake \$100 note the accused gave at the restaurant. The accused then told 'Elenoa that he would come to the base to pay her the money. Before he arrived, 'Elenoa contacted the police and spoke with Detective Fifita, whom Mo'unga had told her was working on the case. The accused then arrived. While he was talking with 'Elenoa, the police arrived, arrested the accused and took him away.

42. 'Elenoa was shown exhibit P5.4. She identified the notes there which showed separation of the two leaves of paper as exactly the same as the notes Mo'unga gave her.
43. In answer to a question from the Bench, 'Elenoa explained that Mo'unga had given her \$300 when the fare had been agreed at \$250 because Mo'unga had an earlier customer who gave her \$70 which she gave (not \$50) to the accused as change when he gave her the \$300 for the taxi hire.
44. In cross-examination, 'Elenoa agreed that she never saw the accused give any money to Mo'unga and did not know the actual amount of money the accused gave her. 'Elenoa confirmed that it was Mo'unga who took the fake \$300 for the taxi hire to the police.

Submissions

Prosecution

45. In his written closing submissions, and after recounting the evidence above, Mr Lutui submitted that the Crown had proven its case beyond reasonable doubt. He submitted that this was not a case of pure coincidence and that the evidence supported a reasonable inference that, on the night of 6 December 2019 and the early hours of 7 December 2019, the accused knew the currency he was uttering to various persons and establishments was counterfeit. In support of that inference, Mr Lutui submitted:
 - (a) Sullieta, 'Ufi and 'Elenoa all immediately noticed that the notes received directly and indirectly from the accused were counterfeit. Therefore, the accused ought to have known the notes were counterfeit because he was in possession of them for far longer.
 - (b) The accused did not use the change he received from Talavao at the Reload Bar because he wanted to keep that genuine currency and dispose of the

counterfeit \$50 notes he gave her; in other words, an attempt at money laundering.

- (c) The fact that the \$50 note given to Sulieta at the petrol station and the \$50 notes referred to in the NRB report as being received by the Reload Bar all bear the same serial number suggest they all originated from the accused. It is “just too much of a coincidence” that the accused happened to be at those locations on the same night when the counterfeit currency was discovered and not know that the notes were counterfeit.
- (d) The accused was calm when ‘Ufi returned the fake \$100 and told her that the store he attended before the restaurant must have deceived him. An ordinary person without knowledge that his \$100 note was counterfeit would have been furious when notified, let alone if he or she knew it was received through deception from a previous store. Furthermore, the explanation of the accused was ridiculous because it would mean that he had made a purchase earlier that night with a denomination higher than \$100 in order to receive a \$100 note as change. There is no higher denomination than \$100 in circulation in Tonga. After having been informed by ‘Ufi that his \$100 note was counterfeit, the accused proceeded to acquire the services of the taxi, which he paid for with \$100 notes, all bearing the exact same serial numbers.
- (e) The accused compensated the petrol station, Reload Bar and Hufanga taxi base. If he truly believed that the notes he gave that night were genuine, he would not waste his money compensating the complainants.

46. During his oral submissions, Mr Lutui added:

- (a) The element in contention in the trial was whether the accused knew that the currency he uttered was counterfeit currency on the various occasions on the night in question.
- (b) The repayments by the accused of genuine currency ought not be interpreted as him accepting, upon being told that the currency he gave was counterfeit,

and then wanting to make good on any resulting debts, but rather as an attempt to avoid prosecution after he had been found out.

- (c) The inconsistency between the accused's subsequent repayment of \$50 to the service station and his earlier statements in his first record of interview (A13) that he only paid \$30 (with a \$20 and a \$10) for the fuel reflects a consciousness of guilt.
 - (d) Similarly, the inconsistency in accounts about his whereabouts on the night in question between his second record of interview (A11) when he included being at the Reload Bar, and his answer to the same question two days later in his third interview (A13), that he was at the Tali'eva Bar with no mention of being at the Reload Bar, thereby seeking to distance himself from the allegations concerning the Reload, was also evidence of the Accused's consciousness of guilt.
47. In relation to count 2, Mr Lutui accepted that there was no direct evidence of the accused giving seven \$50 notes over at the Reload Bar, only of three he gave to Talavao. Mr Lutui therefore applied to amend the count by reducing the amount from \$350 to \$150. After initial objection, Mr Moale accepted that the reduction did not prejudice his client's case or the submissions he intended to make. The amendment was therefore allowed.

Defence

48. Mr Mo'ale submitted, in summary:
- (a) It was for the Prosecution to prove beyond reasonable doubt that the money used on the night in question was counterfeit. As he stated in his records of interview, the accused, through his counsel, maintained that all the money he gave on the night in question was genuine.
 - (b) It was accepted that the notes the subject of exhibit P5 were all counterfeit.

- (c) In relation to count 1, Detective Fifita's evidence that he received the \$50 note when he was given the complaint file conflicted with Sulieti's evidence that she gave the note to Fifita. Further, the note could not have been one of those referred to in the Reserve Bank report because they were all described as having been deposited in the BSP. Therefore, the \$50 note in exhibit P5.1 came from somewhere else.
- (d) In relation to count 2, there was no evidence of any of the counterfeit notes being given to the Reload Bar by the accused. Further, "there (we)re too many hands having access to the money box (at the bar) before the banking on Monday (9/12/19)".
- (e) To the Crown's submission that the \$50 note received by the service station and the (now) three \$50 notes received by the Reload Bar, on the same night, all having the same serial number, could not be explained as mere coincidence, Mr Moale said that it was "all based on assumptions, not facts".
- (f) In relation to Count 3, as the Crown's only witness, 'Elenoa, did not herself receive any of the counterfeit notes from the accused, "that is the end of it" and the count should be struck out for lack of evidence. Mr Moale referred to the following passage from the decision of Cato in *R v Puloka* (unreported, CR 50 of 2019):¹

"[12] ... Probably, fortuitously for the defence, it was known that Inspector Tu'utafaiva had left the police, is overseas and could not be contacted.

[13] I do not have his evidence before me on the threshold reason for giving the instruction to search the accused. Ms Kafa submitted that I could draw an inference from all the circumstances of the case that Tu'utafaiva had reasonable cause to suspect, but like Paulsen CJ, in a similar situation involving a warrantless search of a motor vehicle under section 24 of the Illicit Drugs Control Act, R v Tomasi CR 70/2019 17th July, 2019 (a copy of which Mr Mo'ale provided me with), the unavailability of former Inspector Tu'utafaiva also in that case had meant that a warrantless search in which illicit drugs and firearms had been located could not be supported by evidence as to the state of mind of the former Inspector and was consequently ruled an illegal search. Like Paulsen CJ,

¹ [2019] TOSC 44; CR 50 of 2019 (29 August 2019)

also, in the absence of evidence from Inspector Tu'utafaiva as to his reasons for ordering the search, I am unable to conclude that the search was conducted in good faith and so the evidence should not be admitted under the principles in Bunning v Cross [1978] HCA 22; (1978) 141 CLR 54 which I applied in R v Kitekei'aho unreported, Supreme Court CR 36 of 2015, 27th July 2017. I cannot speculate about the state of belief of the former Inspector's mind. In any event, I also agree with Paulsen CJ that, whilst the small amount of methamphetamine located is plainly cogent evidence, it is offending on the very low scale and does not in my view warrant the exercise of the discretion in the Prosecution's favour.

The significance of the passage, in a case which had to do with the legality of a police search, was not adumbrated in either Mr Moale's written or oral submissions. I apprehend he relied upon the passage simply as support for the proposition that without Mo'unga Palu, there was no evidence as to precisely what notes the accused gave her.

- (g) Mr Moale's response to the Prosecution's submission concerning the accused repaying the complainants the amounts purportedly paid on the night in question is contained in the following exchange during closing submissions:²

Ct ... what do you say then about the Crown's submission that your client returned to the taxi station and paid \$300 for the hire of the taxi in genuine currency? Why would he do that if he paid \$300 in genuine currency in the first place and the same question may be asked in respect of the other counts except for 4 which has now been withdrawn? It's not addressed in your written submissions, so I thought I'd give you the opportunity now if you wish to say something about it. The Crown says that's evidence of consciousness of guilt especially now that the defence has been refined to your client paid on each occasion with genuine currency: why would he pay again?

Mo'ale In terms of evidence I remember the police officer Fifita saying very clear to us that the Accused said to him I'm willing to pay \$300 and also the Accused purposely told the police the reason why. He said the reason why I'm giving you this I don't want to have any debts to anyone. That is the reason.

² Transcript, day 3, page 17.

- Ct Why would he accept that he was indebted to these three places when he told the police from the outset and has maintained at this trial that what he originally paid was genuine.
- Mo'ale I think it's out of love Your Honor.
- Ct Out of love?
- Mo'ale Yes.

Consideration

49. At the outset, I accept the evidence of the lay witnesses: Sulieti, Talavao, 'Ufi and 'Elenoa. I found them to be frank and forthright and their evidence to be clear, consistent and complete. None of their evidence was shaken in cross-examination.
50. I also consider Detective Fifita to have been a reliable witness, although his recollection of the events surrounding his receipt of the counterfeit note the subject of count 1 and his dealings with Tevita Kolokihakaufisi of the Reserve Bank and its report (exhibit P1) were perhaps less than comprehensive. I will turn to those matters further in due course. Nevertheless, and particularly under cross-examination, Detective Fifita impressed me as an experienced investigator who responded appropriately to the information he received and the leads that were generated.
51. Parts of the evidence were littered with hearsay. For reasons which were not apparent at the time, Mr Moale did not object to any of that evidence. I have taken both those observations into account when assessing the evidence below.
52. My next general observation is in relation to the documentary evidence. Initially, the Reserve Bank report was thought to be the Prosecution's expert evidence proving that the notes in question were counterfeit. It transpired that not only was that not entirely accurate, both counsel agreed that as there was no issue that the notes the subject of exhibit P5 were indeed counterfeit, the report added little if anything to the

case and I could effectively put it to one side.³ That concession tended to ameliorate any questions arising from the Reserve Bank report which could not otherwise be answered due to the Prosecution's inability to call Tevita Kolokihakaufisi⁴ to clarify the provenance of the various notes referred to in the report.

53. Next, the physical evidence. As just alluded to, there was and could sensibly be no doubt that the notes comprising exhibit P5 were counterfeit. To anyone with the slightest familiarity with genuine Tongan \$50 and \$100 notes, they were obviously fake. Apart from the most striking feature of identical recurring serial numbers across the two denominations, the notes possessed all of the defects described in the Reserve Bank report. Worse, and as described by two of the lay witnesses, at least one of the \$100 notes showed signs of the two leaves of ruled white paper, which formed the note, coming apart. To the naked and untrained eye, the notes represented a patently amateurish attempt.
54. But that of course was not the issue at hand. The issue was whether, as the accused told the police during his three interviews, the currency he gave the various complainants on the night in question was genuine or the notes of exhibit P5. Once Mr Moale confirmed that as the issue for determination, the evidence took on a different complexion.
55. Mr Lutui emphasised the circumstantial nature of the Crown's case. Against that, and apart perhaps from referring to the Crown's case as being "based on assumptions, not facts", and his explanation for the accused repaying the complainants, Mr Moale's submissions paid scant regard to the Crown's submitted inferential case.
56. Circumstantial evidence is evidence which, if accepted, tends to prove a fact from which the existence of a fact in issue may be inferred: *Festa v R* (2001) 208 CLR

³ Transcript, day 3, page 12.

⁴ Who, Mr Lutui reported, had been rushed to hospital: tx, day 1, p.34.

593. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved.
57. Circumstantial evidence can be powerful evidence, but it is equally important to examine it with care and to consider whether the evidence upon which the Prosecution relies in proof of its case is reliable and if it does prove guilt or are there any other circumstances which are, or may be, of sufficient reliability and strength to weaken or destroy the prosecution's case: *R v Siosiu Po'oi Pohiva* [2008] TOSC 20. A court should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence and mere speculation which amounts to no more than guessing or making up theories without good evidence to support them: *R v Siosiu Po'oi Pohiva*, *ibid.*
58. Circumstantial evidence necessarily calls upon processes of reasoning that involve the drawing of inferences from a jigsaw of established facts: *De Gruchy v R* (2002) 211 CLR 85 at [47]. In order to draw an inference, the Court is required to make findings of primary fact from which the inference may be drawn: *Kolo v Leone* [2008] Tonga LR 188.
59. In *Shepherd v R* (1990) 170 CLR 573, Dawson J observed:⁵

"4. ... In most, if not all, cases, that ultimate inference must be drawn from some intermediate factual conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference. More than one intermediate fact may be identifiable; indeed, the number will depend to some extent upon how minutely the elements of the crime in question are dissected, bearing in mind that the ultimate burden which lies upon the prosecution is the proof of those elements. That means that the essential ingredients of each element must be so proved. ...

6. ... It does not mean that every fact - every piece of evidence - relied upon to prove an element by inference must itself be proved beyond reasonable doubt. ...

11. ... An inference of guilt may properly be drawn although any particular primary fact, or any concatenation of primary facts falling short of the whole, would be insufficient to exclude other inferences. It follows that the insufficiency

⁵ Citing *Chamberlain v. The Queen* (No.2) 153 CLR 521 at 599.

of a piece of evidence to support an inference of guilt does not by itself warrant the setting aside of a verdict of guilty if that piece of evidence, however important, is but a part of the whole body of evidence available to support the inference.”⁶

60. To convict, the inference of guilt must be the only inference that is reasonably open on all the primary facts, established to the requisite standard of proof: *De Gruchy*, *ibid*, at [48]. It is necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference: *Teper v The Queen* [1952] AC 480.
61. Insofar as the Crown here pointed to what it regarded as inconsistencies in the accused’s accounts to police as evidence of his consciousness of guilt, or an admission against interest, the authorities make plain that such evidence must be approached with caution. The Court must be satisfied, firstly, that upon consideration of the relevant circumstances and events, the impugned evidence constitutes a lie, and secondly, that the lie reveals some knowledge of the offence and that it was told because of a realisation of guilt and a fear of the truth. The Court must also be mindful that there may be reasons for the telling of a lie apart from the realization of guilt. A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. If any reason of that kind is accepted as the explanation for the lie, it cannot be regarded as an admission: *Edwards v The Queen* (1993) 178 CLR 193, 208, referred to in *Xi Yun Qian v Kingdom of Tonga* [2020] TOSC 16.
62. Therefore, in order to determine whether the Crown’s case, as a whole, provides a sufficient basis for an inference that supports a finding of guilt beyond reasonable doubt, I make the following assessments of the relevant evidence.
63. My first overarching observation is that the evidence of all the events on the night in question occurred during a period of less than about eight hours. That is, there is a close temporal connection between them.

⁶ Citing *Chamberlain v. The Queen* (No.2) 153 CLR 521 at 599.

Count 1

64. Turning then to count 1. For my part, there was direct evidence in support of count 1. My acceptance of Sulieti's evidence means that I accept that the accused gave her a \$50 note for the fuel at the petrol station. It also means that I accept her evidence that the note was almost immediately recognised as fake. That was confirmed when she was shown exhibit P5.1. It follows that I do not accept the accused's account to police in his first interview that he paid \$30 for the fuel, using a \$20 and \$10 note. Support for that view is found least of all in the lack of any demonstrated motive for Sulieti to lie or any basis for her to even be mistaken about her evidence. Moreover though, the main difference was the vagueness of the accused's account where he first referred to using a \$30 note (which of course does not exist) compared to Sulieti's detailed account of the \$50 note being carefully taken by the accused from a bundle of \$50 notes which he took out of a black bag. That level of detail from a witness with nothing to gain (or lose) from fabricating evidence was compelling.
65. However, the real issue on count 1 was elucidated by Mr Moale when cross examining Sulieti, and then developed in closing submissions, when he detected a difference in her account as to how the \$50 note she retained from the accused found its way to the police compared to Detective Fifita's account. Further, Mr Moale quite naturally drew attention to the fact that the Reserve Bank report described the \$50 note from the petrol station having been deposited in the BSP Bank, whereas Sulieti's evidence was that there was only the one fake \$50 note, which she did not bank, but instead gave to Detective Fifita. His evidence was that he received it as part of the paperwork from Sulieti's initial complaint.
66. If the state of that evidence produced any initial impression of uncertainty about whether exhibit P5.1 was the note the accused gave Sulieti, it may be easily dispelled. There is no doubt on any sensible view of the evidence that the \$50 note reported by Sulieti was provided to the police. Whether that was to the complaints desk initially and then forwarded to Detective Fifita, or whether Sulieti gave it directly

to Fifita, I am satisfied that the \$50 note the Detective presented during his evidence and which became exhibit P5.1 was the note Sulieti received from the accused. As it was agreed that exhibit P2, the Reserve Bank report, could be put to one side, there is no need to speculate about the description of the notes in row 5 of the table having, at some point, been deposited at the BSP bank. There was no suggestion of any other fake \$50 note received at the petrol station on the night in question and Mr Moale did not put that possibility to Sulieti during cross-examination. Then again, his instructions would not have permitted him to do so, because the accused maintained from his police interviews to his counsel's closing submissions that he gave only genuine currency. In that regard, I find that the accused's account to police that he only paid \$30 to Sulieti was a lie designed to distance himself from the use of the counterfeit \$50.

67. Moving onto the evidence of what occurred at the Talahiva Restaurant, the accused told 'Ufi that he must have gotten the fake \$100 he gave her from a shop he went to before arriving at the Talahiva Restaurant. However, in his third record of interview, the accused said that before he went to the restaurant (after hiring the taxi from Hufanga taxi base) he went to buy some food from a Chinese takeaway opposite Longolongo Police Station but found the place closed. He did not mention any other shop. I therefore find that his statement to 'Ufi about where the fake \$100 came from was a lie again designed to exonerate himself when he was caught out attempting to pay for the food he ordered at the restaurant with a counterfeit \$100 note.
68. Alternatively, if the accused did go to a shop beforehand, as Mr Lutui revealed, the accused's explanation of obtaining the fake \$100 note from that shop would be impossible because it would require a purchase with a denomination higher than \$100 in order to receive a \$100 note as change. There is no higher denomination than \$100 in circulation in Tonga.
69. Further, by 'Ufi's account, the accused did not attempt to question or dispute her assertion that the note was fake. She described the accused as being 'calm' during their exchange. By the accused's account to police, there was an argument between him, 'Ufi and her sister when they told him the note was counterfeit. He did not

explain what was said during the 'argument'. His statement gave the impression the argument was about the \$100 being counterfeit. Curiously, however, Mr Moale put to 'Ufi that the argument was about her giving him the wrong food order, which she denied. There was in fact no reference by 'Ufi to the transaction even getting to the point of preparing the accused's order because he gave her the fake \$100 when he ordered and 'Ufi identified it as fake when she went to put it in the till. In his account, the accused did not seek to refute 'Ufi's statement that the note was fake. He clearly accepted that it was. By both accounts, the accused's reaction was simply to take the note back and leave.

70. Having regard to the above, combined with his earlier inconsistent statement about the previous shop being closed but telling 'Ufi that he must have gotten the fake note from such a shop, I am left with no doubt in inferring that the accused knew that the \$100 note he gave 'Ufi was counterfeit and that, in truth, he did not receive it from some other shop earlier that evening.

Count 2

71. In relation to count 2, there is no direct evidence that the three \$50 notes the accused gave Talavao were any of those comprising exhibit P5.2. However, I start with the indubitable fact that the fake \$50 notes said to have been paid to the Reload Bar all bore the exact same serial number as, and indeed were virtually identical to, the \$50 note given by the accused to Sulieti at the petrol station. It is also to be recalled that Sulieti saw that the \$50 note the accused gave her came from a bundle of about 30 of the same denomination. Further, Talavao said that during her time working at the Bar, nothing like this had ever happened before. All of that, alone, is a powerful basis for connecting the accused to the notes given to the Reload Bar.
72. In support of that, I also take into account:
- (a) Talavao's evidence that she noticed the accused as being unusual because he stood out from the crowd, as it were, because he was significantly older than the majority of the clientele;

- (b) that the accused gave Talavao three \$50 notes on three separate occasions for the purchase of a single beer on each occasion rather than pay her with the change she had given him from the earlier purchases and that when she confronted him about that, his reaction was to go to the other bar;
 - (c) the accused's statement to police that he drank 6 or 7 beers at the Reload, which, if he paid for each with \$50 notes as he did for the three he requested from Talavao, would amount to in the order of the \$350 (seven \$50 notes) identified as being fake from the Reload's take that night;
 - (d) the accused's statement to police that he paid for his beers at the bar "with a \$50, \$20 and a \$10" which is at odds with Sulieti's evidence that, at least with her, the accused only tendered \$50 notes.
73. However, perhaps the most damning evidence in relation to this count is the accused's inconsistent accounts to police between his first interviews and his third, some two days later, about his movements on the night in question. The most obvious difference was that in his last interview, he did not even refer to going to the Reload Bar. He also left out any reference to the service station. The differences did not permit of innocent mistake because they were quite detailed. They were clearly calculated to give a very different impression of the places the accused frequented that night. From that I infer that between his first two interviews and his third, the accused realised that he had been caught out when being questioned about the notes given to the taxi driver, and so in an endeavour to disconnect himself from the earlier questioning about the fake \$50 notes given to the Reload Bar, he decided to tell the police that he went to the Tali'eva Bar instead. I regard that as clear evidence of a consciousness of guilt.
74. Viewed as a whole, I accept the Crown's submitted inference that the accused knowingly paid Talavao with more of the counterfeit \$50 notes he paid to Sulieti as a means of recovering genuine currency in change thereby 'laundering' the majority of the value of the counterfeit notes.

Count 3

75. In relation to count 3, the starting point is the accused's admission to police that he gave Mo'unga Palu a total of \$600: \$300 for the hire of her taxi and \$300 for her to drink with him. At the other end of the relevant timeline, we have Detective Fifita who gave evidence that when lodging her complaint with him, Mo'unga gave the detective six fake \$100 notes which she told him the accused had given her. That last aspect was hearsay as defined by s.88 of the *Evidence Act* and to which, as noted, Mr Moale did not object. Ultimately, Mr Moale seemed content to rest on the submission that the Prosecution's inability to call Mo'unga ought put an end to counts 3 and 4 (before 4 was withdrawn) as suffering from the seemingly fatal defect of either insufficient or no evidence to support the allegation that the notes the accused gave Mo'unga were the notes in exhibits P5.3 and/or P5.4.
76. Neither counsel addressed the issue of hearsay in their submissions in relation to this count. Section 89(e) of the *Evidence Act* provides an exception to the hearsay prohibition where, relevantly, the knowledge, intention, motive or state of mind of any person is a fact in issue and the statement proves or disproves the said knowledge, intention, motive or state of mind. Here, that the accused knew that the notes in exhibits P5.3 and P5.4 were counterfeit is not in issue. His statements to police that he did not utter those notes, but only paid with genuine notes, is in issue. That in turn calls into question the accused's knowledge as to what notes he paid with that night. On that basis, I am prepared to receive and accept Detective Fifita's evidence that the notes Mo'unga gave him – exhibits P5.3 and P5.4 – were given to her by the accused.
77. But if I am wrong about that, the intermediate fact is that, on the available evidence, 'Elenoa was the first person to see and speak with Mo'unga when she returned to the taxi base. According to 'Elenoa, Mo'unga gave her three \$100 notes representing the fare for the 'tour' agreed between 'Elenoa and the accused, after Mo'unga gave the accused some change received from another fare earlier that evening. There was no evidence of Mo'unga telling 'Elenoa about the other \$300 the accused

admitted to paying her to drink with him. The likely reason for a taxi driver on duty not telling her employer about that ought be obvious. It also explains, in part, why count 4 was withdrawn.

78. Nonetheless, 'Elenoa's evidence painted a vivid picture of her telephoning Mo'unga on several occasions during the period she drove the accused around. On that evidence, I am satisfied that Mo'unga did not have another fare during what appeared to be a period of a few hours with the Accused, nor was she paid any other currency by any other person during those same early hours of 7 December 2019.
79. Further, I accept that during one of her last calls to Mo'unga, 'Elenoa overheard the accused complaining about the agreed fare of \$250, and that 'Elenoa told Mo'unga to bring the accused to the taxi base so that she could discuss the matter with him. That Mo'unga arrived at the base without the accused was never explained. But it was very clear from 'Elenoa's evidence that the first thing Mo'unga did when she did arrive back at the base was to give 'Elenoa the \$300 the accused paid for the hire of the taxi. It was equally clear that 'Elenoa immediately recognised the notes as counterfeit and she told Mo'unga to take them and report the matter to the police which, according to Detective Fifita, Mo'unga did. Mr Moale did not challenge any of that evidence. In the absence of any evidence whatsoever, or suggestion by Mr Moale for that matter, that the notes in question may have come from another person that night, I am satisfied, beyond reasonable doubt, that they came from the accused.
80. If there be any doubt about that conclusion in relation to count 3, or the process of reasoning by which it was reached, one need only consider the next event in the chronology concerning the taxi base which was the accused contacting 'Elenoa the following Monday. On that morning, he called to apologize for paying with counterfeit money. He told 'Elenoa that he did not know that what he paid with was counterfeit and that he would come to the taxi base to (re)pay the \$300, which he did, just before he was arrested. Again, Mr Moale did not challenge 'Elenoa's evidence in that regard nor did he put any different version of events.

81. A moment's pause will expose the next lie in the accused's account to police. For if the truth was, as he repeatedly stated when questioned, that the notes he used were genuine, why would he volunteer to 'Elenoa that they were not? There was no evidence about what prompted the accused to contact 'Elenoa in the first place about the counterfeit notes. If he truly believed he gave genuine currency that night, why would he even think to contact 'Elenoa?
82. Importantly, there was no evidence that the accused even asked to see the notes to determine for himself whether they were counterfeit, something which an innocent person would reasonably be expected to do. In that regard, Talavao's evidence about the Facebook post circulating the following morning may be instructive.⁷
83. 'Elenoa told the accused that he knew the notes were fake after what had happened at the Talahiva Restaurant. There was no evidence of the accused denying that, nor did Mr Moale seek to challenge that part of 'Elenoa's evidence. Similarly, there was no evidence of the accused trying to explain, as he did with 'Ufi, that he must have been given the notes from the previous shop he went to. This aspect of the accused's conduct was inconsistent with his explanations to the police and, in my view, was consistent with guilt.
84. It also revealed what might be regarded as the 'schizophrenic' nature of the defence as presented. Mr Lutui first conveyed to the Court from what he had been informed by Mr Moale shortly before the commenced that the issue was knowledge, i.e. that the notes the accused gave were counterfeit but that he did not know they were at the time. Then, as noted above, during the trial, Mr Moale nuanced that effectively to the element of uttering, i.e., that the accused uttered only genuine currency, and not any counterfeit notes, in which case, the element of knowledge would not arise.
85. On a final note in relation to count 3, neither the evidence as adduced nor either counsel addressed why, as a matter of logic, the accused would pay \$250 for the

⁷ Although it should go without saying, I do not take into account any evidence about any Facebook posts as evidence of the truth of their contents.

hire of the taxi for a 'tour' which consisted of nothing more adventurous than driving around Tongatapu, where the accused lives, for a few hours in the middle of the night; and \$300 to drink with the taxi driver. The nature of the aged care business the accused operates from his home, as he described it to the police, did not suggest that he was a wealthy man. There was also no suggestion that he was so intoxicated when he engaged the taxi as to explain why he might thereafter splash \$600 for the very basic services provided. In my view, the only rational inference is that the accused purportedly 'spent' those sums because it did not really cost him \$600. Other than for any costs of production or procurement of the counterfeit notes, the taxi services did not actually cost the accused anything. Which brings us to the last issue.

The "(re)payments"

86. The final issue on the evidence, is why the accused repaid \$300 to the taxi base, \$350 to the Reload Bar and \$50 to the Telekava Service Station, if, in truth, he originally paid with genuine currency.
87. If the accused paid the complainants with genuine currency, there is no rational explanation for him paying any of those amounts again. His explanation to Detective Fifita that he did not want to be indebted to anyone, in fact, only serves to contradict his defence. For if he truly paid with genuine currency, then as a matter of law and logic, he could not be indebted to any of those recipients. The only way he could be indebted is if he accepted that the notes he gave the complainants were in fact counterfeit. Then he would be indebted to them. That necessary acceptance belies his statements to police and through his counsel in this trial that he only gave genuine notes.
88. Finally, Mr Moale's attempted reconciliation at the above paradox, that the accused repaid the amounts out of "love", cannot be accepted. Apart from the fact that the suggestion did not come from the accused himself, either during his statements to the police or during the evidence at trial (which was his right and from which I draw no inference whatsoever), the irresistible and only conclusion is that if there was any

'love' in those acts, it was love of the accused himself, in trying to avoid prosecution once he realised he had been found out.

Result

89. For those reasons, when viewed as a whole, I do not consider the evidence to be capable of supporting any inference or hypothesis consistent with the accused's innocence. I am therefore satisfied beyond reasonable doubt that the Prosecution has established that the accused knowingly uttered counterfeit currency as alleged in counts 1, 2 and 3 of the indictment.
90. I therefore find the accused guilty, and he is convicted, on those counts.
91. Submissions on sentence and a pre-sentence report are to be filed by 26 March 2021.
92. The accused is to report to the Probation office within the next 48 hours to arrange a time for his interview to enable preparation of his pre-sentence report.
93. Sentencing will take place on 1 April 2021 at 9 AM in court 1.
94. The accused's bail is extended to that date on the existing conditions.

NUKU'ALOFA
25 February 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC
LORD CHIEF JUSTICE

