

<b>ATTORNEY GENERAL'S OFFICE</b>	
INITIALS: <i>JK</i>	DATE: <i>5/6/21</i>
<input checked="" type="checkbox"/> File	<input checked="" type="checkbox"/> Website
<input checked="" type="checkbox"/> Database	<input checked="" type="checkbox"/> Social Media
<input checked="" type="checkbox"/> Email internal	<input type="checkbox"/>

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

CR 99-100 of 2021

REX

-v-

**Kalolaine FAINGA'A**  
**Paea FAINGA'A**

---

## JUDGMENT

---

BEFORE : THE HONOURABLE COOPER J  
Counsel : Ms. 'E. Lui for the Prosecution  
Defendants in person  
Date of judgment: 10 December 2021

1. At the commencement of the trial the indictment was amended. The new indictment meant that the scope of the allegations they faced was reduced; both faced four counts of theft contrary to section 143 (a) and 145 (a) Criminal Offences Act alleging they had stolen: on 13<sup>th</sup> November 2020 Ta'ovala kie and one Ngatu Fuatanga; on 11<sup>th</sup> November 2020 a Fusion Amp and Subwoofer speaker; 10<sup>th</sup> November 2020 an electric saw and 14<sup>th</sup> October 2020 three paint buckets.
2. Mr. Fainga'a faced two more counts on his own, relating to an allegation of serious house breaking, contrary to section 173 (1) (b) Criminal Offences Act, in that he had broken into the house of Malia Fangupo on 11<sup>th</sup> September 2020 and a count of theft relating to a flat screen television. X Box and charger that was said to have been stolen in that house breaking.
3. Neither defendant was represented. They had no objections to the proposed amendment; bearing in mind they were unrepresented and wishing to over-see the course of their case and ensure its fairness I considered their position; I could not see

that it would prejudice them in any way to allow the change and the amendment was approved and the trial proceeded on that indictment.

4. Case was opened in Tongan and the court followed the English Language version of the Crown's Opening note.

### **Count one**

#### **Lavinia Faeamani Fainu**

5. She had a break in at her home and stolen were the following items :
6. One Ta'ovala kie, one Ta'ovala putu, one Ta'ovala kie, one Ngatu fuatanga, two Black laptops, one electric saw, Ta'ovala fanakio, a sack of kava and an X box games console.
7. This happened on November 13<sup>th</sup> 2020.
8. That same day returned to her by the police were the Ngatu fuatanga and Ta'ovala kie.

### **Cross examination**

9. There was none from either defendant.

#### **' Alamita Moala**

10. This witness gave her evidence by AVL from Vava'u, but in November 2020 she was in Tongatapu for the graduation ceremony of her daughter, from St Joseph Business College.
11. The police had seized some items from her, they were a Ngatu fuatanga and Ta'ovala kie, these were advertised to be purchased from a couple.
12. What had happened was she had met a couple. At first she did not know their names but became aware of them as they talked.
13. The woman was called Kalo. She thought the man was called Paea.

14. A friend of Miss Moala. Veisia Fehoko, had given her a lift. They had met the couple in Fatai near Nukunuku. This couple then borrowed the car returning after about an hour with the Ngatu fuatanga and Ta'ovala kie. They then asked for a lift to Puke. But, before being dropped off there offered for sale the Ngatu fuatanga and Ta'ovala kie.
15. Miss Moala said she did and they were bought for \$700.
16. The couple were then dropped off.
17. She was asked and described them as being a male, small, skinny, dark skin and short hair. The female, small skinny and dark skinned.
18. At this point the prosecutor sought to ask the witness to see if these people could be identified in the court room.
19. That would be a dock identification.
20. I refused to allow that to take place, in keeping with the practice as set out Archbold 14-59 and case of Cartwright (1914) 10 Cr. App. R. 219, CCA.
21. Miss Moala then concluded by confirming that the Ngatu fuatanga and Ta'ovala kie stayed in the car until a time when the police collected them.
22. This happened around November 2020.

### **Cross Examination**

23. Neither defendant had any questions.
24. On Mr. Fainga'a's behalf it was challenged as to when the witness had first heard the name "Paea" but she said it was from the man in the couple who said it himself.

### **Veisia Fehoko**

25. She had been with Mrs Alamita Moala they were in Matafanonua, and a couple hitch hiking a ride. They were Kalo and Paea Fainga'a; she knows them very well. Paea has a

brother she knows well. Kalo, her mother came from Vava'u as do Miss Fehoko's relatives. She knew that Kalo was named after grandmother.

26. The witness runs a business at the Talamahu market and Kalo used to go there.
27. She stopped the car and both got into vehicle. They went to Utulau this residence house friend 'Alamita. They wanted to borrow 'Alamita's car. They wanted to go to an Aunt's residence to get a Koloa fakatonga (a 'traditional mat').
28. They did that and the two ladies waited, the couple returned after an hour or so and had with them fuatanga and Ta'ovala tu'oua tonga. Kie.
29. They offered to sell them for \$700 and after taking Ta'ovala tu'oua to the market and selling that they paid the couple with that money. Then, dropped them at their home in Puke.

#### **Cross examination**

30. Neither defendant had any questions.

#### **Count two**

##### **Nehwni Kinikinilau Mafi**

31. He lives in Hala'ovave.
32. On Wednesday 11<sup>th</sup> November 2020 there was a theft from his home and taken were two amplifiers, a subwoofer speaker, tape player for vehicle and its wires, a television, one external hard disk and an electronic saw.
33. Returned to him were the two amplifiers and a subwoofer speaker. A friend restored them to him. He then reported the matter to the police who recorded the details of his allegation.
34. Exhibit 1 was produced, a book of photographs. At page two, photographs 3 and 4 Mr. Mafi identified the amps and subwoofer as belonging to him.

### **Cross Examination**

35. Neither defendant had any questions.

### **Viliami Kioa**

36. A mechanic from Sopo. He also runs a business pawning goods for money.
37. The amplifiers and speaker in the photographic booklet he recognised. Paea had brought them round. He knew Paea, who was someone who come around to his neighbour. He would be with a woman, but did not know her name.
38. He gave Paea \$300 for them. Then a friend called Lolo Toia came by and knew who the real owner was and paid him \$300 to get the items back to give to another person called Lolo to give to the rightful owner.
39. Paea had been with a woman, who he described as about his height, a bit skinny and with dark skin.

### **Count three**

### **Lavinia Kolopeaua**

40. There was a theft from her home on Tuesday 10<sup>th</sup> November 2020 and a Ta'ovala and an electric wood saw were taken. The saw was returned. The police contacted her to let them know it had been handed in to them.

### **Cross examination**

41. Neither defendant had any questions.

### **Sione Fetulimocata Ve'a**

42. He lives in Puke. His father is 'Una loto Ve'a. This person sold to his father a tape deck for a car and powered saw. He could not describe the person, nor did he know him save to say he was short.
43. The police arrived and seized the items.

**Cross examination**

44. Neither defendant had any questions.

**'Una loto Ve'a**

45. The police came to his address and seized items including an electric saw a type powered by batteries. It was given to him by someone called Paea. But he did not know his last name.

46. He said that he knew Paea and they had been best friends since he was a baby.

47. He said he knew his father, Paula Fifita very well.

48. When he was asked to describe Paea he answered in this way :

“We all know his appearance; he is sitting here in court.”

**Cross examination**

49. Neither defendant had any questions.

**Count 4**

**'Aloisia Pohiva**

50. She had looked after the house of Leveni Hanson for about 6 months in 2020.

51. There had been a break-in at that property around July/August and 4 or 5 buckets of paint, a bicycle and a television were all stolen.

52. 3 buckets of paint were all that the police returned.

**Cross examination**

53. Neither defendant had any questions

**Tupou Tafuna**

- 54. He lived in Sopus last year. Police attended his residence and seized some buckets of paint and an amplifier.
- 55. They came from Paea Fainga'a who had sold them to him and the witness identified the buckets of paint in exhibit 1, photographs 1 and 2 as those in question.

**Cross examination**

- 56. Neither defendant had any questions

**Count 5 & 6**

**Malia Fangupo**

- 57. At her home in Ma'ufanga a flat screen TV, X box and charger were all stolen last year, in September. No item was ever recovered. Her home is in the fourth block of Ma'ufanga behind the 'Haapai Delight' restaurant.
- 58. It had previously been a bakery.

**Cross examination**

- 59. Neither defendant had any questions

**Willi Malu**

- 60. He is a taxi driver and gave evidence that he took Paea to Ma'ufanga to a property behind the Pacific Light Bakery, he said his sister lived there and he needed to get something. A flat screen TV and a game he took from the address and they went to 'Anana and got out there.
- 61. Paea is a friend of his, he said. And, when they got to Anana he got out and took with him the television and the game.
- 62. He added that the bakery is no longer there.

### **Cross examination**

63. Neither defendant had any questions.
64. On behalf of Mr. Paea it was put to the witness that his, Mr. Malu's own mobile phone had been recovered from the scene of the house break.
65. He agreed that it had been.

### **Re-examination**

66. Mr. Malu said that Paea had told him that he, Paea, had lost his phone.
67. When Paea got out the car his phone was nowhere to be found.
68. That concluded the case for the Crown.
69. Neither defendant gave evidence.
70. The case was then adjourned a day for submissions.

### **Consideration**

71. The prosecution must prove the elements of the offences beyond a reasonable doubt.
72. Separate consideration for each count and for each defendant.
73. Just because there are a number of allegations against each defendant, there is no cross admissibility and the consideration of each allegation stands on its own.
74. The first question I ask myself is: have the prosecution proved the continuity of the exhibits and/or identification in this case?

### **Count 1.**

75. The Ngatu fuatanga and Ta'ovala kic were stolen 13<sup>th</sup> November 2020 and returned to the loser that day by the police.
76. Miss Moala and her friend were sold these items by a couple called Paea and Kalo "around November" 2020. Those items were seized by the police.

77. There are no photographs of the item and they have not been produced as an exhibit.
78. Had there been a photograph and a statement from the officer who returned them to confirm from the loser those were the items in question and Miss Mola likewise, then the continuity would have been made out.
79. Otherwise the question I have to ask myself is can I be sure that a Ngatu fuatanga and a Ta'ovala kie the police took from Miss Moala having been sold to her by the couple "around November" 2020 are the same as those returned to Miss Fainu ?
80. Without more I cannot be sure. They could be, is all I can conclude.
81. Therefore there is a break in continuity and the allegation against both these defendants fails.

## **Count 2**

82. The allegation is that "Paea" sold on the stolen amplifier and speaker. I note there is no evidence at all that Mrs Fainga'a was involved.
83. There have been no identification parades at all in this case, nor fingerprint evidence.
84. It is worth noting that Viliami Kioa in his evidence stated that the steps for the property being returned, via the police, were that one person called Lolo saw the items and they were then given to a different person, also called Lolo, and then they were restored to the owner.
85. "Paea" as a means of identifying someone with no other information, no surname, is not enough to prove, so I am sure, that is one and the same as this defendant.
86. There needed to be more and identification parades ought to have been carried out. But, they were not.
87. There being no evidence against Mrs. Fainga'a and there being only that evidence against the second defendant there is not enough to prove that count.

### **Count 3.**

88. The same issue as to identification arose, as in count 2. But in this case there was a dock identification given by the witness 'Una loto Vea.
89. Archbold at 14-59 deals with the admissibility of dock identifications. "The identification of a defendant for the first time in the dock is an undesirable practice".
90. It had already been clear to the prosecutor that identification was an element missing in the trial and there had already been an attempt to get a witness to make a dock identification.
91. With this witness the situation had come around by being asked to describe "Paea". It was therefore highly likely that some form of dock identification would follow as a result of this question.
92. On the evidence, the defendants had never been asked to stand on identification parades nor refused to, having been given that opportunity.
93. I conclude that this was highly prejudicial to the defendant. The prosecutor was all but inviting the witness to point out or make some direct reference to the defendant by asking him to describe "Paea".
94. The Crown knew that all elements of the offence had to be established; the defendants had not given any interviews, so were putting the Crown to strict proof.
95. Therefore the answer given by ' Unaloto Vea : "We all know his appearance. he is sitting here in court." I exclude as being more prejudicial than probative.
96. There being no evidence against either defendant as to identity this count is not proved.

### **Count 4.**

97. Simply put, the witness, Miss ' Aloisia Pohiva was not asked to, nor did she identify the buckets of paint in the photographic album exhibit 1. photographs 1 and 2 as being the buckets of paint that had been stolen.
98. This is fundamental.

99. Therefore there was a break in the continuity in respect of that allegation too, it not being established that the buckets handed to the police by Tupou Tafuna were those that were stolen from the property that Miss Phiva was looking after.

100. This count failed too.

**Count 5 and 6.**

101. Mr. Malu's mobile phone was found at the scene of the house break and he sought to say it had been committed by Mr. Fainga'a.

102. His explanation for that being that Mr. Fainga'a had his phone when committing the burglary.

103. I find this extraordinarily unconvincing.

104. Naturally he would blame someone else. The case against him is much stronger than against Mr. Fainga'a and I discount this witness's account as ludicrous.

105. There was no evidence against Mrs. Fainga'a at all on this count.

106. During submissions on behalf of Mr. Fainga'a I put it quite simply to the prosecutor "Mr. Malu did it". At this point it was revealed that Mr. Malu had been given immunity from prosecution.

107. Had there been a conviction on the evidence of a witness who had been given immunity, this not having been disclosed to the defendants nor the trial Judge. as was the case here, that conviction would be unsafe.

108. Conferring immunity on a witness is so fundamentally entwined with assessments of credibility that this fact must, prima facie, be disclosed. At this time I can think of no reason why it must not always be disclosed.

109. I make these observations; prosecuting is hard work and needs a careful review of the detail of each and every allegation. We all know that building something up is much harder than knocking it down.

110. Yet the simple use of identifications parades can help prove identity and where necessary prove that part of a prosecution case.

111. The expedient of a photograph exhibited as part of a statement to demonstrate that the item seized and restored to the victim was the same item as that stolen can fill the gaps in continuity.

**Conclusion**

112. After a careful analysis of each and every allegation I acquit both defendants on all counts.

**NUKU'ALOFA**  
**10 December 2021**



A handwritten signature in blue ink, appearing to be "N. J. Cooper", is written over the seal.

**N. J. Cooper**  
**JUDGE**