

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

CR 116 of 2013

DPP/SG/MACONLBER

Scan, email +
file

15/12/14

REX

V

HON. HAVEA TU'IIHA'ATEIHO

BEFORE THE HON. JUSTICE CATO

Mr A Kefu, Acting Attorney- General, for the Crown

Mr K Barron - Afeaki SC and Mr G Bradford for the Accused

J U D G M E N T

- [1] The accused, Lord Ha'ateiho, was charged with one count of being in possession of arms without a license contrary to sections 4(1) (2) (b) and 47 of the Arms and Ammunition Act , particulars of which were that in or about the month of August, 2010 at Ha'ateiho, he did possess a .22 semi-automatic pistol without a licence.
- [2] He was tried before myself without a jury on the 24th, 25th and 26th November 2014. After hearing closing submissions from counsel, Mr Bradford and Mr Kefu, I adjourned the trial to deliver my verdict at 2.15 on Friday 28th November, 2014.
- [3] The evidence was in a narrow compass. Lord Ha'ateiho had reported to the police and a statement had been taken from him on the 22nd August, 2014 complaining that there had been a break in of his property at Ha'ateiho opposite the University of the South Pacific Campus on the Tau'afahau Road. In his statement which was produced in evidence he said that he

recd 12/12/14
AIC

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 116 of 2013

had woken up on the morning of the 9th August 2010 at 7am and he had when, later that day, his staff noted a break in had taken place, checked and found that a Nokia phone had been taken and a "Roaker" pistol worth 500 and 22 bullets worth \$50 were missing. As a consequence, he telephoned police. The statement was signed by Lord Ha'ateiho. More specifically in his statement, he said;

' On the morning, the alarm on my mobile did not go off it is normally beside my bed when I am asleep and a pistol beside a safe that is beside the bed which is in a bag together with 2 boxes of bullets 22 rifle (40X2)"

[4] Subsequently, two men were arrested over the incident. Only one gave evidence. His name was Sione Uatekini. He had been subsequently arrested by the police and a statement taken from him in which he had admitted to the break in and stealing a pistol and ammunition and a mobile phone from the premises of the accused. At the trial, unbeknown to Mr Kefu before his evidence was given, although he admitted the break in and stealing a mobile and some food, he denied ever stealing a pistol from the residence. He was then declared a hostile witness and cross-examination by Mr Kefu on his police statement proceeded but he maintained his denial of stealing a pistol from the residence. He also later admitted that he had pleaded guilty to theft at the accused's residence and also taking a pistol as well as two boxes of bullets and also a mobile phone. However, when put to him by Mr Kefu that he did steal a pistol from the accused's residence, he denied this. He admitted that he had later given a pistol to Simione Faiva who was also called to give evidence later in the trial, but he denied that he had given him a pistol stolen from Lord Ha'ateiho's residence, but from a break in elsewhere. The witness further admitted he had broken in to Lord Ha'ateiho's residence after escaping from prison with others. He later re-entered the prison and was involved in a shooting. Ultimately, he was convicted and sentenced to 15 years imprisonment, for a series of crimes

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

CR 116 of 2013

arising out of these incidents and was a serving prisoner at the time he gave his evidence.

- [6] Símione Faiva was called to give evidence later in the trial. He gave evidence that Uatekini had given him a pistol which was later taken by the police. A concession was made that the pistol, which was exhibited, was the one taken from Faiva by police, subsequently examined by a police armourer and produced in court. It was a Ruger .22 pistol. Mr Faiva also gave evidence that Uatakeni had told him that he had got the pistol from the accused's residence. This evidence did not form part of his original police statement and had not been disclosed to the defence, until shortly before he gave his evidence at trial.
- [7] Two police officers were involved with the arrests of Uatekeni and a confederate who did not give evidence. They were officers Latai Fahina and Tu'utufaiva. They gave evidence that after the pistol had been received the accused was spoken to at the station on the 15th September 2010 and the gun and some ammunition was produced. Both said the accused identified the gun, and that, subsequently, his admission that it was his pistol was the subject of a signed diary entry which was contained in an investigation station diary. Officer Fahina said that he had been unable to locate this diary. Officer Tu'utafaiva gave evidence to similar effect. Both officers gave evidence that also produced was a bag described by officer Fahina as a holster bag and Officer Tu'utafaiva as a green bag. This bag was produced as part of the gun exhibit. It was latter, however admitted by Tu'utafaiva that this bag was located by police after the interview with the accused had taken place. He put his mistake down to the period of time that had elapsed since the interview on the 15th September, 2010, and the trial.
- [8] It was put to both officers that the accused had been pressurized into signing the station diary entry. Mr Afeaki put various question to the witness Fahina in cross-examination

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 116 of 2013

suggested the accused had been coerced into signing the station book. Fahina and Tu'utafaiva denied any pressure or impropriety but both said the accused had signed an acknowledgment in the book that the pistol produced was his. Tu'utafaiva asserted that these officers were not involved in anything more than receiving an acknowledgment from the accused that it was his pistol so that the charges brought against Uatekeni could proceed. The accused did not give evidence or in any way support the allegations brought against each officer of coercion. I will return to this aspect of the case later.

- [9] The pistol was examined forensically by Eliko Toni, a police armourer. Although the Crown had intended to call him, the defence stated that his report could be read and it was produced as an exhibit. Eliko Toni did not give evidence. Officer Toni in his brief gave evidence of his training and expertise. No challenge was made to his expertise. He had written in his brief that, on the 25th October, 2010, he had received from Lepi Sione Katoa for examination;

Ex 97(a) /2010 ; 1 x .22 semi-automatic Pistol S/ No ; 191378

Exh 97(b) /2010 ; 15 x .22 Calibre Live Rounds.

These exhibits above seized from Simione Faiva (m) of Kolofu'ou
Refer to Exhibit 97 (a) /2010

It is a semi Automatic pistol
I examined this pistol for evidence that it is in good condition to use.
Characteristic as shown below
Types^g Pistol semi automatic
Make; Ruger mark 1
caliber : 22 Calibre LR
Trigger pressure ; 3.2 lbs
Barrell length; 17.5 cm
Overall length 33 cm (from the muzzle to the rear end of the butt stockm
Rifling ; 6 grooves , rh twist.
Manufactured by Ruger & co Southport Conn, USA.

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 116 of 2013

Refer to exhibit 97 (b) /2010

These ammunitions are all in one types called .22 calibre long Range rounds and they are in good condition to use.

This is a real firearm and ammunitions are in good condition to use but Havea Tu'ih'ateiho has no firearm license for .22 pistol. Havea Tu'iha'ateiho has ammunition lisenca for .22 calibre.

Verdict and reasons.

[10] I find that on or about the 9th August 2010 the accused had stolen from his bedroom a pistol, a bag and 2 boxes of bullets .22 rifle. The pistol was described in his statement as a Roaker. It was suggested to me by Mr Kefu that this should simply be regarded as an error in understanding language but I decline to do this. The officer, who recorded the statement D/PC Finau was not asked about this when he gave evidence, and could have been asked to clarify this.

[11] I do not accept the evidence of Uatekini other than where he admits a break in of the accused's premises. More specifically, I do not in any way rely on his police statement to the effect that he stole additionally to a mobile phone the pistol the subject of these proceedings. He was a hostile and unreliable witness and a serving prisoner. Although I adopt the more modern approach that I am entitled to rely on aspects of hostile witnesses evidence where I am satisfied the evidence is credible I do so with caution. I accept his evidence that he gave a pistol to Simone Faiva but I do not accept his evidence that it was obtained from a location as he said of the Scenic Hotel. I do not; however, rely on any aspect of his evidence to establish that the pistol he gave to Faiva was from the residence of the accused. I would not accept his evidence on any aspect where it was not plainly corroborated.

[12] Nor do I accept as evidence the late statement from Faiva that Uatekini told him that he had acquired the pistol from the accused's residence as evidence that the gun had in fact been

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 116 of 2013

taken from the accused's premises . He had not mentioned this to police when his statement was taken in or about September 2010, and had discussed this with Mr Kefu at court on the day he gave evidence and possibly another prosecutor in the days before. Although I did not know anything much about his background, he must have been sufficiently close to Uatekeni as an associate to be entrusted by Uatekeni with a pistol, that he must have known had been illegally obtained. I exercise caution about accepting his evidence given at such a late stage and I do not accept his assertion that the Uatekine had said the pistol in fact came from the accused. It was in any case only a third party hearsay utterance, and could not, even if accepted, prove that the pistol in fact came from the accused's residence. The evidence of admissions of guilty to charges by the witness Uatekeni that he had pleaded guilty also of break in of the accused premises and stolen various items possibly including a pistol from the accused's premises was not in my view established with the clarity required in a criminal trial taking into account that he denied at trial that he had taken a pistol from the accused's residence. I would have required to have seen court records of what he had pleaded guilty to and the charges before being satisfied I could rely on evidence of this kind to conclude that the pistol was stolen by him from the accused's premises. No official evidence was produced.

- [13] I do, however, despite Uatekeni's denials, accept that the pistol and the ammunition produced in evidence was that stolen from the accused's residence beyond any reasonable doubt. My reason for doing so is that the defence did not, as Mr Kefu pointed out , challenge the fact that on the 15th September 2010 the accused signed an admission that the pistol was his in the investigative diary. The defence simply put to the officers that his signature had been obtained by coercion and improper means. The accused did not give evidence supporting these allegations of pressure and I make no finding adverse on that basis against him of guilt. However, he did not as Mr Kefu

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 116 of 2013

pointed out challenge the fact that he signed the acknowledgment of ownership of the pistol in the diary. Rather the nature of the instructions put to the witness by the accused's counsel under cross-examination amounted, in my view, to an acceptance that he did sign the book albeit he complains under pressure. The witnesses denied any evidence of pressure and, in the absence of any evidence, that there was pressure on him to sign, I accept their evidence on this point. Further, I accept the evidence of officer Tu'utafaiva that at the stage they spoke to the accused, it was simply with a view to confirming that the pistol was his so that the case against Mr Uatekini and a confederate could proceed. They had nothing to do with the accused's subsequent arrest and charges but were only interested in Uatekini. I do not see that they would have had any reason to have acted in a coercive manner and indeed Tu'utafaiva was adamant that he respected the accused's seniority in Tongan society and treated him, accordingly. I accept that.

[14] I do, however, as did Mr Kefu, accept the defence criticism that the station book entry was not now available. In some cases, this would be a reason to reject admissions; likewise, if notebooks cannot be located of entries of conversations or other material that are relevant. These records must be securely kept as part of the investigative file, and copies should be taken and included where originals have to be used in other cases. Despite this unsatisfactory aspect of the case which Mr Bradford in his submissions criticised rightly, I do not in the circumstances of this case for the reasons I have given reject the evidence of either officer that the accused did make an acknowledgment of ownership of the gun in the station investigative diary, and that it was the pistol produced in evidence to which he had made admission. After questioning Fahina for some time on aspects of a coercive tactics, Mr Afeaki put to the witness the question, "and being distracted, intimidated at that time the accused, did sign? and the witness

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 116 of 2013

responded No. He further asked the witness the paper he signed was the station diary correct? In my view, this questioning, assumes the fact that the accused did sign the diary, as the officers said, albeit according to Mr Afeaki's instructions under coercion.

Nor do I accept that any suggestion that Fahina or Tu'utafaiva may have discussed their evidence after Fahina gave his testimony make any difference to the finding I have made that the accused did sign an acknowledgment of ownership of the pistol produced in court. Nor do I find that Officer Tu'utafaiva deliberately gave false evidence when he included the green bag as being present at the interview of the accused when it had in fact, he acknowledged, been obtained by police shortly after in the light of the time that had passed since the interview.

- [15] I also accept, despite Mr Bradford's forceful submissions to the contrary, that there was evidence to establish beyond reasonable doubt the gun was in workable condition, and capable of discharging a bullet. Arm is defined in section 2 of the Arms and Ammunition Act to mean 'any lethal barreled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile.' Mr Bradford contended that the brief of the armourer did not sufficiently establish beyond a reasonable doubt that the pistol was a weapon from which a shot, bullet or other missile could be discharged. He criticized the brief as inadequate because it did not assert that the weapon had been tested and found to be in a workable condition, and this was an essential element of the charge. Mr Kefu, however, in response, contended that the certificate did assert this although not in terms of the language of the section. He pointed out, however, that the armourer said he had examined the pistol for evidence that it is in good condition to use, had then proceeded to say also that the

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 116 of 2013

ammunitions are in good condition to use, followed by his conclusion that it was a real firearm and ammunitions are in good condition to use. Bearing in mind that earlier the armourer had said he had examined the pistol for evidence that it was in good condition to use I consider beyond a reasonable doubt that this unchallenged opinion that it was a real firearm in good condition as was the ammunition to use established that the pistol was an arm within the statutory definition and that with the ammunition it was in a workable condition in the statutory sense of being capable of discharging a bullet. I also pause to additionally note that in his statement of the 22nd August, 2010, tendered in evidence, the accused had said that there was a pistol beside a safe beside his bed which is in a bag together with 2 boxes of bullets 22 rifle. In my view, this is an admission that the gun when it was stolen was in a workable condition and capable of discharging a bullet or else there would have been no reason for the ammunition to be present, as well as the gun and the bag. I also add that it had been suggested by the accused to officer Finau that the accused had told him it was an ornament gun which officer Finau, who had taken his statement, denied. There is nothing in the accused's statement of complaint that suggests that the pistol stolen from him, which I find, he later admitted to officers was his and signed a diary to this effect was an ornament gun. A similar allegation was put to Fāhina and Tu'utafaiva. Both officers denied this was said by the accused.

- [16] Accordingly, I conclude beyond any reasonable doubt that on or about the 9th August that is in the month of August 2010, as the indictment avers, the accused was in possession meaning knowingly had custody and control of an unlicensed firearm namely a Ruger pistol contrary to sections 4(1) (2) (b) and 47 of the Arms and Ammunition Act.

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

CR 116 of 2013

[17] I withhold entering any conviction until I have heard the sentence submissions later at Mr Afeaki's request. The pistol is forfeit to the Crown.

DATED:  NOVEMBER 2014




JUDGE