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IN THE SUPREME COURT OF TONGA ~~CR~~ **186 of 2012**

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

R E X

-V-

MAKA LATU

BEFORE THE HON. JUSTICE CATO

COUNSEL:

Ms. Macomber for the Crown

The accused in person.

VERDICT OF THE COURT

[1] The accused Maka Latu stood indicted that he did commit housebreaking contrary to section 173(1) (b) of the Criminal Offences Act (Cap 18) ; theft contrary to s 143 and 145 (b) of the Criminal Offences Act (Cap 18) and in the alternative possession of stolen property contrary to s 153 of the Criminal Offences Act (Cap 18).

[2] The evidence was brief consisting of only four Crown witnesses; and the accused, as is his right under Tongan criminal procedure, elected to make an unsworn statement. In that statement, he denied he was the

man who had allegedly offered to sell beef in 4 cartons on a date between the 19th and 23rd March 2012.

[3] The evidence was that on the 19th March 2012, the complainant Mr Tenisi Tu'inukuafe, who owned a business Kiwi International which imported meat into Tonga, came to work to find that the lock on a container of meat had been broken and about 18 cartons of meat containing each between 20-26 kilos of meat had been stolen. These were contained in cartons that with freight documents and other markings and logo were easily identified as being those that he had imported.

[4] About a day or two later, he by chance was visiting another business which sold food and other merchandise when he had reason to enter a refrigerated area and saw cartons containing meat which he could identify as his. As a consequence, he contacted police who arrived the next day having received his complaint of theft and burglary earlier. Three full cartons and about 24 kilos of beef which had been taken out of a box and repackaged for sale in kilo lots were found. Also found was packaging and logos which clearly identified the meat as the meat imported by the complainant and stolen from him.

[5] Evidence was given by an employee of the business where the meat was found, that the accused, who the witness said he knew, had come in attempting to sell 4 cartons of meat. The owner of this business, who was not present at the time, did not give his consent to purchase it. However, because the meat was starting to defrost, the accused was alleged to have asked if he could leave it in the refrigerated storage for a small fee. He left and no evidence was given of his return. Curiously, it seems that another employee did process some of the meat for sale in smaller lots of a kilo (evidence being that a kilo could sell for about $35 Tongan) so that when the police arrived with search warrants, of which evidence was given, three cartons were located as well as the repackaged meat – 24 packets containing a kilo each.

[6] The defendant suggested in one question only of the identifying witness that he had wrongly identified him but the witness denied this. Given that he said he knew the accused and was not seriously challenged on this, I am satisfied beyond any reasonable doubt that the accused was the person who came with the meat probably around the 21st or 22nd March. I find also that plainly on this occasion the defendant had the meat in his possession that is under his custody and control.

[7] There was no evidence in any way linking the accused with the break in. The Crown relied entirely upon section 40 of the Evidence Act which provides;

> " Where a person is found in the possession of property proved to have been recently stolen he shall be presumed to have stolen it or to have received it knowing it to have been stolen unless he shall give some satisfactory explanation of the manner in which it came into his possession."

[8] In my view, although nothing turns on this point in this case, the presumption appears one that is absolute or strict that is "shall be presumed"- rather than may be presumed as recent possession at common law is generally understood to mean. For example, in Cross on Evidence, NZ Butterworths, 7thed, November, 2001, Dr D L Mathieson QC writes of recent possession as "the presumption of guilty knowledge arising from the possession of recently stolen goods", and says that adverse inferences may be drawn by the tribunal of fact, but it is not obliged to draw them even if there is no other evidence.

[9] I also asked whether under section 40, if the effect of the presumption was that it was absolute or strict, this meant that the obligation of an accused to provide a satisfactory excuse was elevated to that of a reverse onus, rather than under orthodox law, being an evidential burden only. The Crown suggested it could. However, I indicate that I would have been reluctant to have departed from the normal approach had I been required to consider the case on the basis of explanation preferring to regard the obligation to adduce an explanation as a mere

evidential burden in the absence of a direction in the statute requiring the accused to bear a legal onus. If the effect is indeed that the presumption is absolute or strict, it seems to me an orthodox approach should be taken with the Crown bearing the ultimate onus and the accused only an evidential burden of advancing a satisfactory explanation.

[10] However, here, the defendant did not give any reason; he merely rather lamely put in issue identification, and for reasons given I find that he was the person who attempted to sell the beef, and had possession of it.

[11] Should I apply the presumption under section 40 to convict him beyond doubt of the only crime alleged and that is theft? This case raises the difficulty that the only crime alleged is theft and not alternatively receiving which is usually the case where recent possession is important. The danger of the Crown presenting an indictment alleging theft without an alternative of receiving is that, if the Court feels that the more likely application on the evidence trier of fact feels uneasy applying the presumption to theft, the prosecution will fail.

[12] I am of that state of mind here. The Crown rightly in my view chose not to proceed on the second day of the trial with the housebreaking allegation because there was no evidence at all that the accused had broken into the container. The only basis for such an inference was applying recent possession.

[13] It has been said many times that recent possession is only an aspect of circumstantial evidence. Merely because an accused is found in possession of stolen goods does not mean he necessarily broke into premises or for that matter stole them even if he is mute. The presumption may assist for example if there is other evidence which would put the accused at the scene, but it is in my view a long bow to draw that his recent possession of goods circumstantially means that he must be guilty of housebreaking and or theft, as opposed to receiving from persons unknown. In this case, although I consider there would have been integrity in applying the presumption to a count of receiving

had it been laid in the alternative, there is, in this case, uncertainty as to how he came by the stolen goods, and there is every possibility which I cannot exclude beyond any reasonable doubt, that he received the meat from the thief and burglar rather than stole them himself. Further the evidence here is that he was in possession of less than a quarter of the meat stolen which suggests others may well have been involved.

[14] The danger of not laying the alternative of receiving was discussed in the well known New Zealand text "Adams on Criminal law", 3rd student edition, 2001, where it is written at para CA 220.19;

> "Possession of recently stolen goods may be evidence not only of theft or receiving but of other offences also such as burglary. The prosecution must make a careful choice of alternative charges to lay. If a charge of say burglary alone is laid the prosecution runs the risk that the jury may conclude that the accused is guilty of receiving in which case the accused should be acquitted"

[15] I am in that same mind in relation to the application of the presumption in this case, and to convict of theft would I think be at variance with the effective acquittal on the housebreaking charge. The Crown did not in this case make any application at the commencement of the trial, for an amendment nor at any stage was such an amendment sought.

[16] I turn now to the remaining count, that is the alternative of possession of stolen property under s 153 of the Act. I do not think that this is a count that is triable on indictment. Sections 153 (1) and (2) of the Criminal Offences Act involves an offence arising by way of summons to a magistrate on apprehension by a police officer because a person is suspected of carrying stolen goods. The section expressly says proceedings are to be commenced by summons to the Magistrates Court and determined by a magistrate. This offence is not triable before me, and the charge is dismissed.

[17] The effect is that the accused is acquitted on counts one and two. He is discharged from count 3.

DATED: 21 February 2013 **JUDGE**