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V

SEFO MOALA

BEFORE THE HON. JUSTICE CATO

VERDICT OF JUSTICE CATO

Mrs Langi for the Crown

The Accused was unrepresented

- [1] The accused stood trial on a charge of attempted armed robbery, on the 25th February, 2013. He elected to be tried before a judge sitting without a jury. The evidence and submissions closed on the 6th March 2013. Although the evidence was confined to a very few witnesses and the accused gave evidence, the trial was lengthened because one of the witnesses had difficulty

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getting to Tongatapu from Ha'apai, and the trial was adjourned to enable this to occur.

THE EVIDENCE

[2] The case against the accused was that he was one of a group of men who entered a building known as Mana Money Transfer, tied up a man working as a security or night watchman, Fala'opako Finau, who was in the building at the time working on some assignments associated with his study in the early hours of the morning of the 4th September 2001. Previously, Mr Finau at about 3am had heard footsteps approaching from outside. He went to the veranda area and saw a person who asked him if a person by the name of Mone was there. He said there was no one by that name. He then saw this person leave and walk to the road intersection approximately adjacent to the Mosiami building.

[3] Mr Finau returned to his assignment and about 5 minutes later two men entered the room with masks, one of whom pointed a gun at him. He was told to lie down or otherwise they would shoot him. They then asked him where the on- off switch was for the power.

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They then turned off the lights. One of them gagged Mr Finau with a piece of cloth and used a tee shirt to tie his hands and feet. He said that he could hear one of them say to lie still and he could hear them cutting a chain in the vicinity of the safe area. He said it took them about 5 to 7 minutes to carry out what they were doing. He told them he did not have a key to the safe as only the manager had that. He heard them whispering. He was some distance away from that area where the safe was in what was known as the security room. He heard a dog barking as they left.

- [4] He said the man he saw earlier had a black hoody top and the hood came all the way up to the top. It covered he said part of his hair. He said he had shaven hair. He was not able to give any further identification of his clothing. He had seen him for up to a minute. There was nothing covering his face. He described the light in the vicinity of the veranda where he had first seen him as bright. When he spoke to him he was about two to three meters away. He said he did not see him again that night. He said he did not know of any person Mone working there.

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[5] Mr Finau said that he went with police four days later and was asked whether he could identify two men he saw at Nukunuku police station. He was unable to do so. The next time he was taken to Mu'a police station and he said there was one person there for him to look at. He was asked to wait outside and look to see if he could identify a person. One of the police officers went inside whilst another officer Tu'utifaiva remained with him. Mr Finau was standing near the door. All of a sudden he said a person came out another door. He said he asked the officer who was with him, "who is that?" The officer said that is the one we came to have a look at.

[6] A Mr Sefanaia Filai gave evidence that he was a police officer and had been working on the morning of the 4th September 2011, in a police patrol vehicle which he was driving. He said he was at the Fatefahi Road across from the entrance of the Mana Money transfer office when he saw a person entering the gate with a long sleeve black hood top with the hood on and in grey coloured pants. He was driving a patrol vehicle. He said this would be approximately 2.00 am. This did not raise concern because he thought it was just one of the residents of the church premises near Mana Money. He

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said that they continued with the patrol and he came back on the same road and near the front of the Mosimani building a silver coloured car was parked. He did not see the licence plate other than to make out R for rental. He said he saw the person he had seen earlier standing next to the car. He said that the car was parked about 20 meters from the Mana building. He agreed he only had the man under observations for a short time. He agreed that all he could say was that he saw a man similar to one he had seen earlier standing by the silver car.

He said he continued working then got a call about 3.30 concerning the armed robbery at Mana Money and then drove back there. He said he remembered a car being parked near the Mosimani building but after he had spent about ten minutes talking to the victim it was not there anymore.

[7] Another witness Mahe Lasitani lived at Mataika. He said he saw the accused drive by at about 9am on the 5th of September in a small blue car. He said he was wearing a hood. He could not be sure if it was blue or black. He said he would have seen him for under a minute. The accused had lived in the area and he was known to the

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witness for he said about a year. He said that he ordinarily had a blue coloured car and a hummer. He said, however, that on the day he was arrested the accused had a silver rental car. He was about three houses down from the house where Moala was arrested on the 6th September, 2011. He knew it was a rental car because it had an R.

- [8] There was no evidence given of any forensic evidence located either at the scene or at the residence of the accused which had been searched which linked the accused with the crimes. No fingerprints were located, masks, nor was any evidence adduced that he had in fact hired a silver vehicle over the relevant period, or that one was located by police on the 6th when he was arrested. Police evidence was advanced from officer Patelesio Tu'itavuki who noted that the safe had not been removed because it was too large to get through the door. He did not find any prints. He made a sketch of the scene that was produced in evidence. Photographs he took could not be produced, he said, because they had become mixed up with other photographs. He said there would be about 7 meters between the area of the safe and the security room.

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[9] Police officer Sateki Tu'utafaiva gave evidence of the identification process at Mu'a. He confirmed the accused had been brought out and it appears he was the only one brought before the witness. He had no notes of the precise instructions given to the witness, nor could he recall precisely what instruction was given to him. He admitted Moala was the only person that was presented at Mu'a because he was a suspect. He said he did not introduce others because his only instruction was that the accused be produced. He admitted he simply went along with what he was instructed to do by an officer by the name of Tukuafu.

[10] Officer Tukuafu gave evidence. He denied he ever gave any instructions in relation to the identification. Another officer, he said, had been in charge of the investigation. He said Mr Moala had declined to answer any questions at interview.

[11] The Crown also produced a witness, Heamani Lopeti, to give evidence of an incriminating conversation he overheard between the accused and a third party in the early hours of the 4th September when travelling past the Mana Money building at about 5am. He said that the accused and a third man, Ta'u, had picked him up

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earlier and they had gone to look at a vehicle to carry out an armed robbery of the Westpac bank. He said when they came from there the office of the Tongan church (near the Mane Money building) was full of officers and cops. He said that Sefo said to Ta'u maybe Teau did not tie up the guy properly enough. Sefo, he said, also remarked it was a shame the safe could not fit in the van. He said when Sefo picked him up he was wearing a shirt and shorts. He said he had only seen Sefo driving this vehicle which was a rental vehicle that day. He had made a statement to the previous witness officer Tu'utafaiva.

[12] He had said these things about 4 days later when he was being interviewed about the Westpac bank robbery and had written out a statement. He said he was in custody as a suspect for the Westpac robbery when he gave this information and it was incorporated in his statement. He was asked about whether he had struck a deal with Mr Tu'utafaiva. He said that he made his statement and afterwards Tu'utafaiva had said to him that they would release him to become a witness. He said it was important to be released because he was not involved in anything. He also said in evidence that the police dropped the charges so long as he became a

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witness in this case. He said he agreed to this. After his release, he was arrested on more recent charges of housebreaking, robbery and assault. He had four earlier housebreakings, four thefts, attempted rape, and indecent assault. He was awaiting trial on armed robbery, housebreaking and assault. He had not been given bail. He had been remanded in custody at Hu'atolitoli prison earlier. He said he got bail on the fresh charges because the police did not oppose his application for bail. This was because he was a witness against Moala. He admitted it was important for him to have bail. He admitted he was facing a charge of housebreaking the next day. He denied any deal with the police over the recent charges.

[13] A number of matters were raised with Mr Lopeti by the accused. He asked the witness whether he had said that Moala had a light blue rental vehicle. Mr Lopeti said he had told Tu'utafaiva it was silver rental car but the officer said it was light blue. Moala also questioned him about his statement that when he had come to Pahu, Moala left and came back to pick him up with Tau. The witness had said Moala was in a blue car and came back in a silver car. Then Mr Lopeti said he made a mistake in his evidence. He said Moala came in a blue

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car to Pahu, we left in a blue car and exchanged it for a silver car. He admitted he said they drove past the Mana building in a light blue rental car. I did not know until his evidence was led that officer Tu'utafaiva was the officer who also had been involved with taking this witness's statement. No application was made to recall Mr Tu'utivaiva on the issue as to any arrangement that police may have reached with this witness.

[14] The accused elected to give evidence and denied involvement. He denied being in the area of Mana Money and or having a silver rental car. He gave evidence of having other vehicles.

VERDICT

[15] This is a serious charge. There is no doubt that an attempted robbery was committed on the 4th September, 2011, however, the issue that concerns me in relation to this verdict is whether it is established by the Crown beyond reasonable doubt that the accused was one of the men who was involved. There is no evidence of any forensic kind, fingerprints, clothing or masks presented that link the accused with this

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attempted robbery. There was a search of his residence when he was arrested but no evidence was found there.

[16] Nor was any evidence adduced that he had hired a silver motor vehicle about the time of the robbery. Though there was evidence given that he was associated with a rental vehicle there was no other evidence of registration aside from the letter R. Nor did witnesses give a description of a particular model.

[17] Evidence was given to suggest that the accused was the man that went into the Mona Money premises on the night in question looking for Mana. The inference the Crown asks me to draw is that the accused must have been the man who soon after was involved in the attempted robbery.

[19] I must, however, be satisfied that the evidence of Mr Finau on identification is safe and reliable. Further, although the robbery took place shortly after he was allegedly seen by Finau, Finau does say he last saw him walking away from the area of the Mana Money building towards an intersection. Mr Moala may well have returned, and entered the Mana Money premises but, without more, I could not convict him beyond

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reasonable doubt of this. That means even if I accept the identification of Mr Finau that Mr Moala was the man who approached him shortly before the robbery, in order to find him guilty of this crime, I must be satisfied beyond reasonable doubt that Mr Lopeti's evidence is reliable because it is his evidence that implicates Mr Moala directly as one of the men who carried out the robbery. Nor have I overlooked the timing of Mr Moala allegedly being on the premises but suspicion without more is not sufficient to draw the inference that it was he who shortly after returned and committed the robbery.

[20] I remind myself of the important direction set out in Turnbull v DPP [1977] 1 QB 225 on identification to take care because an honest and convincing witness may be mistaken. In this case, Mr Finau did not know Mr Moala; however, he gave evidence that he observed him reasonably closely for a period which, whilst it could not be said to be a lengthy time, was more than a fleeting glimpse. His evidence, however, of identifying Mr Moala at the Mu'a police station, in my view, was so lacking in procedural integrity, that it would be unsafe to place any great weight on it. Mr Moala was not asked whether he would participate in an identification parade

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which is the safest procedure. Had he agreed the police would had had to have organised a parade in which he would be placed in a line with a number of other persons generally about 8 of similar height and physical characteristics. The witness without any prompting would be invited to see whether he could identify anybody in the line-up as the man he had seen. See Rv Likio [2006] Tonga LR 395 The witness should be informed that the person may or may not be amongst the persons in the parade. Section 45(3) (d) of the New Zealand Evidence Act, 2006, provides that the person making the identification must be informed that the person to be identified may or may not be among the persons in the procedure. Notes should also have been taken of the procedure, the instructions given and the answer given by the witness contemporaneously with any identification. No notes were it seems taken here at least by this witness who suggested that another officer had taken notes. If so, that police officer did not give evidence.

[21] If Mr Moala did not agree to enter into a parade, or for some reason it was not possible to organize a formal line up, then an informal procedure could take place. However, if an informal procedure is used, be it a

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photo montage or an informal crowd parade, it must be fairly representative. See R v Clune [1982] VR 1, for a useful summary of the principles relating to informal parades R v Wright (1991) 60 A Crim R 215, at 220-221. In the later case, Slicer J observed;

"An identification confrontation will have little evidentiary effect if the prospective witness has been shown the accused alone and such a process could be unsafe."

If a photo montage is used, the suspect's photo should be placed amongst those similar in appearance. If, as here, the witness is taken to an area where a known suspect will be, then the suspect should be placed in a situation where there is an opportunity to observe him amongst others of similar appearance. Moala was here informally paraded on his own. Further, when the witness asked, on Moala's appearance at Mu'a, who he was, Officer Tu'utifaiva replied that he was the one we came to have a look at. This is, at least, suggestive that Moala was at that time a suspect in the case. I consider that this evidence is unsafe because of the procedure used and I would be reluctant to place any great weight on this evidence.

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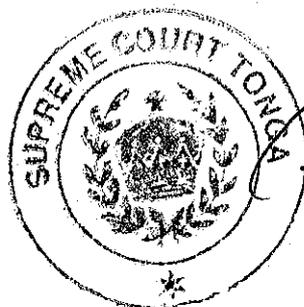
[22] In any event, I am not satisfied either with the evidence of Mr Lopeti. A person of Mr Lopeti's history of dishonesty in particular must be considered with care. Whatever he may say about not having been offered a deal or having some expectation of favourable treatment, always present is the risk that he is attempting to curry favour with the police or prosecution. See the judgment of the High Court of Australia in Pollitt v The Queen(1992) 174 CLR 558 on a related issue, that is alleged admissions made to fellow prisoners or gaol- house confessions, and the need for a strong direction in cases of that kind. Here, it seems Mr Lopeti advanced the information at a time when Moala, others and himself were being investigated about a Westpac robbery. He was released on the Westpac charge. He agreed to give evidence against Moala on these charges. He was later granted bail after a magistrate had more recently remanded him in custody after more very serious offending, with the police not opposing this. I had the opportunity of comparing both men in size and stature. I did not get the impression that Mr Lopeti would be any shrinking violet even if exposed in prison to Mr Moala, but I accept he was anxious to gain bail

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and one way to do this as he would know was to continue to support the prosecution. Further, he was shortly he said to face the charge of housebreaking. Although he may assert there was no arrangement with the police, I have concern about this. I did not hear from officer Tu'utifaiva on this point. Nor did I find Mr Lopeti's rather inconsistent evidence concerning the cars satisfactory. What he said was also wrong about the safe. The safe could not be removed from the building because it was too large to get through the door of the room in which it was situated. It was not, as he testified because the safe, could not be put in the vehicle.

[23] I would be most reluctant to rely on Mr Lopeti and convict another of any offence let alone such a serious offence as attempted robbery with a firearm without strong supporting evidence. He is a man with a proven record for dishonesty and is facing further serious charges. I am not satisfied that he is telling the truth. That being so it is my verdict for all the above reasons that the Crown has not made out the charge beyond a reasonable doubt. The accused is acquitted.

DATED: *11th* **MARCH 2013**



[Handwritten Signature]
JUDGE