

IN THE SUPREME COURT OF TONGA

CR Case 144-08

THE CROWN

V

KONI KUSITAFU GUTTENBEIL

BEFORE THE HON Mr. JUSTICE SHUSTER
MISS E S T FONOU FOR THE CROWN
THE DEFENDANT WAS NOT REPRESENTED
HEARINGS 26th & 27th FEB 09 - 2nd & 3rd MARCH 09
JUDGMENT DELIVERED 11th MARCH 2009

JUDGMENTTHE DEFENDANT

The defendant is charged on an amended Indictment filed in the Supreme Court on the 24-02-2009. He is charged with six offences alleging-

- Two offences of housebreaking,
- Two offences of theft and
- Two offences of receiving stolen property.

The defendant was originally arraigned on 23 June 2008 when he pleaded Not Guilty to the original indictment as is legal right. The defendant was then bailed to attend court on the 27th June 2008, the 30th June 2008 and the 2nd July 2008. The defendant failed to attend court on any of these adjourned dates. He failed to offer an explanation for his non attendance via his lawyer Mr Pounou - so a bench warrant was issued on the 2nd July 2008 for his arrest.

The defendant was subsequently arrested by police on 24th February 2009, when the warrant was executed. On 24th February 2009 the accused appeared with his lawyer Mr. Pounou. Mr. Pounou asked the court for permission to withdraw from any further involvement in this case and as a result of his representation, his request was allowed. Accordingly I place on record the defendant had been represented by a lawyer of his choice- at the start of these proceedings.

The defendant was remanded in custody- for failing to attend court on the 02 July 2008. The hearing of this matter was therefore expedited, and the trial took place on the 26 and 27 February 2009- then 2nd and 3rd March 2009- with closing arguments heard on the 9th March 2009.

Count One

HOUSEBREAKING, an offence contrary to section 173 (1) (b) and (4) of the Criminal Offences Act (Cap 18)

Particulars of which are: -

KONI KUSITAFU on or about the night of 26th February 2008 at Ma'ufanga having entered EZI World Cargo bonded warehouse as a trespasser, you committed an offence therein.

Count two

THEFT, an offence contrary to section 143 (b) and 145 (b) of the Criminal Offences Act (Cap 18)

Particulars of which are: -

KONI KUSITAFU on or about the night of 26th February 2008 at Ma'ufanga did dishonestly and without any colour of right take from the bonded warehouse of EZI World cargo:- Property to a total value of \$45,490.80, with intent to permanently deprive EZI World Cargo of such property, and with the intention of converting it to your own use, or the use of any other person without the consent of EZI World Cargo

Count three

HOUSEBREAKING, an offence contrary to section 173 (1) (a) and (4) of the Criminal Offences Act (Cap 18)

Particulars of which are: -

KONI KUSITAFU on or about the 7th March 2008 at Ma'ufanga you did enter the Administration Office of Apifo'ou Secondary College, as a trespasser, with intent to commit an offence therein.

Count four

THEFT, an offence contrary to section 143 (b) and 145 (b) of the Criminal Offences Act (Cap 18)

Particulars of which are: -

KONI KUSITAFU on or about the 7th March 2008 did dishonestly and without any colour of right take a student's cash collection box containing \$20.00 from Apifo'ou College Administration Office which was under the custody of Father ANAUA FINAU with intent to permanently deprive him of such property, and to convert it to your own use,

Count five

RECEIVING, an offence contrary to section 148 (1) and (5) of the Criminal Offences Act (Cap 18)

Particulars of which are: -

KONI KUSITAFU on or about the 27th February 2008 at Mataika you did dishonestly receive five pieces of KIE waist mats belonging to LOMELI HEIMATOTO by undertaking to sell them to DENIS MA'AFU knowing or believing the same to be stolen

Count six

RECEIVING, an offence contrary to section 148 (1) and (5) of the Criminal Offences Act (Cap 18)

Particulars of which are: -

KONI KUSITAFU on or about and between October 2008 and February 2009 at Houmakelikao you did dishonestly receive certain goods namely 10 door locks valued at \$1,000 and one shower valued at \$80.00 to the total value of \$1,080 belonging to Black Pearl Suite by undertaking to sell them to SAITO MATAKAONGO knowing or believing the same to be stolen

THE PROSECUTION'S CASE

their opening address the prosecution alleges the defendant committed the offences with which he is charged and they ask me to convict the defendant on all counts.

- **Count 1:-** The Crown says- during the night of the 26th February 2008 the locked and secured premises of EZI WORLD CARGO, a bonded warehouse was broken into, by someone cutting the fence and obtaining entry to the premises at the back by cutting through the wall of the warehouse, entering and stealing a large quantity of property- as listed in count 2 of the indictment.
- The Crown says the accused was either one of those persons who broke and entered the premises- or he received stolen property. They rely upon the doctrine of recent possession to show the defendant was in fact in possession of part of the proceeds of the crime. The defendant denies the offence.
- **Count 2:-** In relation to count two the prosecution infer- and seek to use section 40 of the Evidence Act - the presumption being that the defendant has stolen the goods stored at EZI World Cargo because of recent possession, and they ask me to convict the defendant- on that basis. The defendant denied the offence.
- **Count 3 and count 4:-** The Crown rely upon the breaking and entering at the premises of APIFO"OU College, and the evidence for the break in is supported by the fact the accused's fingerprints were found and were properly identified as being the defendants, by the police. The Crown says the defendant's fingerprints were found on window louvers which had been removed at the scene of the break in. The latent fingerprints were lifted and examined by police officers familiar with crime scene investigations. The Crown says this is strong evidence the accused committed this particular offence. The Crown says a collecting box was stolen which they say had approx \$20.00 contained

therein; and that constitutes the crime of theft. Neither the collecting box; nor the money was recovered. The Crown says this crime of theft is made out; because it's supported by the defendants fingerprints found at the scene; they say this is very strong evidence that it was the accused who committed the offences. The defendant denied the offence.

- **Count five:-** The Crown say the defendant went with another man on 27th February 2008 soon after the HSB at EZI World Cargo, and they offered a woman by the name of DENISE MA'AFU five (5) KIE Tonga mats for sale- which she bought for a reduced sum. The Crown says because the defendant advertised the 5 Tongan mats, he assisted his co-accused - thus he assisted another person in the disposal of stolen property and by implication- he is also guilty as charged. The defendant denied the offence.
- **Count 6:-** the Crown says the defendant admitted in his VCS to advertising a box of door locks and a shower fixture to a man called SATIO MATAKAIONGO. The Crown say he approached SATIO because he knew Satio had a brother working in the construction industry, these were stolen goods offered for sale and they were valued at \$1,080. The Crown says they rely upon the defendant's admissions in his VCS. The defendant denied the offence.

HE DEFENDANT'S CASE.

The defendant as is his right under the law denies the offences as alleged in the indictment, and he puts the prosecution to strict proof. The defendant gave an explanation of his version of events, in a VCS both to the police and by his sworn evidence to this court. When a defendant gives evidence in court; his evidence is to be accorded the same respect and consideration as any other parties. The defendant denied the offences and he questioned the non production of various Tongan artefacts as exhibits to the court. The defendant also alleged he had been assaulted by police officers and he claims he was detained in police custody for three weeks. He also questioned why other people had not been charged with these offences who had been implicated and who gave evidence against him. The defendant in his closing claimed he would be acquitted if he had a lawyer.

THE ESSENTIAL ELEMENTS OF THE OFFENCES

173 HOUSE-BREAKING

- (1) A person is guilty of housebreaking if—
 - (a) He enters any building or part of a building as a trespasser with intent to commit any crime; or
 - (b) Having entered any building or part of a building as a trespasser he committed or attempted to commit any crime in the building, or that part of it.
- (2) Reference in subsection (1) to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is.

- (3) For the purposes of this section the word “enters” in subsection (1) means the putting of any part of the body of the person making the entrance, or any part of any instrument used by him, inside the building.

143 THEFT

Theft is the dishonest taking without any colour of right of anything (which by section 144 is declared capable of being stolen) with intent either—

- (a) To deprive the owner permanently of such thing; or
- (b) To deprive any other person permanently of any lawful interest possessed by him in such thing, -and with the intention of converting such thing to the use of any other person without the consent of the owner or person possessing such interest therein as aforesaid; “theft” and “steal” shall be construed accordingly.ⁱ

148 RECEIVING STOLEN GOODS

- (1) Any person who receives any property knowing or believing it to have been stolen or obtained in any way whatsoever under circumstances which amount to a criminal offence is guilty of an offence and is liable to the same punishment as if he had committed theft.ⁱⁱ
- (2) Any person who receives any mail bag or any postal packet or any chattel or money or valuable security, the stealing or taking or embezzling or secreting whereof amounts to an offence under the Post Office Act or this Act, knowing or believing the same to have been unlawfully stolen, taken, embezzled or secreted, and to have been sent or to have been intended to be sent by post, is guilty of an offence and is liable to the same punishment as if he had committed theft.
- (3) Any person mentioned in subsection (1) may be indicted and convicted whether the principal offender has or has not been previously convicted, or is not amenable to justice.
- (4) Any person who, without lawful excuse, knowing or believing the same to have been stolen or obtained in any way whatsoever under such circumstances that if the act had been committed in the Kingdom the person committing it would have been guilty of an offence, receives or has in his possession any property so stolen or obtained outside the Kingdom is guilty of an offence and is liable to the same punishment as if he had committed theft.
- (5) For the purposes of this section and of any other written law relating to receivers or receiving, a person shall be treated as receiving property if he dishonestly undertakes or assists in its retention, removal, disposal or realisation, or if he arranges to do so.ⁱⁱⁱ

LEADING CASES AND POLICY.

In considering this my judgment, I have considered and I will apply the following leading cases widely known throughout the Commonwealth. These cases are routinely applied in most, if not all common law jurisdictions for offences; or allegations involving theft, or cases involving dishonesty. They can equally be applied in Tonga.

- **R v GLENISTER (1980) 2 NSW LR 559 at 603-605** extensively covers the meaning of the work "fraudulently." The Court of Appeal of NSW in that case said at p.607: "We conclude that the mental element described as fraudulent....is equivalent to dishonesty. It will be sufficient....that the Crown must prove that the accused acted dishonestly. It is unnecessary for him (the trial judge) to go further and define honesty. It is enough that he informs the jury (himself) that in deciding whether an application was or was not dishonest, they should apply the current standards of ordinary decent people." The court cited R v Feely (1973) 1 QB 530
- **R v SMART 1983 VR 265 at 295 (a decision of the Supreme Court)** In determining whether the prosecution has proved the defendant was acting dishonestly (it) must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in way which he knows ordinary people consider as being dishonest, even if he asserts or he genuinely believes that he is morally justified in acting as he did. Per Lord Lane in R v Ghosh.
- **R v BARRICK 1986 7 Cr AR [s]**. For allegations which concern Breach of Trust cases. It is trite law that a servant or agent owes a high duty of care to his employer to carry out his duties properly; and more important honestly. The higher up the scale one goes in a company, or organization, the higher the degree of responsibility is imputed in him by law; because without that trust; the business world and all organs of a government would be in chaos.
- **R V GHOSH 1982 2 ALLER 689**. Is the well known test for Dishonesty, which states; "it is dishonest for a defendant to act in a way which he knows ordinary people consider to be; dishonest; even if he himself asserts, or genuinely believes he is morally justified in acting as he did."
- **R v GOMEZ 1993 1 ALLER 1**. Authority for the well established test of; appropriation and or, misappropriation of property. This is a Leading House of Lords case which all legal practitioners in Tonga should read, understand and apply in cases such as this.
- **MACHENT v QUINN 1970 2 ALLER 255 DC** It is not necessary to prove all the articles or values mentioned in the indictment to have been stolen, if it is proved that the defendant stole any one of them also see **R v Parker 53 Cr App R 289 CA per Donaldson** at page 229 it is submitted that the jury must be agreed on which particular item, or value was stolen.

A DEFENDANTS GOOD CHARACTER DIRECTIVE.

Modern Law says I must consider and apply to every case "**a defendant's good character directive**" that is to say good character cannot of itself provide a defence to a criminal charge,

but it is evidence which I should take into account when I come to consider my verdict.

See: R v Vye, Wise and Stephenson 97 Cr App R 134: R v Aziz and others [1995 2 Cr App R 478.

THE BURDEN AND STANDARD OF PROOF.

Certification: As this is a trial before a Judge sitting alone; I have directed myself in accordance with the Law on the Burden and Standard of Proof in a criminal case. If appropriate I have directed myself of the need to consider the evidence in respect of each charge and for the defendant separately. Where appropriate I have given the Accused, the benefit of any doubt. The prosecution brings this case; they must prove the case beyond any reasonable doubt so that I am sure he committed the offences. The defendant does not have to prove anything; because he is innocent until he is proven guilty.

VOLUNTARY CAUTION STATEMENT

I am also required to carefully consider a defendant's voluntary caution statement[s] also his charge statement and or his confession statement to determine whether they are voluntary; or not, in the true sense of the word.

- I find as a fact upon hearing the evidence that the confession Exhibit 1, is voluntary in the true sense of the word;
- As is the charge statement Exhibit 2
- And the Confession Exhibit 3.

PROSECUTION CASE

I heard a total of fourteen prosecution (14) witnesses who testified they knew the accused and had dealings with him concerning this particular case.

- At the conclusion of the trial I was asked by the Prosecutor to find the accused guilty as charged. and at the conclusion of the trial I was asked by the defendant to find the accused not guilty
- The defendant himself gave evidence on oath- and on Friday the 6th March 2009 told me he did not wish to call any witnesses to give evidence on his behalf.
- Closing submissions were made on the 9th March 2009 by both parties, and at that time the defendant said if he had a lawyer he would have been acquitted.

INFERENCES AND SPECULATION

A court is not entitled to speculate, but it may draw inferences. There may be strong circumstantial evidence in which a court may say, when taken together will lead to the sure conclusion it was the defendant who committed the crimes. 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. Finally a court should be careful to

distinguish between arriving at conclusions based upon reliable circumstantial evidence and mere speculation. Speculation in a case amounts to no more than guessing; or making up theories without good evidence to support them, neither the prosecution, the defence nor should I do that.

ANALYSIS

In opening its case the prosecution intimated it relied on the doctrine of recent possession with regard to counts one, two and five.

Count 1 – Housebreaking relating to Ezi World Cargo Warehouse.

In opening its case, the Crown proposed to rely on the doctrine of recent possession – as enunciated in:-

- *R v Loughlin 35, Criminal Appeal R.69, CCA which reads – “It is submitted that where it is proved that premises have been entered and property stolen there from and that very soon after the entry the defendant was found in possession of the property, it is open to the jury to convict him of burglary. And this of course applies equally to thefts other than in the course of a burglary.”*

The doctrine of “recent possession” is provided for in the laws of Tonga in the *Evidence Act*, section 40 which reads –

- *“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.”*

There is and can be no dispute that there was a housebreaking & theft on the night of the 26th February 2008 at Ezi World Cargo. The witnesses Fine Filimoe’ulie the supervisor of the Ezi World bonded warehouse, Maria Tutavake (the manager) and Inspector Hausia all testified as to the circumstances of housebreaking and theft at the premises on the night in question. What is in dispute is whether the Accused was involved in the actual housebreaking? The prosecution says Section 40 of the Evidence Act presumes either Theft or Receiving where recent possession of stolen property has been proved. Although it was submitted the Prosecution is entitled to invite the court to draw all inferences reasonably open on the evidence. The prosecution was of the view that evidence adduced at trial was not sufficient to prove all the elements of the offence of housebreaking in Count 1.

FINDING OF FACT

- *The Crown are correct- and I find the defendant NOT GUILTY ON COUNT ONE OF THE INDICTMENT and he is acquitted- on that first count*

(ii) Count 2 – Theft - in relation to goods stolen at Ezi World Cargo. The Crown argue that applying the provisions of section 40 of the *Evidence Act*, there is a presumption that the defendant has stolen or received goods knowing them to have been stolen- IF- it can be shown he

is found in the possession of property proved to have been recently stolen----UNLESS ---he shall give some satisfactory explanation of the manner in which it came into his possession.

Theft is complete where the following elements have been proved

- *That the defendant dishonestly appropriates*
- *Goods (property) belonging to another*
- *With the intention to permanently deprive that other person*
- *And converting such goods to his use or to another's use*
- *Without the consent of the owner.*

There can be no dispute that the goods listed in Count 2 were stolen from Ezi World Warehouse.

HOWEVER:- This court must ensure the defendant is made aware of the rule in *Machent v Quinn [1970] 2 All E.R. 255, DC*; THE RULE MAKES IT QUITE CLEAR- that it is not necessary to prove all the articles mentioned in the indictment to have been stolen. - If it is proved that the defendant stole any one of them, then this it is sufficient.

THE EVIDENCE

Some of the liquor - one and a half boxes of Whiskey and Pulse beer cans and other liquor items identical to those stolen from Ezi World Cargo - were seen in the possession of the defendant on the night of the break in, 26th of February 2008. Pulotu Mahe testified the defendant came in a car on the night of the 26th of February 2008 and asked to leave a quantity of liquor at his place for safekeeping- he said "safe from his drinking buddies." The defendant returned the next day, 27th and he took the boxes with him.

The witness Denise Ma'afu corroborates Pulotu's MAHE's evidence - that on 27th she drove the Accused and his friend Papa Lo'amanu to Pulotu's house where they picked up some boxes from Pulotu's place. After collecting the boxes, she saw Papa drinking a Pulse beer. She took the defendant and the boxes and Papa to the house of the latter. Although Denise and Pulotu differ slightly on the time of the collecting of the goods, they agreed on the date which was the day following the alleged theft at Ezi World Cargo, the 27th of February, 2008.

Papa Lo'amanu testified that he had pleaded guilty in the Supreme Court, to a charge of receiving a carton of whiskey from the defendant Koni Kusitafu on 27th of February 2008. The Prosecution asked the Court to find that because evidence adduced amount to an offence not specifically charged in Count 2, the Court exercises its discretion under section 42(3) of the *Criminal Offences Act*- and convict the defendant on an alternative verdict.:

- *"42 (3) Where on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specially charged in the indictment but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the Court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specially charging that other offence."*

The Crown says based on the evidence before it then the defendant could be convicted of receiving stolen property.

FINDING OF FACTS

- *I agree with the prosecution that there was, and there has been sufficient evidence adduced to convict the defendant on count two of the indictment- OF - Receiving stolen property, applying the relevant law- and considering the principles enunciated in the case of Quinn*

(iii) Count 3: Housebreaking (at Apifo'ou College)

The elements the Prosecution needs to prove are –

- *The defendant*
- *Did in fact enter a building or part of a building*
- *As a trespasser*
- *With intent to commit an offence therein. i.e. steal*

here can be no dispute that the office of the school Apifo'ou College was forcibly opened, and that an amount of money went missing. What is at issue here was the identity of the offender and the amount of money stolen.

The witnesses for the Crown included police officers PC Valeliano Manu and Corporal Tevita Vailea. The Crown says these officers were expert fingerprinting officers who have had extensive training- both locally and overseas in their field of expertise. Including, but not limited to the lifting and identifying of fingerprints suspects- and the court accepted the officers as experts in their respective fields. PC Havea testified that one of the four prints lifted from the glass louvers at the scene matched those of the right forefinger of the defendant and they contained- over 12 prominent identifying points the required number of points. The officers also matched other prints belonging to the defendant- and they were certain they were the prints of the offender at the locus in quo.

The defendant contended that he had never been fingerprinted. This was contrary to the evidence of PC Alekasio Tonga and Corporal Vailea. PC Tonga testified he took the fingerprints of the defendant on the 23rd of March, 2008 (just after he was arrested) for comparison, and there was a distinct match to the locus in quo. Corporal Vailea produced the fingerprint form which bore the signature of the defendant and was dated 23rd March, 2008. These were the exhibits used to identify the offender. Several times during the trial the defendant requested the fingerprint evidence be sent abroad, for comparison simply because he did not trust the police.

(iv) Count 4 – The Theft (at Apifo'ou College)

The evidence adduced revealed that the amount of money stolen from the students' collection boxes was in fact more than \$20 dollars which the defendant has been charged. The evidence revealed collection boxes contained more in the vicinity of \$700.

The witness- Father Anaua testified that each school class collected money to be donated to the poor as charity at this time of year – just before Easter. These collecting boxes were stored in the college office and the money was transferred into a few boxes whilst waiting to be transferred to the bank for deposit to their account.

The collecting boxes had been stored in a room that was accessed through a hole that had been broken in the wall. None of the money was recovered. Evidence revealed the defendant had also attended that college as a student.

The Court notes the Crown did not apply to amend the amount of money alleged to have been stolen- after Father ANAUA had testified there may have been \$700 PA contained within the boxes.

FINDING OF FACT ON COUNTS 3 AND 4

- *Because the police found fingerprint evidence on the louvers, which were removed to gain access to the college, and because I heard evidence they were the defendants fingerprints and that is evidence which I believe and I accept, I can have no hesitation in accepting the crown's evidence that the defendant committed the offence.*
- *Further the defendant offered no explanation whatsoever for his fingerprints being found by police at the scene. I convict the defendant- on both counts 3 and 4 - because the evidence against him is overwhelming.*

(v) Counts 5 & 6 – Receiving

The defendant was charged under section 148 subsections (1) and (5)- with receiving stolen property. Subsection (1) relates to receiving generally; and the necessary *mens rea* namely knowledge or belief that the goods received were obtained by stealing or any other act amounting to a crime. Subsection (5) is put alongside subsection (1) to describe what acts amount to receiving. The second part of subsection (5) provides –
“...A person shall be treated as receiving property if he dishonestly undertakes or assists in its retention, removal, disposal or realisation, or if he arranges to do so.”

The elements of receiving in subsections (1) and (5) that the Prosecution has to prove are –

- *i. The Accused knowing or believing the goods to be stolen*
- *ii. Dishonestly*
- *iii. Undertakes or assists*
- *iv. In the retention, removal, disposal, or realisation or*
- *v. He arranges to do so*

Count 5 – the defendant allegedly went with Papa LOAMANU to Denise MA'AFU's house at Mataika on 27th of February 2008 and offered to sell her 5 pieces of the Tongan waist mats- artefacts “*kie Tonga*” cheaply. They both spoke to her, but evidence revealed it was Papa Lo'amanu who advertised the *Tongan Kie's* to Denise telling her the mats belonged to the

defendant. The Crown says although the defendant did not advertise the Tongan mats, the fact that he went together with Papa Lo'amanu to Denise, and the fact that mats were advertised as belonging to the defendant, the Crown says the defendant did assist Papa Lo'amanu in the realisation or selling the mats and thus he is therefore guilty.

In R v Aves, 34 Cr App R. 159, CCA and paragraph 21-319 of *Archbold 2004* edition—"to try and prove recent possession as evidence of guilty knowledge in the receiving charges where the only evidence against the defendant is that he was in possession of recently stolen property, the prosecution will try and infer guilty knowledge.

- *(a) If the defendant offers no account for his possession of the property*
- *(b) If any explanations consistent with his pleas of innocence - is untrue.*

The defendant said that the 5 kie pieces belonged to Papa Lo'amanu. Whereas Denise gave evidence that the pieces were advertised to her by Papa Lo'amanu - as belonging to the defendant. The Crown says the defendant therefore has not given a satisfactory account for his possession of the 5 kie mats, which were very recently stolen from EZI World Cargo.

FINDING OF FACT ON COUNT 5

- *I agree with the prosecution it has adduced sufficient evidence to convict the accused on count 5 in this indictment*

In count 6 – The defendant admitted to advertising a box of shower and door knobs to one Satio Matakaiongo. The defendant testified that he had approached Satio because he knew Satio had a brother who was a construction worker. He also testified that he knew Satio's brother very well and he knew where he lived. The Crown says the defendant chose to approach Satio whom he hoped would sell the box of goods to his brother for a reduced price. The defendant when he was cross examined as to why he had not directly sold the goods to Satio's brother- said he just went to Satio so he would contact his brother. When it was put to him that the real reason he did not go directly and advertise the goods to Satio's brother because the brother's suspicion would immediately be raised about the goods, the Crown says the defendant evaded the question and he replied he had only said "yes" in the Interview to advertising the goods to Satio because he was still suffering from a beating he had received from the Police on his arrest. It was suggested by the Crown the defendant in advertising the box of goods to Satio he either knew or believed that the goods had been stolen, or obtained under circumstances – and that amounts to a crime.

FINDING OF FACT ON COUNT 6

- *I agree with the prosecution on the evidence the prosecution has adduced enough evidence to convict the accused on count 6*

ANCILLIARY MATTERS

I wish to deal with certain other points which were raised during this trial:-

The defendant throughout the trial maintained he was beaten by the police. Police officer Mosese Vi answered when he was cross examined by the defendant- about his alleged suffering at the hands of the Police the officer replied the defendant was "**forcibly arrested**" because the defendant was a suspect and he was very difficult to find. PC VI's testimony was corroborated by IP Hausia's. IP Hausia testified the defendant took to his heels in the bushes at Mataika, when he saw the police vehicle approaching they suggested the force used against the defendant in order to restrain and arrest him was reasonable.

FINDING OF FACT

- *I believe the defendant was in fact evasive and that he took to his heels meaning he ran, and he evaded arrest.*
- *I do not believe the defendant was injured significantly, because no evidence was adduced of any injury to the defendant during the trial. If he ran he is likely to be chased.*
- *I do not believe that his confession- or his VCS were coerced and as such they were voluntarily made.*

LLEGATION OF MISSING EXHIBITS

The defendant queried the absence of certain of the police exhibits in court. I feel it is right and proper to address this concern for the benefit of the defendant. With regard to the 5 *kie* mats, IP Hausia and Toni Heimatoto the brother of Lomeli the complainant gave evidence the 5 *kie* mats seized from Denis's Ma'afu's home were positively identified by Lomeli as part of his Tongan artefacts stolen from the EZI World Cargo warehouse. Lomeli's brother Toni Heimatoto testified he signed the property book at the police station for the release of the five Tongan artefacts towards the latter part of last year, and he had shipped the artifacts to Lomeli in New Zealand late last year. He testified he was also present when his brother Lomeli identified the five Tongan *kie* mats at the Police station.

The court indicates now: - **AND** it indicates **forcibly**- for the benefit of the defendant, that it is perfectly acceptable; and proper practice for police to return stolen exhibits to a complainant – more especially after a reasonable time has elapsed against receipt. The authorities can of course take photographs of perishable goods alleged to have been stolen- as direct evidence. Moreover in this particular case the defendant had deliberately failed to surrender to the custody of this court in July 2008- seven months previously. It is also perhaps fair to say the defendant might not have been arrested for quite some considerable time.

A reasonable man might ask himself so what else is the victim of a crime supposed to do? Must he wait for his property forever, and, are the police able and willing to store alleged stolen good, for long periods of time- awaiting the result of court cases? The evidence in this case reveals one of the victims of this particular crime lived overseas; and he wanted the return of all his stolen property (the Tongan artefacts)- which; he is perfectly entitled to request.

I am; and moreover, I have been completely satisfied- the police were right in returning the stolen artefacts to their lawful owner in New Zealand on request. The defendant cannot rely upon

such an argument - to support his case- when he was unlawfully absent from this court's jurisdiction. I have taken into account - all the parole evidence, adduced in relation to the defendants claim concerning the non production of the five stolen Tonga kie mats as evidence; (and or the alcohol) BUT I am completely satisfied these items existed - and that they were in fact stolen by the defendant- and they were returned to their rightful owner against receipt. Common sense has prevailed.

The box containing a shower and the door locks

The defendant maintained these items were taken into the interviewing room by a person called Leka, while the defendant was being interviewed. However the evidence given by the interviewing police officer PC Vi and the countersigning officer PC 'Otutaha point to the fact the box was at the police station before the defendants arrest- and before his interview with the police. I chose to accept the evidence of the police officers.

The Crown say there were inconsistencies in the defendant's evidence, which the Crown says rose questions as to the defendant's credibility. For example they say, he said, he and his wife were separated- but then he changed his story to them separating. The assertion is correct. Second, the Crown point to his acquaintance with Denise; contrary to Denise's' testimony, the defendant maintained Denis was one of his drinking buddies and they were well acquainted. I find on balance the defendant was not a credible witness.

The Crown concluded their case to say- quote- by the defendant's own admission,

- ***He just happened to be at the wrong place at the wrong time.***

The Crown says the defendant has not adduced satisfactory evidence as to how or why he came to be in possession of the stolen goods as alleged in Counts 1, Count 2 and Count 5 and Count 6- **and I agree.**

The Crown says it could also be inferred from looking at the circumstances of the defendant at the time of the alleged offending,

- That he was separated from his wife,
- He had 6 children to support,
- He was living with his elderly, unemployed mother- who also had to be fed.
- The defendant was unemployed and
- Living in the home of Sifa Apo or Sifa Latu at Ngeleia
- Where he was open to association with persons of questionable – if not criminal characters.

The crown says the evidence also revealed the defendant was very familiar with the two places where the offending took place

- Apifo'ou College and
- Ezi World Cargo,
- Both are located at Ma'ufanga,
- Where the defendant's home is situated.

ACCORDINGLY

I find the prosecution has proved its case against the defendant on - five out of the six charges which have been levelled against him.

I convict the defendant as follows:-

<i>Count one</i>	<i>He is acquitted and discharged on count one</i>
<i>Count two</i>	<i>He is convicted of receiving mats and alcohol</i>
<i>Count three</i>	<i>He is convicted of Housebreaking</i>
<i>Count four</i>	<i>He is convicted of theft of a sum of money</i>
<i>Count five</i>	<i>He is convicted of receiving stolen property</i>
<i>Count six</i>	<i>He is convicted of receiving stolen property</i>

In my opinion the prosecution has proved its case beyond reasonable doubt so that I am sure the defendant committed counts 2-6 of this indictment and he is accordingly convicted on those five counts.



SHUSTER J.
JUDGE OF THE SUPREME COURT