

IN THE SUPREME COURT OF TONGA

CR Case 377 of 2007

THE CROWN

V

SOKOLOTESI NUSI

Coram:

Before Hon Mr. JUSTICE SHUSTER

Miss Finau the Crown

Miss Fifita for the Defendant

Date of Extemporaneous Judgment. 16 July 2008

EXTEMPORANEOUS JUDGMENT

THE DEFENDANT

The Defendant is charged on an Amended Indictment filed on 16 July 2008, He is charged with an offence alleging an offence of Fraudulent Conversion of Property. He was originally arraigned on the 25 January 2008 before Justice Andrew, and pleaded Not Guilty to a single count indictment, as is legal right. The hearing took place on the 16 and 18 July 2008 before me; the accused was convicted after trial of this matter sitting as a Judge alone.

• Count One

**Fraudulent Conversion of Property, an offence contrary to section 162 of the Criminal Offences Act (Cap 18)**

Particulars of which are: -

**Sokolotesi NUSI** on or about July 2007 you did fraudulently convert to your own use and benefit the proceeds from the sale of the car belonging to Seneti Tofua which was entrusted to you to sell and pay the proceeds to Seneti Tofua.

THE PROSECUTION CASE.

The prosecution alleges the accused was entrusted with a motor vehicle, which was owned by the complainant in this case, to sell. It is said the accused sold the vehicle and kept the proceeds of the sale, TOP 2,000.00 for himself and, as such he fraudulently converted property (money) for his own use. The prosecution called three

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witnesses to prove their case. The defendant elected to give sworn evidence he was supported by his wife who testified on his behalf. After hearing the case the defendant was found guilty and a brief extemporaneous judgement was given in open court. The case was put off for pre-sentence reports. These are my reasons for my finding Guilt.

### **THE DEFENCE CASE.**

The accused as is his right under the law denies the offences as alleged in the Indictment, and puts the prosecution to strict proof. The accused gave an explanation of the events, in a VCS both to the police and to this court. His VCS was not challenged by the defence. The accused gave evidence in court; his evidence is to be accorded the same respect and consideration as any other parties. The accused called a witness on his behalf, his wife. He also relied upon his VCS and his confession to the police.

### **THE ESSENTIAL ELEMENTS OF THE OFFENCE**

To find the Accused Guilty of an offence of Fraudulent Conversion of Property, under section 162 of the Criminal Offences Act (Cap 18) the prosecution must prove each of the essential elements of the offence.

In layman's terms, and in a nutshell the essential elements are:-

- EVERY PERSON WHO:-
- FRAUDULENTLY
- CONVERT TO HIS OWN USE, AND, OR BENEFIT
- PROPERTY AND OR
- PROCEEDS BELONGING TO ANOTHER AND
- WHICH WERE ENTRUSTED TO HIM/HER
- COMMITS AN OFFENCE

And, upon conviction shall be liable to imprisonment, for any period not exceeding seven (7) years

### **LEADING CASES AND POLICY.**

In considering this my judgment, I have considered and 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 be applied here in Tonga.

- **R v GLENISTER (1980) 2 NSW LR 559 at 603-605** extensively covers the meaning of the word "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 to be 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 I 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 should read, understand and apply in cases such as this.
- **MACHENT v QUINN 1970 2ALLER 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. 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.
- **COOPER v STABLE R v SMITH**. Corrupt is doing an act which the law forbids.
- **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 (under modern law) to consider a defendant's voluntary caution statement[s] also his charge statement and or Confession 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.
- The documents were never challenged by the Defense

### **PROSECUTION CASE**

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

- The first prosecution witness is SENETI TOFUA (PW) she testified that she and her son came to the home of the accused to look for her de facto partner, and she asked the accused's wife if they could stay with them because they had been chased away from the family they used to live with. It is not in dispute that the accused and his wife felt sorry for PW1 and her son and took them in under their roof for a period of approx 6 weeks.
- The complainant was unemployed and with a small child. The accused and his wife did not ask PW1 for money or for anything in return.
- At a point in time PW1 asked the accused to sell her vehicle, after some time, the vehicle was towed and eventually sold to an Indian gentleman for 2,000.PA. PW1 Testified she had agreed the accused could sell the vehicle but it was never agreed he could keep the proceeds. She would pay some money for her keep.
- It is not in dispute the accused paid 400.00PA per month in rent and that he was in employment as was his wife at the time of this incident. It is not in dispute that 2,000.00 PA was received from the Indian man. I accept all of the testimony from the prosecution witnesses who gave evidence in court. What is in dispute is that the accused acted with dishonesty.
- At the conclusion of the trial I was asked by the Prosecutor to find the accused guilty as charged.

### **DEFENDANT'S CASE**

- The defendant says there was no fraudulent conversion of property. The defendant agreed to sell PW1's vehicle. His testimony was that he would use the



money from the proceeds of the sale to pay household bills, to help with their living costs and expenses. In his testimony to the court the accused said he paid electricity bills, buying food for the family settling a debt at the store and paid for family necessities. Counter that with his Record of Interview where he was asked at question 40, what did you use the money for? And he answered, "Use to drinking at the nightclub." He was asked by the prosecutor which statement was true the one in court or, in the record of interview. He stated he used the money to pay bills, for buying food and for his family. There was no challenge to either the record of Interview or the Confession during the trial.

## **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 this case the Defence submits the prosecution has woefully failed to prove their case beyond reasonable doubt, and they ask me to acquit the accused. I do not intend to rehearse the prosecution evidence in detail, or the prosecutions closing, speech because in a case such as this, it is a question of who do I believe, on the evidence placed before me. Further this was a short trial with very few issues. It is the evidence given in open court and on oath which goes to prove whether or not I find the guilt or innocence of this particular accused. In this case it is the evidence of

## **ACCORDINGLY:-**

Assessing the evidence as a whole

- I believe he Crown's version in this case; because in the VCS the accused said he knew why the police arrested him (Question 9 and 10) He said it has to do with the complaint of Seneti concerning her car. In answer to Question 17 how much did you sell it for A) 2,000PA then in Question 19, what happened to the 2,000PA A) I used it personally. Question 40 what did you use the money for? A) I got drunk with the money at the nightclub, and in answer to question 41 who do you believe the money should have been given to? A) It should have been given to Seneti these all point to his guilt.

- *In his Confession Statement to the police- when answering the caption, "I make this statement of my own free will I have been told that I need not say anything unless I wish to do so and whatever I say may be given in evidence, he replies.*
  - *I State, I am guilty due to using money and selling the car to the Indian under false pretences to Seneti Tofua. Seneti Tofua had asked me to bring the vehicle and advertise it for sale and had no further involvement with the car leaving it to me and her partner.*
- *The Confession Statement was signed and dated 14.54 on 13.11.07*
- *Question, what clearer indication of guilt can one ever come across?*

In my view the prosecution has proved their case beyond reasonable doubt so that I am sure the accused committed this offence. I have no hesitation in finding him guilty as charged and I convict him of this offence.



SHUSTER J  
JUDGE OF THE SUPREME COURT  
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