IN THE SUPREME COURT OF TONGA **NO.CR.765/97** CP

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

REX

-V-

WIGHT

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel : Mr S. Tapueluelu for the Prosecution
: Mr S. Tu'utafaiva for the Accused.

Date of hearing: 4,5,6 & 9 August 1999.
Date of judgment: 11 August 1999.

JUDGMENT

The accused was originally charged with 13 counts relating to stolen goods, drugs and arms and ammunition. At the close of the prosecution case, I found no case to answer on the drug offences and some of the arms offences.

The trial has now proceeded on the following counts:

1. theft of 2 band mixers, 48 compact discs and 155 cassettes from Samisoni Talia'uli
2. receiving the same items
8. possessing 12 rounds of live .32 ammunition without a licence
9. possessing 25 rounds of live .410 gauge ammunition without a licence
10. possessing 22 rounds of live 12 gauge ammunition without a licence
11. failing to keep a .22 rifle and ammunition securely or in safe custody.

The charges all arise out of a search the police carried out on the accused's house in Ha'amea on 28 May 1997 in execution of a warrant to search for stolen goods.

On that day about twenty police officers were involved in the operation and all rooms in the house, some outhouses and the grounds were searched. The evidence of the police was that there were three bedrooms in the house one of which was clearly the accused's, another was that of his son Raymond and the third was of his son Marvin.

At that time Raymond was in the United States. His room was locked and had to be opened by the accused by the use of a knife.

Marvin's room had also been shared by a nephew of the accused, Sele, at least until about a month before the search.

The house stands on an 'api of over 40 acres and the police witnesses agreed that there were a number of out houses which were not in current use, in particular an old copra shed, and a toolshed which appeared not to have been used recently.

The items specified in counts 1 and 2 were stolen from a nightclub apparently a little over a year before the search. When they were found, the owner was called and identified them as his property whilst the search was being done. No evidence was called to prove the theft or the date on which it occurred save for the evidence that the owner had identified it as his.

One of the mixers was found in Raymond's bedroom. The accused was present at the time and denied having seen it before – a denial he repeated in interview under caution later. The other, apparently rather larger, mixer was found in the tool shed under a pile of old sacks. It was not visible until the sacks were moved. In the same shed were 119 of the cassettes. Again the accused denied any knowledge. In the copra shed was sack containing a plastic bag inside which were the compact discs and a few cassettes. The final cassettes were found in Marvin's room.

Although the accused denied any knowledge of each of these items, he does not dispute that they are stolen goods. Strangely, no one else has been charged with these offences although it was the prosecution case that the only stolen goods that were found in the house were in the rooms of Raymond and Marvin.

When the police first went into the house, they immediately searched the room of the accused. The room contained two beds on one of which, together with a lot of clothes was a .22 rifle in its carrying case. The prosecution accepts that the accused has a licence for that firearm. The case against him is that it was loaded with one bullet in the breach and 8 more in the magazine. In the room was a substantial amount of additional .22 ammunition. There were boxes of bullets on the bed and in the carrying case and loose rounds on top of the drawers. The accused does not deny those items were in his room. There is a dispute whether the boxes were on the bed or the floor and a more serious

issue whether the gun was locked with a trigger lock that could be only opened with a key. The accused produced the lock in court and said that he had to unlock it for the police. The police witnesses all deny this and it is not mentioned in the interviews the police recorded although the accused told the court that he undoubtedly mentioned it at the police station.

Further .22 ammunition was found in the car in which he had arrived at the house just after the search party. It was in a bag under or by the front seat. Two further loose rounds were found in Marvin's room. The accused said he did not know about those or why they were there or where they came from.

When the police continued the search, one of the officers removed a book from a bookshelf in the living area of the house and, secreted behind it, was the ammunition referred to in counts 8, 9 and 10.

There is no dispute that that ammunition was where the police alleged. The defence case is that the accused did not know about it.

The prosecution called the nephew, Selè. He told the court how he had lived in the house and shared Marvin's room. He lived there for some months until the accused's attitude to him changed and it appeared he was more and more determined to make his nephew leave. Eventually, in about April 1997, the accused told him he must go and the witness told the court he has never been back. It appeared in cross-examination that at least part of the problem was that he had had a fight with Marvin. It is also clear that it was his information that led to the police raid about a month later.

He said that he had been shown the stolen items by Raymond when he was living there and that, when Raymond left for the States, they had all been present as he packed. Included in the items he took was one of the electronic instruments from the night club and some compact discs and tapes. He had told the court he recognisd all theses items including the one packed but there was no evidence that such a item had been stolen or that such an item existed apart from Sele's account.

I do not need to take his evidence any further. I did not consider him a credible witness. From the outset he was clearly motivated by malice towards the accused. He was equally clearly, in evidence in chief, trying to suggest the reason for his departure was the hostility of the accused and his malice towards the accused was apparent throughout his evidence. Had I needed to consider his evidence further, I would have treated him as an accomplice and needed to look for corroboration but I do not because I do not consider him credible and I attach no weight to his evidence.

The accused gave evidence that the house was his family home and had been occupied by his father before him and two of his brothers. He does not deny

that presence of the various items charged but denies any knowledge of them prior to the police search except for the gun and the .22 ammunition. The other ammunition he says must have belonged to the various members of his family who lived in the house before he moved in.

The expert witness who examined the ammunition agreed that the various rounds from behind the book on the shelf were not of very recent manufacture.

The accused told the court that he was not really staying in the house in 1997. He was living in rented accommodation in 'Anana and only visited the house in Ha'amea once or twice a week. I accept he had a house in 'Anana but I do not believe his evidence that he went to Ha'amea so little.

He denies that the gun and ammunition was not being kept in a secure condition.

The prosecution must, as in all criminal trials, prove the various elements of the case beyond reasonable doubt.

In relation to the first and second counts, the prosecution relies on section 40 of the Evidence Act to prove knowledge. That is a statement of the doctrine of recent possession. There is no evidence of when the goods were stolen although the particulars of offence give the date as 20-22 April 1996. In order to establish recent possession the burden is on the prosecution to establish the recent theft. I do not accept the theft has been proved to be recent in relation to the time the police found the goods in the accused's house. For what it is worth, the evidence of Sele was that Raymond showed him the goods not long after he started to live in the house in 1996. There is no other evidence that the accused stole the goods and he is acquitted on count 1.

In relation to count 2, the evidence is that one mixer was locked in Raymond's room. Again, Sele's evidence was that Raymond was clearly in knowing possession of the items stolen. The other equipment was hidden in two places in different outhouses. The police witnesses agreed that the copra shed was no longer used and that the toolshed looked as if it was not used either. The accused says he never went into those sheds. For much of the time that those goods were on the premises there was little to stop Raymond, Marvin, Sele and various people who worked for the accused on his 'api from having access to those places. I cannot, on that evidence, consider the prosecution has established that the accused had knowing possession of those goods and he is acquitted on count 2.

His defence to count 11 is that the gun and .22 ammunition were being kept in safe custody and securely. I disagree. I do not believe the accused's account of the gun being locked at the time with a trigger lock. It was left loaded lying on a bed in a room that was locked but in a house where, to his knowledge, a

number of other people lived and had access. The ammunition was not kept out of sight of anyone in the room. Other ammunition was in the car. The accused said he had forgotten it was there. That aggravates the situation for, without knowledge that it was in the car, the accused would leave it only in the way one would leave a car in normal life without any extra precautions to safeguard the ammunition.

I am satisfied beyond any doubt that the gun and the ammunition for it were not being kept by the accused securely or in safe custody and he is convicted on count 11.

In relation to counts 8,9 and 10, the prosecution contends that the offence under section 4 is absolute. I agree that is the case in the sense that, once possession is proved the accused must show his lack of fault. However, in this case, the defence is that the accused did not know he was even in possession of the ammunition. If that may be the case, he must be acquitted.

I have considered the evidence of the officers and the accused in relation to this. As I have already stated, I do not take the evidence of Sele into consideration of this. I am satisfied beyond reasonable doubt that the accused did know of the presence of that ammunition in the house. I accept it was old and may have belonged to his brothers or father but I am satisfied that it was in his house and he knew it. He is convicted on counts 8, 9 and 10.

Sentence:

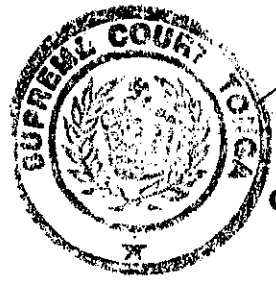
I accept that the ammunition in counts 8,9 and 10 had been left in the house by other members of your family when they lived there. The serious offence in this case is the failure to keep your rifle safely.

Count 8 - $50.00 or one month in default of payment
Count 9 - $50.00 or one month in default of payment
Count 10 - $50.00 or one month in default of payment
Count 11 - $150.00 or three months in default of payment.

In addition I order that all the ammunition in counts 8,9 and 10 and all .22 ammunition in excess of 50 rounds shall be forfeited.

I do not order that the gun or the remaining rounds of .22 ammunition shall be forfeited but I note that your licence has expired and I order that the gun and the 50 rounds shall be held by the police pending any application for a new licence.

I order that a copy of this judgment shall be served on the police. Should application be made by the accused to renew his licence, the police should consider the facts of this case in deciding whether to issue a licence or, if they do issue one, whether they should impose any special conditions.



NUKU'ALOFA: 11 August 1999. **CHIEF JUSTICE**