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KELEKOLIO TAPUELUELU

BEFORE HON JUSTICE FINNIGAN

**Counsel:** Mr Bloomfield for Crown, Mr Muller for Accused

**Dates of Hearing :** 6, 7, 8, 9, 10, 15 & 16 December 1999

**Date of Verdict :** 17 December 1999

VERDICT OF FINNIGAN, J

The accused faces four counts. The first is unlawful possession of 6 pistol bullets, contrary to s4 of the Arms and Ammunition Act, cap 39. The other three are of forgery and using a false document, contrary to Ss159, 170 and 172 of the Criminal Offences Act, cap 18.

I remind myself that he comes before the court as an innocent man. He is charged by the Crown, but is not to be convicted of any offence unless the Crown proves to me beyond reasonable doubt that one or more of the offences charged against him has been committed. It is not for the accused or his counsel to prove anything at all, and it is the Crown's work to prove that the accused committed the offences. In respect of the ammunition charge however the accused has raised a positive statutory defence and the onus is on him to establish that defence (see, e.g. s106 Evidence Act cap 15).

I have heard excellent addresses from Mr Bloomfield for the Crown and Mr Muller for the accused. These addresses showed the commitment and skill of both counsel in a difficult and unusual case. They have helped me greatly in my decision about each charge in turn.

The first count is the charge of possession of ammunition contrary to s4 of the Arms Act.

The accused does not deny being in possession of the 6 bullets. He has raised a positive defence to this charge, namely justification. He claims to be exempted from the law in s4 of the Arms Act under which he is charged because he says he comes within the exception provided by s4(4)(a). The exception in s4(4)(a) is as follows:

- (4) The following persons shall be exempt from the operation of this section to the extent specified-*
- (a) any member of the police or military forces of the Kingdom or any person employed in the Prison Department or Customs and Excise Department in respect of any arm or ammunition possessed, used or carried in the course of his lawful duties.*

Under the law the onus is on the accused to prove this defence. The standard of proof is the balance of probabilities.

The main relevant facts that I find proved in the evidence are these. The accused was given by a member of the public .357 calibre magnum pistol and ammunition. No permit was issued to him, or was likely to be issued. During 1997 he was relieved of his duties as a police fireman by the police commander and employed on secret operations. This was dangerous work in itself, and as a further consequence the accused and his family received threats of violent injury, including injury by use of firearms. It was the police commander's opinion that the accused was justified in carrying arms, for his own protection, while engaged in his secret duties. The police commander was aware that he had the illegal pistol. He knew too that there were some others like it that had been confiscated from members of the public and were held in the police armoury. He gave evidence that this firearm is a more forceful weapon than the .38 calibre firearm that is normally issued when arms are issued to police officers. The 6 bullets that the accused had, and which were produced in evidence, are hollow-nosed bullets. The commander said he felt that the magnum was a more suitable firearm for the accused because it is better for use at night. He said in evidence that he did not know where the accused had obtained the gun, but that he knew it was illegally obtained and held. He authorised the accused to retain the magnum pistol and ammunition which he illegally had, and instructed him to deliver them to the police armoury upon completion of his secret duties. His authority to do so, he said in evidence is s7 of the Police Act. The provision is as follows:

7. All members of the Force shall with the approval of the Prime Minister carry arms for the performance of their duties.

When asked how s7 applied to this situation he replied that "we have been authorised by the Prime Minister", and the matter was taken no further in questioning. He said he regarded the gun as suitable for the purpose of self-protection, authorised by himself, and in police ownership. Under s4(4)(a),

no licence was needed for its use by a police officer if it was carried in the course of his lawful duties.

Possession of the pistol by the accused became well known. It was seen by one police officer in the police commander's car, which was driven by both that officer and the accused. He used it openly in the presence of eight police recruits and at least one other police officer when on the police commander's orders he attempted unsuccessfully to kill a cow for food for the Ikale Tahi rugby team. In that incident, he first used a gun owned by the commander of the police training school, a .22 rifle, and being unsuccessful with that, then brought the pistol from his car. With that also he was unsuccessful. On another occasion, in the company of others, he used it openly, shooting at coconuts in a tree. The accused in evidence explained his actions on these two occasions and said that at both times he had been on duty as a police officer.

Some police officers investigated these events and under a search warrant on 27 December 1997 found or were shown by the accused the 6 bullets that are the subject of the present charge. In a statement to a police officer the accused said that the gun had been stolen from him in the second or third week of November. He is charged only with possession of the bullets.

Any thoughts I may have about the gun and the use of it by the accused I have to put from my mind, as they are not necessary for my task. The question for me is, has the accused shown on the balance of probabilities that his possession of 6 .357 magnum bullets was, on 27 December 1997, within the exception provided at s 4(4)(a) of the Arms Act?

The evidence shows that at that time he was still employed secretly as a police officer. He was a "member of the police" for the purposes of s 4(4)(a). His duties were unstructured, and he was on duty whenever he chose to be, or perhaps was always on duty. The police commander's claim that the police are authorised by the Prime Minister to carry arms for the purpose of their duties under s7 of the Police Act was not challenged. If this claim is intended to mean that it justifies the police commander giving authority to the accused in the circumstances of this case, I doubt that s7 has been properly interpreted or properly applied, but that is not an issue for this case. The accused was authorised by the police commander to carry the firearm and the ammunition with him on duty for his protection. The police commander appears to derive his authority under the Police Act from the Minister, and it is the Minister who in law is the police commander. There is no evidence or suggestion by the Crown that the officer who authorised the possession did so without the authority of the Minister.

This is not a case for making decisions about the legality of the authorisation. The accused has not been charged with possession of the gun, although there is ample evidence for that charge. Had it been laid, the court would have been required to declare on the legality of the authorisation. But the charge is possession of the bullets only. Without

the gun, the bullets were useless to the accused. Whether or not the authority he previously had been given was valid, it still did not warrant his retaining the 6 bullets in his possession once the pistol itself had been stolen. They were dangerous items whose possession was controlled by the Arms Act, and if the pistol had been stolen in the second or third week of November, he was unable from that time to use them for his protection. Any authority he might have had to possess the bullets had expired. Pursuant to s33(1) of the Act he was required upon expiry of any authority he might have had to deposit the bullets forthwith with the police, and although a defence is provided at s33 (4) of reasonable behaviour and reasonable delay, these defences are not raised by the accused and do not arise from the evidence.

On this charge the accused must be convicted.

I turn now to counts 2, 3 & 4. These are charges of forgery, knowingly dealing with a forged document and falsifying a document with intent to defraud, under ss170, 172 & 159 respectively of the Criminal Offences Act. They arise in connection with the ammunition charge only because a document was discovered in the possession of the accused during the search with produced the 6 bullets. There is otherwise no connection with that other charge.

Briefly, the main relevant facts that I find established are these. The accused had been a police fire officer. On 28 August 1997, a house on an allotment owned by his wife's father was burned down. A fire officer made the standard report, based on information he had gathered. These reports are apparently used by insurance companies in assessing claims for insured property. The extent to which the insurers rely on these reports is not clear to me. The report was not dated immediately, and now bears the date 16 March 1998. The evidence of one witness, Pulei Tonga, suggests it may have been written, not on the day of the fire, but early in 1998. The owner of the house in the report was partly incorrect, inasmuch as one of the daughters of the allotment owner (Meliamé Taufa) was named, but she was not the owner of the house. The owner may have been one of the other daughters (Lesieli Suka), or may on the evidence have been a third daughter Pesi Tapueluelu and her husband, who is the accused. The legal ownership of the house is not clear on the evidence but is not a matter for this trial.

This report is the document that was found in the briefcase of the accused.

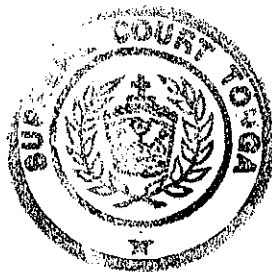
Suffice it to say that the accused had some good reason to say that he and his wife were the owners of the burned house, because they had paid some of the money due to the bank for the loan that built the house. The accused also had some reason to believe that the house had been insured with an insurance company, MMI, although it is not clear who, if anybody, paid any premium. On the evidence it is established that, with the proper authority of his superior, he obtained the original handwritten report from the file and had a second report typed. I have compared his evidence with that of the

officer who was involved in that part of the events, Sateki Tupou. His typed report showed his wife in place of her older sister as part-owner, and gave a higher figure for the value of the goods that had been burned inside the house. It appears those goods were owned by another person (Pulei Tonga) and her husband, who had been living in the house. The higher amount was, on the evidence of Pulei Tonga, more correct. These goods however were not insured. Whether or not that is strictly relevant depends on evidence of the state of mind of the accused in reporting the higher amount. There was no evidence from any officer of the insurance company.

There is a great deal of detail that can be given, but the defence of the accused is simple. In his own words, it was not his intention to defraud, but to report the correct facts. He says it was not his intention to alter the first report at all, but rather to make his own report, which was more accurate. He says he acted with authority from his superior, but that person did not give evidence. He did not act in accordance with the normal procedure for altering reports. Neither did he put the two reports side by side in the official file, but kept the first one in his briefcase. He explains that his superior told him that his typed report was the correct and acceptable one, so he retained the other. I have some doubts about the fact that the first report was neither filed nor destroyed, but was retained by the accused. It appears the police suspected something about this, because a fire service investigating officer accompanied the police when they executed the search warrant for the firearm, and found this report in the same briefcase as the bullets. However the significance of those facts, if any, was not made clear to me.

On the evidence that I heard there is plenty of ground for reasonable doubt about whether the accused intended to defraud the insurance company, or anybody else. He had been told, he said, that the insurance on the house was T\$1,000 more than the amount stated in the first report, but in his report he did not increase the amount. Clearly the intended result of his action is that he should benefit, but that alone does nothing to justify the suspicions which his actions aroused. If he was correct in his beliefs as stated in evidence then the original report named the wrong owner when it should perhaps have named his wife and perhaps himself. As I said there is scope for reasonable doubt about the true facts of the whole matter and on the evidence put forward during this trial it would be wrong to convict the accused of these three crimes. On counts 2, 3 & 4 he is acquitted and discharged.

**NUKU'ALOFA: 17<sup>th</sup> December, 1999**



*[Handwritten signature]*  
**JUDGE**