

HIGH COURT. Apia. 1955. 30, September; 7, 20, October.  
MARSACK C.J.

Prosecution for theft - complicated and conflicting evidence - witness giving testimony closely involved in dealings with defendant giving rise to offence - duty of Court to carefully weigh evidence.

In criminal proceedings where the evidence is complicated and conflicting and where the possibility exists that a witness giving testimony has been closely involved in dealings with the defendant giving rise to the subject of the prosecution (but where it is not shown that such witness is an accomplice), the Court must remind itself of its duty very carefully to weigh the evidence as a whole having regard to the burden of proof in criminal cases and also to the weight to be placed on the evidence of such witness.

Defendant convicted.

Inspector McLean, for Police.  
Phillips, for defendant.

Cur. adv. vult.

MARSACK C.J.: This is a prosecution under which defendant is charged with the theft of £1,089.17.1 the property of the Vacuum Oil Company.

In the mass of complicated and often conflicting testimony one fact stands out clearly; that the defendant entered into an under-hand and irregular arrangement with Leutele Vaafusuaga Poutoa (who for reasons of clarity will be referred to hereafter as Poutoa) for the supply to Poutoa of large quantities of benzine from the Vacuum Oil Company under the distributors licence held by J.B. Fonoti. I accept the evidence of Fonoti that when the matter was referred to him in the first place he gave written authority for Poutoa to purchase from the company one 44 gallon drum of benzine under Fonoti's licence provided that he paid cash for it; and that he gave no further authority to use his name. Subsequently very large quantities of benzine were supplied to Poutoa by Meredith under what purported to be the same arrangement. I am satisfied that Fonoti did not authorise the continuance of the arrangement and in fact was ignorant of the supply to Poutoa in his name.

The supply of the first 44 gallon drum was perhaps an irregularity but not a very grave one. The subsequent very large supplies amounted to an irregularity which was inexcusable.

It is I think clear from the evidence that both Meredith and Poutoa recognised that they were engaged in illicit dealings in benzine, involving what might be termed commercial dishonesty even if not actual crime. This in my opinion is shown by the conduct of the two parties concerned when the transactions grew in volume and the situation got out of hand.

Meredith states that he received his instructions, in the first instance, from Mr Brownlee, Accountant for Morris Hedstrom Limited, agent for Vacuum Oil Company. Mr Brownlee has been for some time resident in Fiji and his evidence is not available to the Court. If all that the defendant had done in the matter of these benzine supplies had been in accordance with his instructions from Mr Brownlee than there was no reason whatever why the matter should have been hidden; there was no reason whatever why he should not have reported the whole matter to Mr Chisholm, the Manager of Morris Hedstrom Limited. He could have done this with a clear conscience as he had been bound to obey the instructions given to him by the firm's accountant. But instead of this his evidence discloses that he went to great lengths to keep the transactions secret, and away from the knowledge of Mr Chisholm.

Poutoa sets up in his evidence that he paid large sums of money on different occasions to Meredith, but almost invariably was unable to obtain a receipt. He further deposes that on the 7th December 1953 he took the sum of £271.4.0 to the defendant at Morris Hedstrom's office, and the defendant said to him "you must not bring money to Morris Hedstrom's, take this away and I will call for it later". He states that the defendant came to his

house that evening and picked up the money. It seems to me abundantly clear that if Poutoa had considered his transactions with the defendant honest and above-board he would have insisted on a receipt on every occasion; and moreover, would have become extremely suspicious when informed by the defendant that he was not to make payments at the obvious place, namely the office of the company concerned. I can draw no other conclusion from Poutoa's own evidence than that he knew he was involved in transactions which were of a shady nature even if not criminal in themselves.

On these findings, I think it is the duty of the Court to weigh any evidence given by Poutoa very carefully, and to subject it to the closest scrutiny. It may be that the normal rules regarding the evidence of an accomplice do not apply in the case of Poutoa, but the surrounding circumstances are such that his evidence must at least be regarded as that of a deeply interested party.

In the course of these transactions, I find it proved that Poutoa received from the Vacuum Oil Company benzine and similar products to a total value of £2,491.0.8. Of this amount £37.8.0 represents the total concerned in the two charges of forgery which have been admitted by the defendant, leaving a balance of £2,453.12.8 to be accounted for in these proceedings.

Poutoa claims that he has made payments totalling £2,429.18.1. The amount admittedly banked by the defendant to the credit of the Vacuum Oil Company in respect of benzine, etc, sold to Poutoa (after allowing him a credit of £85.13.10 which had been placed, it is surmised wrongly, to the credit of A.J. Fepulea'i) comes to £1,340.1.0. The difference between these two sums, namely, the amount which Poutoa alleges that he paid to the defendant, and the amount which the defendant admittedly paid to the credit of the Vacuum Oil Company, is £1,089.17.1 and it is this sum which the defendant is charged with stealing.

There is no question regarding the amount actually paid into the bank to the credit of the Vacuum Oil Company. There is a very serious dispute as to the amount actually paid by Poutoa. The total sum which the defendant admits receiving is £1,369.14.8. This is the total of the formal receipts issued by the defendant, plus the amounts which he has from time to time acknowledged in statements submitted to Poutoa. It is impossible to place full reliance on the evidence of the defendant regarding the amounts paid by Poutoa. It is clear that the defendant has acted in a most reprehensible manner throughout. Not only has he failed to give receipts for the large majority of payments, but in many cases he has held amounts received for considerable periods - in one instance, at least, nearly 12 months - before paying them into the company's credit.

I am quite unable to accept his explanation that he was worried about the position, and held the moneys for these lengthy periods on that account. As I have said earlier in this judgment, if his conscience had been clear he could have easily have discussed the whole matter with Mr Chisholm. In any event he was under a bounden duty to pay into the bank all moneys he received on behalf of the company, and could not in any circumstances be excused for holding those moneys longer than overnight.

But I have already stated that the evidence of Poutoa must be subjected to rigorous scrutiny, and that it cannot be accepted at its face value without some corroboration. This is particularly so, as to establish the guilt of the accused, it is necessary to prove, in accordance with the standard of proof insisted on in criminal cases, that the amount which Poutoa paid to the defendant was in excess of the amount paid by the defendant to the credit of the company.

In support of his evidence Poutoa submits a note-book (exhibit 2) in which are set out in a spasmodic fashion, some of the financial transactions involved in the transport business carried on in the name of Poutoa's wife. I have very carefully examined the entries in the note-book which are referred to in the full statement (exhibit 1). I am impelled to make the following comments with regard to certain entries:-

whereas the total of three items appears originally to have been £124.17.6, this has been altered to £224.17.6. This creates at least a suspicion that the extra £100 was added subsequently to the original entries.

Page 13 - An item "benzine £36.19.3" appears as a single disbursement on a page containing over 20 items of receipts, and it is written on one of the same lines as a cash receipt item.

Page 20 - An item for September 30th, "Ave ia O. Penisini £50" is written over an obvious erasure.

Page 26 - The two entries on page 26 £50 for October 9th and £50 for October 23rd are written among a mass of erasures, and their authenticity are doubtful.

Page 30 - The item "December 15th Ave Penisini £150" appears to have been altered from £50 by the addition of "1" written in ink, whereas the £50 and the rest of the entry is written by a ball-pointed pen. The two items "Oscar Penisini £50" for December 31st and January 25th are written over erasures.

Page 34 - The item "February 16 Ave ia O.M. £158.16.0" appears below the last line on the page and after the other items of expenses had been totalled; half-way down the page there is also an item "February 16 Ave ia M.H. Penisini £51.1.10". The item of £158.16.0 appears on the face of it to have been added at a later date.

Page 67 - Two items dated August 25th 1954 read -

"Ave benzine Oscar £20  
" " " £ 5"

The words "benzine Oscar" are however written over the word "Poutoa" with what appears to be a different pencil. It is to be noted that the entry immediately preceding the first of these is "Ave Poutoa £1.11.0" and immediately following the second is "Ave Poutoa £4". I am unable to accept the two entries of £20 and £5 as having been made on the date set out against them.

I reject the entries which I have specified in this commentary on the note-book as affording any corroboration whatever of the evidence of Poutoa. Moreover, the very obvious alteration of items in the note-book casts serious doubt on the validity of the remaining entries. It is to be noted however that the defendant acknowledges payment of £156.16.0 on 16th February 1954, so that the entry in the note-book on that date as to £158.16.0 may be taken as substantially accurate.

As both the main parties to these transactions have ignored all the rules of accepted commercial practice - in particular in the failure to maintain any reliable system of book-keeping, and in paying or receiving substantial sums of money without any receipts being given - it is extraordinarily difficult for the Court to find exactly what payments were made by Poutoa and received by Meredith.

It seems clear that all benzine supplies to Poutoa covered by invoices rendered up to the 6th June 1953 were paid for by the 20th June 1953 and the

payments acknowledged. It is from that date onwards that the difficulties arise. I find that the total value of benzine, etc., supplied from the 20th June 1953 to the 30th November 1953 amounted to £858.12.10. During that period no payments whatever were acknowledged by Meredith. I find it impossible to believe that for that period of nearly six months Poutoa made no payments whatever.

Poutoa claims the following payments were made during that period:-

3rd July 1953 - £36.19.3. I have already stated my reasons for considering that the entry in the note-book of this amount was open to suspicion; and moreover, the sum does not represent the amount of any invoice received up to that date. I cannot hold that this payment has been proved.

30th September 1953 - £50. As the corroboration from the note-book is not accepted, this payment cannot be held to be proved.

26th October 1953 - £100. The note-book entry is not open to the objections taken in respect of a number of others, and it is reasonable to suppose that some lump sum would have been paid in reduction of Poutoa's mounting indebtedness; I therefore accept this payment as having been proved.

9th and 23rd November - Two items each of £50. It would be reasonable to expect payments of similar sums about that time; but in view of the lack of corroboration - the entries in the note-book on page 26 being open to some objection - I cannot hold that they are proved to the virtual certainty necessary in a criminal prosecution.

It follows, therefore, that though there is a strong probability that a greater amount was paid by Poutoa during the period 20th June 1953 to 30th November, 1953, I find that for the purpose of this prosecution only one such payment, that of £100 on the 26th October 1953, has been proved.

From the beginning of December 1953 until the end of the financial transactions between the parties substantial sums are acknowledged by Meredith and substantial sums were paid by him into the Vacuum Oil Company. It is, for reasons that have already been given, completely impossible for the Court to reconcile the sums acknowledged by Meredith and the payments alleged to have been made by Poutoa. I find myself unable to put my finger on any item during that period and say that it represents a payment proved to have been made by Poutoa, and proved to have been unacknowledged by Meredith or retained by him dishonestly.

Consequently I find that the total amount proved to have been received by Meredith was £1,469.14.8 made up as follows:-

Payments acknowledged by the defendant	...	£1,369.14.8
Payment by Poutoa 26/10/53		<u>100. 0.0</u>
Total	...	<u>£1,469.14.8</u>

As the amount paid by the defendant to the credit of the Vacuum Oil Company was £1,340.1.0, I find that he has dishonestly retained the sum of £129.13.8. He will be convicted of theft of this amount.

It is very unlikely that in this judgment full credit has been given to Poutoa for all the payments which he actually made; but the standard of proof required in criminal prosecutions must be observed in these proceedings, and I am unable to find that definite proof to the required standard has been submitted with regard to any other sums which Poutoa claims to have paid.

Defendant convicted of theft of  
£129.13.8.