

HIGH COURT. Apia. 1957. 29, 30, July; 5, 7, August. ROTHWELL J.

Criminal law - prosecution for theft and misappropriation of moneys - evidence confused - onus of proof on Crown.

Where the evidence is confused, the Court must remind itself that the onus is on the Crown to prove beyond all reasonable doubt that the accused had committed the offence for which he is charged.

Wilson, Attorney-General, for Police.  
Metcalf, for defendant.

Cur. adv. vult.

ROTHWELL J.: The Water Supply Ordinance 1953 was passed as a consolidating, and amending measure and it repeals the Water Supply Ordinance 1934. Under the provisions of the 1953 Ordinance the accused was appointed on 1st June 1954 Water Supply Inspector and has been referred to throughout these proceedings as the Water Supply Officer. He was constituted by that Ordinance a Public Servant of Western Samoa and given certain duties as set out in the Ordinance.

Water Supply Committees had been operating under the provisions of the previous Ordinance and a number of others were formed under the 1953 Ordinance and at the relevant date of these proceedings which was in the month of July 1955 there was considerable activity in the installation of water supply services, and at that time there were 9 committees which had been properly formed in accordance with the requirements of either the old Ordinance or the 1953 Ordinance and there were 5 more which were projected or in the course of formation. As I have said there was in July 1955 considerable activity in the matter of installation of water supply, and Treasury called a conference of those concerned with the work of water supply committees to go into the matter of accounts and records which should be kept in respect of their activities.

Now at that time there was no West Coast No. 4 Water Supply Committee. The Ordinance lays down quite definitely what formalities are required in the formation of committees. It must be formed by persons nominated for the committee, it must have the approval of the District and Village Government Board and it must be constituted under a warrant signed under the hand of the High Commissioner which must thereafter be gazetted. The West Coast No. 4 committee was provisionally formed only on November, 9th, 1956 and the warrant for its constitution was signed on May, 9th, 1957.

It is true that a Post Office Savings Bank Account was opened on the 12th March 1957 but I hold that that was completely unconstitutional and not properly done, not done with any improper motive, but there was no committee which could operate on that account. Dealing with the Treasury conference and the accounts and records which were required to be kept the accused could well have thought that these requirements would apply to committees properly formed and have no application to the committees which were then in the process of formation and if he thought that, I would agree with him.

The Salailua district had already installed water supply on the basis of an estimate of cost and a collection from those who were to participate in the supply, of amounts which were estimated to cover the costs of their installation. These proceedings were also unconstitutional because The Water Supply Ordinance 1953 provides that Water Supply schemes should be approved by the District and Village Government Board and in those cases as I have already held, there was in fact no committee properly constituted under the Ordinance to apply for approval. The Salailua village installed the scheme by collecting estimated costs of installing and going ahead with the work.

It was decided that the West Coast No. 4 committee should follow the same plan and install its water supply. In pursuance of that resolution the accused got estimates of the costs of the installation of

supplies, arranged for the collection of moneys to pay for the estimated cost divided proportionately amongst those who participated in the scheme and arranged that it should be done. In the course of his collection of moneys and arranging for installation of these schemes, there are in these prosecutions two main items of complaint.

The first is that he issued no receipts for moneys paid to him and in that respect I cannot see any way in which it was possible for him to issue formal receipts because there was no formal committee, although it has been pointed out that the payments could have been made to a Trust Account and therefore receipts issued by Treasury to people who paid these amounts. The second, and I think the main item of complaint is that brought forward by Tauti, consisting of an allegation of duplicity and fraud on the part of the accused in over-estimating the amounts required for the cost of installations, for the purpose of having a surplus fund which he proposed to mis-appropriate and keep for his own purposes.

During this trial and during the investigation the people of the village of Nofaalii have been made the guinea pigs for the decision of what was in the mind of the accused when these transactions took place and Tauti has been the spearhead of the attack. It was his letter to the Bulletin in April this year which touched off the explosion which occurred since.

Tauti's evidence leaves one somewhat uneasy. In the first place, on the second day of the hearing, he said twice very definitely that his letter to the Bulletin had contained no information regarding lengths of pipe; that made it necessary to procure the original letter which was handed to the Court and it was found that the translation which had been put in evidence was accurate and that the letter contained little else than details of the lengths of pipe used. I find it hard to believe that Tauti in three months could have forgotten what he wrote in that letter and why he made the statement which he did, is a matter upon which I do not propose to comment here. Secondly in connection with his evidence the schedule of information of specifications of pipe which he produced and which we all recognised as Exhibit 11 is headed up - "Wednesday, July 12, 1955." July 12 1955 was a Tuesday; whether a mistake of that description could be made by somebody typing the document on the day in question, is also a matter I should perhaps not comment on further.

The third matter in connection with his evidence which I do not like is that the schedule of specifications showing the estimated lengths of pipe and also the lengths of pipe which he alleged were actually used was put forward on that basis to show what pipe went into these installations. It was only on cross-examination from me that it was disclosed that on the day on which this memorandum was made, the work had not been done and that the shorter lengths of pipe shown in that memorandum were not in fact lengths used but lengths which had been charged for by the Public Works Department.

Fourthly in respect of his own tap, the cost was originally £14.14.0 and was reduced by an amendment to £12.12.0. That £12.12.0 was to be paid by two other contributors at £1.1.0 each and the balance by Tauti and his family. Sa'aga said definitely that he was first asked to pay £8.0.0 and that was afterwards reduced to £6.0.0. Tauti does not seem to have treated his kinsman Sa'aga as generously as his own evidence would suggest.

Tauti suggests that the accused for his own purposes inflated the estimates of material and costs which had been given to him and that the accused gave Tauti wrong figures with the intention of collecting surplus moneys. He produced Exhibit 11 to prove that allegation. Exhibit 11 has a perfectly simple, logical and convincing explanation, if we take some of the documentary evidence that has been produced in conjunction with one small scrap of evidence from Mr Topp. Mr Topp said that the Government's intention in connection with this matter was to pay for the first 20 ft. of pipe line for every tap that was installed. I think the Public Works Department thought that 21 ft. was near enough as the pipe was in 21ft. lengths and in charging up the work that was done, the first 21 ft. length of pipe was eliminated from the account to comply with the Government's promise to bear part of the cost.

If we examine Exhibit 11 we find that tap No. 1 the estimated length

of pipe is 124 ft. the length of pipes charged for was 103 ft. No. 2 tap estimated 178 ft. charged for 157 ft. No. 3 tap estimated 200 ft. charged for 179 ft. No. 4 tap, (Tauti's own tap) estimated 136 ft. charged for 115 ft. No. 5 estimated 62 ft. charged for 41 ft; in each case there has been a deduction of 21 ft. as Government promised and that formula applied to all 5 taps. We can cross check that with Exhibit 15 which is Mr Johansen's estimate and Exhibit 32 which is Mr Lee's note on which the charges are based. Estimates for the 5 taps, for the whole of Nofaalii village, 700 ft; the bill 595 ft. an allowance of 105 ft. for 5 taps at twenty-one feet each, otherwise the rest of the bill agrees.

The accused must have known that there was an unbalance between the moneys that he had collected and the money he had paid as there could not possibly have been an estimate which coincided with the actual cost. It is necessary then to examine his mental attitude to the problem of correcting this unbalance. If he had a surplus, where was it to be paid and how was it to be paid - would he pay all of it to the committee - there was no committee in existence. Did he calculate in each case how much he had in each village and pay the surplus to some representative of that village or did he calculate on so much per tap and pay it to the representatives of the tap-holders or was the calculated surplus to be paid to each individual?

It is reasonable to assume that he probably shirked the problem of this unbalance in the moneys and there is some evidence that he had other jobs to do in conjunction with his work as Water Supply Officer, but I do find that he must have known that he had money belonging to other people. He knew that Tauti knew it and most of the tap-holders knew it and nothing was done until early 1957.

Now we come to the conduct of the accused when the investigation started and that does nothing whatsoever to help him because he was not frank in the early stages. He made mis-statements and he endeavoured in some cases to get people who had given information to correct or alter that information, but it could be that knowing he had money belonging to other people, when the investigation started he tried to cover up when he should have been frank. However, the fact is that he did produce records in assisting to clearing this matter up and furthermore paid these moneys which were owing to these tap-holders. Out of this picture of confusion and muddlement (and I think it is proper to say here, that the Government was equally confused and muddled because the Public Works Department job cards did not balance either in themselves or with amounts paid to Treasury) - out of this picture of muddle and confusion I am called upon to find the truth. It is common ground that the surplus moneys must have been collected but that is not enough. It must be shown that the accused had the intention of misappropriating those moneys before he can be convicted of the offence with which he has been charged and I must remind myself here that the onus of proof is on the prosecution: the accused is not required to prove anything; I am not required to be convinced of his innocence but on the contrary I am required to be convinced of his guilt and the Crown must prove intent to steal beyond all reasonable doubt. The position must be shown to be inconsistent with innocence. The evidence falls short of that standard and the four informations for theft relating to the 1955 transactions will be dismissed.

Dealing with the allegation and two charges relating to the alleged thefts of 1957 the position was that still at that time there was no legally constituted West Coast No. 4 Water Supply Committee and that there was in fact no Bank Account into which the money was to be paid and again I find that the accused having made statements that he paid these moneys to his own account for the purpose of safety was reasonable in making that statement, and I have no evidence here on which to convict and these charges will also be dismissed. The position with regard to the two charges of paying moneys to his own Post Office Savings Bank Account is different. The liability is absolute and the facts are clear. The penalty imposed must be substantial. Defendant will be convicted and fined £25 on the first charge and on the second he will be convicted and discharged.

- (3) That interest accrued or to accrue since that date must be credited to the respective estates to which the funds belong.