

HELD AT APIA

CP 73/91

BETWEEN : LAUTAFI LIVI of
Satupaitea in Savaii
Planter

PLAINTIFF

A N D : PINA SU'A of Vaivase-uta
near Apia in Western
Samoa, Engineer

Counsel : Nelson for Plaintiff
Fepulea'i for Defence

Hearing : 4 May 1993

Judgment : 11 May 1993

JUDGMENT OF SAPOLU, C.J.

This is an action which arises out of a contract of sale of goods. That being so the provisions of the Sale of Goods Act 1975 apply. Before I deal with the provisions of that Act which apply in this case, I will refer first to the evidence.

There are two versions of what took place. According to the plaintiff he is a fisherman by trade and the defendant an engineer. The plaintiff had a car which he took to the defendant for repairs. Through talks the plaintiff had with the defendant during his visits to the defendant's premises while the defendant was doing repairs to his car, the defendant became aware that the plaintiff was a fisherman by trade. On some of those visits the plaintiff brought fish for the defendant. On one of these visits the defendant told the plaintiff that he had a friend with a fishing boat outboard motor for sale. The plaintiff then told the defendant

to ask his friend about the price of the outboard motor. When the plaintiff saw the defendant again the following week, he was told that the price was \$4,000. So the plaintiff refused to buy the outboard motor as the price of a brand new outboard motor at Burns Philp's store at that time was \$4,500 and the outboard motor by the defendant's friend was second hand. The defendant then told the plaintiff to leave matters to him and he will negotiate the price with his friend.

When the plaintiff saw the defendant again, he was asked by the defendant to go and see his friend, Eneliko. That seems to be the first time the name of the defendant's friend was mentioned to the plaintiff. When they arrived at Eneliko's place in the defendant's car, the defendant went and talked to Eneliko while the plaintiff sat in the car. The plaintiff says he never talked to Eneliko as it was the defendant who did all the talking with Eneliko. When the defendant returned to the car, he told the plaintiff that the price was to be \$2,000 and that he would exchange his car for Eneliko's outboard motor. An arrangement was then made between the defendant and the plaintiff for the defendant to exchange his car with Eneliko's outboard motor and for the plaintiff to buy the outboard motor from the defendant. It was also the plaintiff's understanding that the person he was dealing with was the defendant, he knew, and not Eneliko, he did not know.

On that same day, the plaintiff paid \$1,000 to the defendant and took the outboard motor. The following week the plaintiff visited the defendant again and paid the remaining \$1,000 which was the balance of the purchase price. In January 1990, about 2 months after the sale, the Police went to the plaintiff's place and seized the outboard motor as it was a stolen property. At no time was the plaintiff aware that the outboard motor was stolen property. It appears clear from the evidence that when the plaintiff obtained the outboard motor he was acting in good faith and without notice

of any defect in the defendant's or Eneliko's title. It was only when the Police came to his place and seized the outboard motor that he knew that the outboard motor he had purchased was stolen property.

The defendant in his version of what happened, says it was the plaintiff who needed an outboard motor. So they went to his friend Eneliko's place and the plaintiff saw the outboard motor and asked Eneliko about the price and the price was \$4,000. So they went back and the plaintiff asked the defendant for assistance. They then returned to Eneliko's place and the defendant enquired of Eneliko and his wife in the presence of the plaintiff whether they wanted his car to which Eneliko and his wife replied yes. So the defendant said to the plaintiff, that is my assistance, meaning the defendant's car would be given to Eneliko and Eneliko would hand over the outboard motor.

The defendant and the plaintiff then went back to the defendant's place in the defendant's car together with the outboard motor. The plaintiff then told the defendant that he would pay \$2,000 for the outboard motor and paid \$1,000 the same day. About a week later, the plaintiff paid the remaining \$1,000 to the defendant. The defendant kept the \$2,000. The defendant also says that he was not aware that the outboard motor was stolen property. In cross-examination, he also says that the value of his car which he gave Eneliko for the outboard motor was about \$5,000. So he lost about \$3,000 on this deal.

In view of the conflicting versions by the plaintiff and the defendant, it is for the Court to decide which evidence is to be believed and accepted. Having observed both the plaintiff and the defendant giving evidence, I have decided to accept the evidence of the plaintiff as representing the truth of what happened in this case. I was not impressed with the defendant and his evidence and I have decided to disbelieve his evidence.

The contract in this case is clearly a contract of sale of goods. Such contract is defined in section 2(1) of the Sale of Goods Act 1975 (hereinafter referred to as "the Act") to include a sale as well as an agreement to sell. There is no dispute that an outboard motor is "goods" within the meaning of the word "goods" as defined in Section 2(1) of the Act.

There was dispute, however, during the course of the hearing whether the contract is between the plaintiff and Eneliko and therefore the action should be dismissed as the wrong party has been cited as defendant, or whether the contract is between the plaintiff and the present defendant. As the Court has accepted the evidence of the plaintiff, I am of the view that the contract of sale in this case is between the plaintiff and the defendant and not with Eneliko. It was the defendant who brought to the attention of the plaintiff that his friend, Eneliko, had an outboard motor for sale. Eneliko was unknown to the plaintiff and it was the defendant who talked to Eneliko about the sale of the outboard motor to the plaintiff. At no time did the plaintiff talk with Eneliko. The price of \$2,000 that the plaintiff paid was paid, not to Eneliko, but to the defendant and the defendant kept that money. The money was not handed over to Eneliko. The reason for that was that the plaintiff and the defendant had agreed to an arrangement for the defendant to exchange his car with the outboard motor from Eneliko and the plaintiff would buy the outboard motor from the defendant.

There is another difficulty in respect of the defendant's position. If one were to ask what consideration did Eneliko receive for the outboard motor, the answer is, the car. And if one were to ask further, but where did the car come from and whose car was it, the answer is, the car came from the defendant and it was the defendant's car. So there was no consideration moving from the plaintiff to Eneliko and the plaintiff is thus not a party

to the exchange of goods between the defendant and Eneliko. The transaction between the defendant and Eneliko is certainly not a contract of sale of goods because section 3(1) of the Act provides that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods for a money consideration called "the price". In this case what Eneliko received as consideration for the outboard motor was not money but a car. The transaction between the plaintiff and the defendant involved the exchange of an outboard motor for a money consideration and that transaction has the attributes of a contract of sale as provided in section 3(1) of the Act. It must, however, be pointed out that there may be cases of contract of sale where the consideration is partly in money and partly in kind but we are not here concerned with such case.

Having found that the contract in this case is a contract of sale between the plaintiff and the defendant, it appears that what the plaintiff is claiming special damages for is recovery from the defendant of the sum of \$2,000 he paid for the outboard motor seized by the Police as it was stolen property. Now section 53 of the Act, so far as it is relevant, provides :

"Nothing in this Act shall affect the right of the buyer.....

"to recover money paid where the consideration for the payment

"of it has failed."

So in effect, what the plaintiff is saying is that, he is the buyer under the contract of sale between himself and the defendant, the seller.

The consideration for the money he paid to the defendant, the seller, has failed completely, therefore he should recover his money back. However the matter is not as straightforward as that. To succeed in an action for recovery of money paid under a contract of sale ~~between~~ where there has been a total failure of consideration, the buyer must first ensure that his way is clear through the other provisions of the Act that may be relevant to his claim. The relevant provision of the Act to this claim is section 13(a)

which provides :

"In a contract of sale, unless the circumstances of the contract
"are such as to show a different intention, there is --

" (a) an implied condition on the part of the seller that
"in the case of a sale he has a right to sell the goods, and
"that in the case of an agreement to sell he will have a right
"to sell the goods at the time when the property is to pass."

There is nothing in the evidence to suggest that the parties had a
different intention as to the right of the defendant to sell the outboard
motor to the plaintiff. Thus the implied condition on the part of the
seller that he has a right to sell the goods applies. This implied
condition on the part of the seller is sometimes expressed as the seller's
implied undertaking as to title to the goods.

There is no dispute that the outboard motor purchased by the
plaintiff from the defendant was stolen property. It is not mentioned in
the evidence who the true owner was or who was the thief. What is mentioned
in the evidence is that neither the plaintiff nor the defendant was aware
at the time of the sale that the outboard motor was stolen property and
that the plaintiff acted in good faith and without notice of any defect in
title. The effect of all this in the circumstances of this case, is that
the defendant had no title or right to sell the goods he sold to the
plaintiff as the goods were stolen goods and the true owner therefore still
had the title to the goods. It follows that the defendant was in breach
of the implied condition in section 13(a) of the Act. As a consequence,
the contract of sale is void and the plaintiff is entitled to succeed in
his claim for recovery of the sum he had paid for a consideration that
totally failed. If authority is needed for the point that sale of stolen
goods to an innocent buyer without notice and acting in good faith makes
a contract of sale void, I refer to the decision of the House of Lords in

Cundy v Lindsay (1878) 3 AC 459, in particular the judgement of Lord Cairns, and Rowland v Divall (1923) 2 KB 500. There have been criticisms of the latter decision but I do not think those criticisms would affect the just outcome of this case as the Court did not believe the defendant and what he says.

It must also be pointed out that the circumstances of this case must not be confused with the provisions of section 23 of the Act. What section 23 is referring to is circumstances where the title of the seller is voidable whereas in this case the title of the defendant to the goods is not voidable, but void, as the goods he sold was stolen property.

As to the claim for general damages I accept that the plaintiff is entitled to some such damages. On the basis of the evidence adduced, I am only prepared to assess general damages at \$150.

In all then, the plaintiff is awarded \$2,000 for special damages and \$150 for general damages. Costs are also awarded to the plaintiff which I fix at \$300.

T F M Sapolu
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Chief Justice