IN THE SUPREME COURT OF TONGA C3,510/97
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

REX

-V-

HALA TAVALEA

BEFORE HON JUSTICE FINNIGAN

Counsel appearing: Mr Malolo for the Crown, Mr Tu'utafaiva for the Accused

Date of hearing: 31 May, 1999
Date of judgment: 1 June 1999

VERDICT OF FINNIGAN J

The accused is charged with arson under s 177 of the Criminal Offences Act, cap 18. The Crown alleges that on/about 20 September 1997, together with Uate Kailahi, he wilfully and without lawful justification set fire to Fungaveita store, which fire spread to two other stores and caused damage approximately T$446,500 in total.

This is a very serious crime, if proved. The evidence, if accepted, shows that two other persons were involved, but neither has been tried. Whatever part the accused may have played, he was a minor actor in the burning down of these buildings. The Court must ensure that it judges this accused by the evidence against him and not take into account other things that are not part of the evidence.

Mr Tu'utafaiva has ensured that the trial has been conducted economically as he always does, without any red herrings at all. The issues are narrow. Thus, there is no dispute that the buildings concerned were burned down by the application of fire to them, and that the claimed damage was caused thereby. There is no issue about the physical presence of the accused near the scene at the time the fire was lit by his co-accused. There is no dispute that the accused made three statements to a police officer, Sgt Vaihu, which, if accepted, amount to admissions of knowing involvement in the unlawful burning of these buildings by Uate Kailahi.

Two defences are raised. The first is that the evidence shows the accused is at worst, a party who abetted a crime committed by Kailahi, and the Crown has deliberately not charged him as a party. Instead, it altered the charge against him from that charge to a charge of full complicity as an offender in a joint enterprise. The second is that, even if the evidence of abetting by the accused is sufficient to bring him within the ambit of a joint perpetrator of the

crime, there is still no proof that the accused, in being present near the scene with Kailahi, was there with the necessary guilty mind.

THE EVIDENCE

Without details, the evidence of the Crown is that the accused, in three separate interviews with Sgt Vaihu, stated voluntarily that he had gone with Kailahi to the store as his partner in crime, being advised on the way what was about to happen and why. It is evidence that he associated himself with Kailahi by waiting in the van nearby while Kailahi lit the fire, ready, as agreed with Kailahi, to sound the horn of the van if anybody appeared. It is evidence that when the fire had burned the building, he was paid T$200 by Kailahi for his part in the crime.

The evidence of the accused is that he did not say everything that is recorded as his statements, and in particular did not admit that he was to be paid for the work by Kailahi and did not admit that he had agreed with Kailahi to do the work. He said in evidence that he signed his statements without knowing what was written because he could not read the writing, which was too small. He said he thought he was going with Kailahi on the usual nightly errand from their security job, to get hot water and bread. He said he found out only after the vehicle stopped near the scene what Kailahi had in mind, and that he immediately refused to do the work. He said he remained in the van while Kailahi was away lighting the fire because he was afraid that leaving would cause Kailahi to dismiss him from his security job. He said he accepted the money because he was frightened that Kailahi would carry out his threat and make something happen to him and/or his family if he did not.

VERDICT

I must say that, having observed the police officer and the accused give evidence, I am satisfied that what is written in the records of the three interviews is a coherent, consistent and truthful account of what the accused said to the police officer, voluntarily, over three different occasions. In the facts of this case, the fact that he was in custody is by itself insufficient reason to reject the statements, and there is no other reason appearing. Even if the accused cannot read, that would not go to show that the recorded statements are untrue. About that, I know the accused wrote a small part of the written statements himself and signed it. I do not think he is an expert writer, but there is very little help for him in his claim that he could not read what the sergeant wrote. I have been shown no reason to think he did not know what had been written. Even if that were so, there are only two statements out of a large number that he challenges, and the statements even without those two answers tend to only one conclusion. He knew what Kailahi was about, and went along with him, knowing that.

For that reason alone, I find that the evidence of the statements is evidence of a knowing partnership with Kailahi when Kailahi lit the fire. I cannot accept that there is a reasonable doubt about whether the accused had the same guilty intention as Kailahi. I find the charge as set out in the indictment is proved beyond reasonable doubt.

In respect of the first defence, that the charge that may have been proved was not the charge in the indictment, the situation is covered, if necessary, by s 42(3) of cap 18. That provision is authority for the court, when the allegations in the indictment amount to or include a charge that has not been laid but has been proved, to convict an accused on the other charge. That section would apply in the present case and on the evidence the accused stands to be convicted of a crime under s 8 of cap 18, namely abetting Kailahi's crime, as well as actually committing it.

That would be so even if the Court accepted the evidence of the accused. He said he knew nothing of the intention to burn the store until he arrived. Yet after that he sat in the van, with instructions to sound the horn if anybody came, and after the fire was lit he stayed with Kailahi, and he accepted the money. It is not a defence for him to say that he was afraid of losing his job, and was afraid something might happen to him or his family. By staying with Kailahi, he looked after the van and was ready to sound the horn as a warning. By doing that he gave Kailahi his assistance. He should have left the van, and gone away, so that it was clear to Kailahi that was doing nothing to help. There might then have been a reasonable doubt about whether he was part of Kailahi's plan, and he might have been acquitted.

The accused is convicted and remanded for pre-sentence report. Bail will continue on the same terms until he is sentenced.

NUKU'ALOFA: 1 June 1999 **JUDGE**