IN THE SUPREME COURT OF TONGA

CRIMINAL APPEAL JURISDICTION

VAVA'U REGISTRY **CR. APP.437/99**

REX

-V-

HENELIKA FUNAKI

BEFORE HON JUSTICE FINNIGAN

Counsel : Mr Cauchi for Appellant, no appearance for respondent

Date of Hearing : 22 October 1999
Date of Judgment : 30 November 1999

JUDGMENT OF FINNIGAN, J

This is an appeal against a finding of the learned Magistrate in a hearing of a charge of abetment of a crime. The facts are these. A principal offender committed the crime of theft by uprooting kava plants and carrying them to the roadside. He then went and got the other accused, the respondent in this case, who came in his car and helped the principal offender, by transporting the stolen goods.

The man with the car, the respondent, was charged with abetting the crime of theft, under s 8 of the Criminal Offences Act, cap 18. The learned Magistrate held that the crime of theft had been complete before the respondent became involved. The Magistrate thus held that he was not guilty of abetting that crime under s 8, but that he could have been found guilty had he been charged under s 13 of that Act.

I have my doubts about whether the facts fit within s 13, which is the crime of assisting a criminal by doing something to impede his apprehension, prosecution or sentence. Certainly, under s 148, the respondent would have committed a crime of receiving, once he had taken some or all of the stolen property into his possession knowing it had been stolen. It is possible too that the evidence may have established the offence of being in possession of stolen property under s 153. However, the question for the learned Magistrate was whether, in what occurred, the respondent committed the crime of abetting theft.

In arguing this appeal against the learned Magistrate's ruling, Mr Cauchi did not seek to deprive the respondent of the benefit of his acquittal. What the Crown seeks is only a ruling on the application of s 8 to the facts as found by the Magistrate. Mr Cauchi submitted that in applying s 8, the Magistrate had considered only the words "commands, incites", and had overlooked the overall sense of s 8 for which one must also take into account the associated words "encourages or procures". He referred to the wording of similar provisions in other jurisdictions, such as "aids, abets, counsels or procures", and submitted that although the words in s 8 are different, their meaning is the same. In his submission the respondent could at law become involved and be an abettor of the theft even though a theft has been completed.

I accept that submission. There are two points to be made. The first is that the offence of abetting is defined by four words that must be read together, even when interpreting only one of them. The words take their colour from each other. The principle *noscuntur a sociis* is perhaps best translated as "words of a feather flock together". Therefore, the general sense of s 8, even with the restrictive interpretation applied to criminal statutes, must be taken from all of the words, and is broad rather than narrow. In the words of s 8, an abettor of an offence committed by another person is "every person who directly or indirectly commands, incites, encourages or procures the commission of [that] offence". This means that an abettor is a person who does any action within that range. The act of the respondent in the present case, helping a thief to carry away stolen kava plants, was encouraging the thief.

The second point is that an offence is not necessarily over even though it is legally complete. There are many examples of this, a common one is the offence of exceeding a legal speed limit. That offence can be completed in the blink of an eye, but the offender may continue, still committing the same offence, for a period of time. A person may encourage that offender by word or action (some authorities say, even by inaction and silence) after the offence is complete and is still continuing. Theft provides another example. A person may pick up a coin belonging to another, intending to deprive the owner of it permanently, and be guilty of theft as soon as the act of taking is complete, i.e. within a very short period of time. Sometimes proof of the *mens rea* is available immediately, e.g. from words said during the action, or almost immediately, e.g. from concealing the coin in a hand, or putting the coin in a pocket. Proof of the *mens rea* may not come till later, e.g. from the fact that the taker walks out of the room with the coin still concealed, or walks out of the building with it, or arrives at another place some time later with it. The crime of theft was complete as an offence as soon as the act of taking and the intention to deprive permanently were both complete. Whether the necessary evidence that proves the offence becomes available immediately or does not come until some later point during the journey, it is still the same theft. By merely transporting a stolen item, a thief does not add anything to the theft, but he does continue the theft, and he is adding further acts by which the seriousness of his offence may be judged. The

theft is still going on, even though the ingredients of theft have all been present for some time.

Therefore, the offender in the present case was still engaged in the theft of the kava plants when he left them and went away to get help to carry them. He was still engaged in the theft when he came back with the second man to get them. As soon as the second man did some action or said some word that incited or encouraged the first to continue taking the kava plants, knowing that the first man had stolen them, he was a party to the theft.

DETERMINATION

Therefore, pursuant to s 80 of the Magistrates' Court Act, cap 11, in determining this appeal I declare that in the present case the law permits conviction of the respondent for the offence of abetting theft. I make no further orders and leave the decision of the learned Magistrate, by which he acquitted the respondent, undisturbed.

NUKU'ALOFA, 30 November 1999 **JUDGE**