

IN THE SUPREME COURT OF WESTERN SAMOAHELD AT APIAS. 35/94BETWEEN: THE POLICEInformantA N D: TIPI MAGASIVA MALAITAI
of LefagaoaliiDefendant

Counsel: K. Latu for prosecution
P. Fepuleai for accused

Hearing: 15th and 16th August 1994

Judgment: 18th August 1994

JUDGMENT OF SAPOLU, CJ

The accused is charged under sections 85 and 86 of the Crimes Ordinance 1960 that at Ologogo, Savaii on the 18th day of December 1993, being a servant of the Western Samoa Trust Estates Corporation (WSTEC), he did steal three cattle beasts valued at \$400 each which were the property of his employer, WSTEC.

The evidence shows that the accused was first engaged in the employment of WSTEC on its Ologogo farm in Savaii in 1986. He started off as a driver and at the time of this alleged incident he was holding the rank of foreman which is the second most senior position after the farm manager on the Ologogo farm. From January 1993 to October 1993, when WSTEC had no manager on its Ologogo farm, the accused became acting manager until Lui Wulf was appointed manager of the farm. The accused then became full time foreman

again until January 1994 when his employment was terminated due to the present incident.

It appears from the evidence that on 15 December 1993, the accused was approached by a relative named Vaitogi Konelio with a request to buy three cattle beasts for a faalavelave. A total sum of \$1,100 was paid to the accused for the price of those cattle beasts. It was arranged upon request from Vaitogi that the cattle beasts were to be slaughtered after midnight in the early hours of Saturday morning, 18 December 1993, obviously because Vaitogi's faalavelave was not to be held until the afternoon of that same day. The accused says that his family has their own livestock but he, himself, also had three cattle beasts on the WSTEC's farm at Ologogo. On Friday, 17 December 1993, the defendant instructed Siliva Avapalu, a cowboy employed on the WSTEC farm, to round up three cattle beasts with cut marks on their left ears and put them in the stockyard. At that time the farm manager was visiting his family in Apia as he normally did for weekends.

Now after 1.00am in the early hours of Saturday, 18 December, the accused, Vaitogi and three other men went in a truck through the road at Paia to the WSTEC farm at Ologogo. When they came to Foisala's farm at Ologogo, their truck was noticed by Sepulona who was sleeping with one Tualagi on Foisala's farm. These two men then put some logs on the road to stop the truck on its return. Meanwhile the truck continued on to the WSTEC farm. Upon arrival at the WSTEC farm the truck went to the stockyard where Siliva had rounded up three cattle beasts the previous day on instructions from the accused. Siliva then chased the cattle beasts up the stockyard and as they came up the stockyard, the accused shot each one of the cattle beasts with a single-shot gun. The carcasses of the cattle beasts were then pulled

onto the tray of the truck, covered with a tarpaulin, and the truck headed back to the village. When the truck came to Foisala's farm it stopped.

There is some discrepancy here in the evidence whether the truck stopped because of logs which had been placed on the road by Sepulona and Tualagi or because the defendant who was at the front seat with the driver saw Sepulona and Tualagi. There is also some discrepancy as to what was said between the defendant and Sepulona and Tualagi. Be that as it may, I am of the view that this part of the evidence does not have a material bearing on the elements of the charge or the outcome of this case.

The truck then continued on its journey with its cargo of carcasses of cattle beasts taking the Lefagaoalii road. When it came to the village at Lefagaoalii, the accused and Siliva got off and the truck continued to Salelavalu where Vaitogi's faalavelave was to be held. At Salelavalu the carcasses were off-loaded and Vaitogi also got off.

It must be said at this junction that the evidence up to the point that the accused, Vaitogi and the other three men arrived at the WSTEC's farm at Ologogo and then slaughtered three cattle beasts is not in dispute. Vaitogi and those three other men all testified as to how they travelled in the truck to the WSTEC farm and how the three cattle beasts were shot by the accused^{and} placed on the tray of the truck. Their evidence as to what happened are substantially consistent. The witness Siliva also testified as to how he rounded up the three cattle beasts on Friday, 17 December, and put them in the WSTEC farm stockyard on instructions from the accused.

Insofar as these men (other than the accused) were parties to the killing and removal from the WSTEC farm of these three cattle beasts they

must be treated as accomplices and their respective testimonies must be treated with due caution. The same caution applies to the testimony of the witness Siliva about rounding up the cattle beasts and putting them in the stockyard on the day before on instructions from the accused. In law it is dangerous to accept the testimony of an accomplice and convict on such testimony without corroboration. I bear that warning in mind. However there is no general rule of law against mutual corroboration and witnesses whose testimonies require corroboration can corroborate each other : see D.P.P. v Hester [1972] 3 All E.R. 1056. Having considered the respective testimonies of the witnesses who attended with the accused to the killing of the cattle beasts, I am satisfied that their respective testimonies corroborate each other in material particulars. There is also the cautioned statement and oral testimony of the accused which afford cogent corroboration to those witnesses testimonies including Siliva's testimony as to the rounding up of the cattle beasts and putting them in the stockyard the day before the slaughtering.

Now essentially what the accused says is that the three cattle beasts he slaughtered belonged to him as they were in exchange for four horses and one foal he gave to WSTEC for use on its Ologogo farm. He says that in 1992 there were only two old horses on the WSTEC farm and as those horses were no longer of use for farm work, the then farm manager ordered that those horses be removed and replaced. The accused then brought four horses and a foal of his own in November 1992 to be used for work on the farm. At that time, the accused says there was a WSTEC policy that horses given to WSTEC for farm work were compensated with an exchange of WSTEC cattle beasts. So what he did was to earmark three WSTEC calves between two and three months old with cuts on their left ears as his own in exchange for the four horses and

one foal he had given to the WSTEC farm. These calves were kept on the farm during the time the accused was acting farm manager from January to October 1993. When the new farm manager Lui Wulf was appointed in October 1993 the accused says he informed the new farm manager about his three cattle beasts which were in exchange for the horses he had given to farm. The new farm manager replied that was alright. The new farm manager gave evidence and he confirmed that when he was appointed farm manager at Ologogo and came onto the farm, the accused did tell him that he had three cattle beasts on the farm which were in exchange for the four horses he had given to WSTEC for work on the farm. He accepted that statement from the accused. He also observed on the farm the three cattle beasts which were differently earmarked for the accused as WSTEC cattles were marked with a tag in the shape of a "W" on the right ear and branded on the right hind leg. The accused's three cattle beasts were marked with cuts on the left ears without any brands on their hind legs.

These were the three cattle beasts that the accused says he shot and gave to his relative Vaitogi. The witness Siliva in his evidence says that the three cattle beasts which were slaughtered were all marked with a cut on the left ear. As already stated when this incident took place, the farm manager was in Apia. The accused says that when the farm manager returned to the farm, he informed him that he had removed his three cattle beasts. This is confirmed by the farm manager who says in his evidence that about the Christmas weekend in 1993, he was informed by the accused that his cattle beasts had been removed from the farm. When the accused left the employment of WSTEC, he says his horses ^{were} left behind on the farm and he has never taken them back. What the accused says in his oral testimony is substantially consistent with what he told in his cautioned statement to the Police investigating officer

The general manager of WSTEC also gave evidence and he says that he did not know whether the accused had horses on the WSTEC farm at Ologogo. However, he knows that some WSTEC employees have horses on the Ologogo farm. He also says that the procedure when a person wants to buy cattle from WSTEC was to apply to the head office in Apia and pay for the cattle there. The cattle will then be slaughtered at the WSTEC abattoir at Vaialele. He also says that WSTEC policy with regard to its Ologogo farm is that no cattle beast is slaughtered on that farm without the authority of the general manager and he has never given any authority for a cattle beast to be slaughtered at Ologogo since he was appointed general manager in 1992.

Counsel for the accused puts the defence for the accused on the basis that the accused had ownership of the cattle beasts he slaughtered. That is because these cattle beasts were taken by the accused in exchange for his four horses and one foal given to the WSTEC farm at Ologogo. This was in accordance with WSTEC policy that WSTEC cattle beasts could be exchanged for horses given to WSTEC farms. I have some reservations about this defence of ownership. The accused unilaterally earmarked three WSTEC cattle beasts in November 1992 as his own in exchange for his horses. WSTEC was not informed about it until the new farm manager took over in October 1993. It is not clear whether property in the cattle beasts had passed to the accused, and, if so, at what point in time. What happened was that after the accused had informed the new farm manager about the cattle beasts, the latter said that was alright. It is not clear whether the new farm manager had authority to ratify the exchange the accused says he had done unilaterally on his own. It is arguable that at least from that point in time the property in the cattle had passed to the accused. The rules provided in the Sale of Goods Act 1975, for ascertaining the time when property in goods passes from seller

to buyer, are not of real assistance here as the transaction in this case is not a contract of sale goods for money consideration but seems to be a barter, which is an exchange of goods. What must be said, however, is that burden of proof in this case is on the prosecution. It is for the prosecution to prove the charge beyond reasonable doubt. I am in doubt whether ownership of the three cattle beasts had passed to the accused as he claims. Be that as it may, it is my view, that if property in the cattle beasts had passed to the accused then he cannot be convicted of theft. Likewise, if the evidence creates a reasonable doubt as to whether property in the cattle beasts had passed to the accused, that doubt should be resolved in favour of the accused and he must also be acquitted.

If, however, the prosecution is right that ownership of the slaughtered cattle beasts was still with WSTEC and had not passed to the accused, there is a second possible defence open to the accused on the evidence. This is the common law defence of claim of right which applies to offences relating to property. In New Zealand the defence was put in this way by Henry J in Murphy v Gregory [1959] N.Z.L.R. 868, 872 :

"The essence of the defence of colour of right is honesty of purpose. Where an accused person really believes he has the right asserted, it is a good defence even if he is mistaken both in fact and in law....it is for the prosecution to prove there was no colour of right. If a prisoner puts forward, however wrongheadedly, an honest claim of right, he ought to be acquitted".

See also for an application of this defence the judgment of the New Zealand Court of Appeal in R v Nottingham [1992] 1 N.Z.L.R. 395.

In English law the phrase "claim of right" is used instead of the phrase "colour of right" used in New Zealand law. The two, however, really

mean the same thing. The defence of claim of right under English common law is stated in this way in Stephens History of the Common Law, Vol.III :

"Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be. This, if not the only, is nearly the only case in which ignorance of the law affects the legal character of acts done under its influence".

This passage from Stephens History of the Common Law, Vol.III was cited with approval by the English Court of Appeal in R v Bernard (1938) 26 Cr. App. R.137, 145. The Court in that case also said :

"if the prisoner honestly thought that she had a claim [of right], she was entitled to be acquitted, even though she was wrong in so thinking".

In Australia the phrase "claim of right" is also used as opposed to the phrase "colour of right". However as I have stated the two really mean the same thing. As shown from the judgments of the High Court of Australia in the case of Wolden v Hensler [1987] 163 C.L.R. 561, the defence of claim of right is also available under Australian criminal law. In that case Brennan J cited with approval the following passage from the judgment of Gibbs J in R v Pollard [1962] Q.W.N. 13, 29 :

"In R v Pollard, Gibbs J in a judgment in which Stanley and Hanger JJ concurred said : 'An accused person acts in the exercise of an honest claim of right, if he honestly believes himself to be entitled to do what he is doing....

'It is not to the point that the accused had no right to take the vehicle. If he had honestly believed that he was entitled to take it, or if the jury had a reasonable doubt whether he had such belief, he should have been acquitted, however wrong his belief may have been, and however tenuous and unconvincing the grounds for it may seem to a judge'".

What is of added importance about that case is that it appears from the judgments of Brennan J and Gaudron J that they do recognise the existence of the defence of claim of right at common law. In 1 Adams Criminal Law C.A. 2.06.06, there is also reference to a common law defence of colour or claim of right.

The question now is whether this common law defence of claim of right or colour of right exists under Western Samoan law. I am in no doubt that the answer must be yes. Section 9 of our Crimes Ordinance 1960 preserves all rules and principles of the common law which render any circumstances justification or excuse for any offence unless they have been altered or are inconsistent with any enactment. I have found no such alteration or inconsistency. Article 111(1) of the Constitution under the definition of "law" also applies the English common law to this country except in certain circumstances which do not apply to this case. I have therefore come to the view that the defence of claim of right, or colour of right as it is called in New Zealand, is available under Western Samoan law to offences relating to property which includes theft as is charged in this case. As the defence is called claim of right under the common law, I would prefer to use that phraseology to describe the existence of this common law defence under Western Samoan law.

Applying this defence of claim of right to this case, it is clear from the accused's cautioned statement as well as his oral testimony, that all along he asserts that the three cattle beasts he slaughtered belonged to him as those cattle beasts were in exchange for the horses he gave to the WSTEC farm at Ologogo. He earmarked those cattle beasts differently from other WSTEC cattle and he told the new farm manager when he took over the

farm in October 1993 that he had these three cattle beasts marked differently in exchange for his horses. After the accused slaughtered the cattle he informed the farm manager he had removed his cattle. When the accused's employment with WSTEC was terminated he says he left the horses with WSTEC. The farm manager says the accused did not remove any horses when he left the employment of WSTEC and the general manager of WSTEC says that he knows that WSTEC employees have horses on the farm at Ologogo. It is also clear from the evidence of the farm manager and that of the accused that WSTEC has a policy of exchanging WSTEC cattle for horses.

All these evidence, plus other evidence related to the present issue given in this case, have satisfied the Court that even if the property in the slaughtered cattle beasts was still with WSTEC and had not passed to the accused the defence of claim of right must succeed. It is clear that the accused firmly believed that the slaughtered cattle beasts belonged to him. His conduct in discussions with the farm manager about these cattle beasts is testimony to that belief. From the evidence as a whole, it cannot be said that the accused's belief, even if mistaken, was without any reasonable grounds to support it even though reasonable grounds are not essential to the defence of claim of right. The result of this is that the taking required for the offence of theft was neither fraudulent nor dishonest. But even if for some reason there is doubt on the evidence as to the availability of this defence in this case, it is clear from the passage cited from Murphy v Gregory (supra) that the burden of proving beyond reasonable doubt that there was no claim of right rests on the prosecution. In my view the prosecution has not discharged this burden beyond reasonable doubt.

It is clear to me that the defence of claim of right is directly related to the elements of fraud and dishonesty provided in section 85 of

the Crimes Ordinance 1960 for the crime of theft. Where the defence is established, it must necessarily negative fraud and dishonesty. But if there is a reasonable doubt as to the existence of the defence of claim of right, then it must mean that the prosecution has not proved the elements of fraud and dishonesty beyond reasonable doubt.

For all those reasons the charge is dismissed.

T F M Sapala
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CHIEF JUSTICE