IN THE COURT OF APPEAL
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 7 of 2020

In the matter of section 17D of the *Court of Appeal Act* and a submission by the Attorney General of questions of law arising at or in connection with the trial in *R v Vaipulu Ikamanu* (CR 53 of 2020)

JUDGMENT

Coram: Whitten P
Moore J
Randerson J

Counsel: Mr J. Lutui DPP for the Attorney General
Mr S. Taione for Mr Ikamanu

Date of hearing: 23 March 2021
Date of judgment: 30 March 2021

Nature of the appeal

1. In Supreme Court proceedings CR 53 of 2020, Vaipulu Ikamanu was charged with two counts of causing the importation of prohibited goods (a rifle and ammunition) contrary to s.95(1) of the *Customs and Excise Management Act* ("***Act***").

2. On 3 September 2020, Niu J acquitted Mr Ikamanu on both counts.[1] In doing so, the Judge held, relevantly, that:

   (a) s.117 of the Act was ultra vires clause 11 of the Constitution and therefore void pursuant to clause 82; and

   (b) s.95(1) of the Act did not provide for an offence of causing to be imported any restricted goods.

3. Section 17D of the *Court of Appeal Act* provides, relevantly:

   17D Appeal after acquittals

[1] *R v Ikamanu* [2020] TOSC 67; CR 53 of 2020 (3 September 2020).

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> (1) Where a person tried on indictment has been acquitted (whether in respect of the whole or part of the indictment) the Attorney General may, after the conclusion of the trial, submit for determination by the Court of Appeal any question of law arising at or in connection with the trial.
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> ...
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> (5) The determinations by the Court of Appeal of the question submitted shall not in any way affect or invalidate any verdict or decision given at the trial.

4. In this proceeding, the Attorney General asks this Court to determine the following questions of law:

   (a) Was Niu J correct when he ruled that s.117 of the Act is void because it is inconsistent with clause 11 of the Constitution?

   (b) Does a charge of causing to be imported prohibited goods under s.95(1) of the Act include causing to be imported restricted goods, by virtue of the definition of "prohibited goods" in s.2 of the Act?

Section 117

5. During his opening of the trial below, after outlining the elements of the offences under s.95(1), the Prosecutor stated:

> *"Section 117 of the same Act states that the onus of proof shall lie with the accused in any smuggling or counterfeit prosecution which is what this case is about. Smuggling means the importation or exportation of goods with the intention to defraud the revenue and includes the importation or exportation of prohibited or restricted goods.... The Crown anticipates that the accused will deny the charges because he has a licence permitting him to import goods from overseas and did not know that the firearms imported exceeded the amount that he was permitted to import...."*

6. At the conclusion of the evidence, Mr Tu'utafaiva, who appeared for Mr Ikamanu below, referred to s.117 in the following terms:

> *"... As to the first issue of the burden of proof, it is counsel's practice to submit at the beginning of the closing submission that the prosecution has not proven its case beyond reasonable doubt. However s.117 of the CEM Act provides, ... that the onus of proof shall lie with the accused in any smuggling or counterfeit prosecution. The term smuggling is defined in the Act to include the importation of prohibited or restricted goods. Import is also defined in the Act to mean to bring goods or cause goods to be brought into the Kingdom. It is therefore accepted that this case is a smuggling prosecution and the issue then is what matters the defendant shall prove as provided in*

> *s.117. ... it is submitted that it is not for the defendant to prove all the elements of the offence; that burden is on [the] prosecution to prove. In other words, s.117 is nothing more than the 'reverse onus' principle. That is, the defendant is entitled to raise a positive defence on the balance of probabilities. The onus then reverts to prosecution to disprove the positive defence beyond reasonable doubt. In this case, the defendant says that he did not know that the .22 rifle and ammunition charged against him were in the box. The Crown then has to disprove the allegation by the defendant...."*

7. During his closing submissions, the Prosecutor did not make any reference to s.117. It is clear both from the written submissions and the transcript of the oral submissions that the Prosecution proceeded in the conventional way by appearing to accept that it bore the onus of proving all elements of the offences beyond reasonable doubt. The submissions did not include any reference to the defendant having to disprove any element of the offences or whether in fact the defendant had done so.

8. In his reasons for verdict, the Judge stated:

> *[13] Normally, and it is law, the prosecution carries and bears the burden of proof in criminal trials, such as the present trial, unless express provision is made in a particular law concerning the trial that it does not bear that burden. S.117 of the Customs and Excise Management Act (the Act) provides:*
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> "117. **Smuggling prosecutions.**
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> The onus of proof shall lie with the accused in any smuggling or counterfeit prosecution."
>
> *and the term "smuggling" is defined in the Act to include the importation of prohibited or restricted goods and "import" is defined to mean:*
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> *"to bring goods or cause goods to be brought into the Kingdom."*
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> *[14] Mr Tu'utafaiva argues that (despite the provisions of S.117) it is not for the accused to disprove all the elements of the offence. He says that S.117 is no more than the "reverse onus" principle which he says is that: the accused is entitled to raise a positive defence, and that if he is able to establish that defence on a balance of probability, the onus then reverts to the prosecution to disprove that defence beyond reasonable doubt.*
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> *[15] Mr Fifita made no submission about this issue which Mr Tu'utafaiva has referred to but he had stated in his opening for the Crown at the commencement of this trial that the accused shall bear the burden of proof in a smuggling or counterfeit prosecution, which this case is, as is provided in S.117 of the Act."*
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> *[16] There are three problems with S.117 in the present case. Firstly, the definition of smuggling does not include "**causing** the importation of prohibited goods" which is the specific offence in S.95 (1) with which the accused is charged.*

> *[17] Secondly, what is the onus of proof that shall be with the accused? The proof of what? It is unfortunate that the Act is silent about what it is that the accused has the burden of proving. It leaves both the prosecution and the defence to speculate as to what it means. Despite what the provision says, the Crown has not relied upon it and has instead prosecuted its case against the accused as if the burden of proof lies upon it instead, and then merely says that the accused has the burden of disproving the case against him. On the other hand, the defence says that the provision is no more than the reverse onus principle which is that as long as the accused has established a positive defence, upon a balance of probability, the onus reverts to the prosecution to disprove it beyond a reasonable doubt."*

9. At [18], his Honour opined that the position would be clearer if s.117 'had clearly provided for what it is that the accused or the prosecution has to prove'. He referred to s.154 of the U.K. *Customs and Excise Management Act* 1979 which details the issues or elements on similar charges which may be the subject of prima facie proof and those for which the burden of proof lies on specified persons who either bring or against whom proceedings are brought under that Act.

10. His Honour then continued:

> *"[19] Thirdly, S.117 may be ultra vires clause 11 of the Constitution, because it intends that the accused shall bear the burden of proving his innocence in a smuggling or counterfeiting prosecution. That is because the prosecution in such prosecution does no more than to present the accused with the appropriate indictment and leaves it to him to prove that he did not do what is alleged he has done in the indictment. If he cannot prove it, then he is convicted.*
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> *[20] Clause 11 provides on the other hand as relevant, as follows:*
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> > 11. **Procedure on indictment**
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> > No one shall be tried ... unless he have first received a written indictment ... Such written indictment shall clearly state the offence charged against him and the grounds for the charge. And at his trial the witnesses against him shall be brought face to face with him (except according to law) and he shall hear their evidence and shall be allowed to question them and to bring forward any witness of his own and to make his own statement regarding the charge preferred against him ....
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> *[21] The words in brackets "(except according to law)" in that clause were inserted to enable the admission of evidence of experts overseas who have analysed drugs forwarded by the police in Tonga without the experts having to attend at great costs, unless the accused gives reasonable notice that he wants to cross-examine such witness, and the accused, if convicted may be ordered to pay for the costs of the expert in attending for that purpose. They certainly do not mean that the Legislature could thereby enact a law that the onus of proof of guilt of an accused person be shifted altogether so that he*

has to prove his innocence instead. That would render the whole of the above quoted provision of clause 11 pointless.

[22] To me, clause 11 is the foundation upon which the rule of law, due process and natural justice are based. It is the basis upon which the fundamental law of the presumption of innocence is based. For the Act to provide that in respect of smuggling and counterfeiting prosecutions that foundation is to be put aside, and that the accused person is to bear the onus of proof instead, I find that difficult to accept, in view of the fact that clause 11 still requires the burden of proof in criminal trials to rest on the prosecution instead. I must consider the provisions of clause 82 which provide as follows:

> 82. This Constitution is the supreme law of the Kingdom and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency be void."

11. The Judge then concluded:

> *"[23] Because s.117 does not provide what it is that the accused person has the burden of proving,* ***I can only interpret it as meaning that it provides that the accused person has the burden of proving his innocence of the charge that is made against him. That is inconsistent with clause 11 of the Constitution as I have stated and I therefore find that s.117 is void.***"
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> [emphasis added]

12. Mr Lutui submitted that:

    (a) the premise to the Judge's finding of inconsistency, as revealed in paragraph 19 of his reasons as to how we considered the reversal of onus under s.117 might operate, was flawed'

    (b) at no time during the conduct of the prosecution or in the Prosecution's closing submissions below was it ever submitted or suggested that the trial was to proceed in a manner where the prosecution simply presented the indictment, called no evidence and that the onus was therefore on the defendant to lead exculpatory evidence to prove his innocence;

    (c) it was therefore the Judge's interpretation of s.117 that gave rise to the potential for inconsistency with clause 11;

    (d) further, there cannot be any inconsistency between the two provisions because there is 'no nexus' between them. Clause 11 provides for the procedures on indictment. In *'Amini Tu'ivai v Rex* (CA) [2006] Tonga LR 215 at [217] this Court that:

> *"... Clause 11 and those which follow it are designed to ensure that people are tried according to proper procedures which ensure that they have an adequate opportunity to mount a defence to any charges laid against them...."*

(e) nothing in clause 11 either expressly or impliedly provides that the onus of proof must lie with the prosecution or that a shift in that burden as provided by s.117 is barred; and

(f) for those reasons, s.117 is not ultra vires clause 11 of the Constitution.

13. The Judge's analysis and finding on s.117 did not in fact arise for determination. Even though the Prosecution referred to the provision in opening, it is abundantly clear, including from what was recorded by the Judge at paragraph 17 of his reasons, that at no time during the trial did the Prosecution ever rely upon any reversal of onus nor was the trial conducted by either party on that basis. As such, the Judge's findings on the point were not essential to his decision on the s.95 charges and were therefore *obiter dicta*.

14. For that reason, any question as to the constitutional validity of s.117 did not properly arise at the trial. On that basis, we are minded not to answer the question. Section 17D does not permit of an advisory opinion.[2]

15. However, s.17D does extend to questions 'in connection with' the trial. Therefore, even though the Judge's finding on s.117 did not form part of the *ratio decidendi* of the case, and therefore cannot create any binding precedent, the possibility that the finding may be cited as persuasive authority in later cases impels us to the following further observations.

16. We agree with the submission on behalf of the Attorney General that, on a plain reading, clause 11 of the Constitution is concerned with procedures to be applied to criminal proceedings on indictment. Further, however, assuming that the references to an accused having witnesses against him brought face to face with him, for him to hear their evidence, to question them, to bring forward any witnesses of his own and to make his own statement regarding the charge against him, imply the conventional requirement in any common law criminal proceeding

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[2] For a discussion on the Australian High Court's refusal to provide advisory opinions, see *Re Barrow* [2017] HCA 47, per Edelman J at [9] to [11].

for the Crown to adduce evidence to prove the elements of the relevant charge, that is as far as it goes.

17. The implications of that interpretation do not extend, relevantly, to prescribing the extent to which the Crown bears the legal or evidentiary onus in a given prosecution nor does it prohibit or even inhibit other laws being enacted which might alter the legal or evidentiary onus by requiring an accused to prove any legal defence or reverse it entirely by requiring an accused to disprove any particular element of a charge. Indeed, as Mr Lutui mentioned, other statutes such as the *Illicit Drugs Control Act* (ss 3, 4, 5, 5A and 38B) and the *Arms and Ammunition Act* (ss 25, 44 and 45) contain such provisions. Mr Lutui also stated that he was not aware of any previous decision in which the validity of provisions such as those had been challenged as being inconsistent with clause 11 and therefore void pursuant to clause 82.

18. Ultimately, and even if clause 11 could be construed as prohibiting any form of reversal of onus, which in our view it does not, any determination as to whether s.117 is inconsistent with clause 11, and the extent of any such inconsistency, requires consideration of an anterior question: what does s.117 mean?

19. On any view, s.117 is an unhappy piece of drafting. Read literally, it actually requires the accused in any smuggling or counterfeit prosecution to prove the prosecution's case. A similar absurdity emerges from an interpretation that the 'prosecution does no more than to present the accused with the appropriate indictment and leaves it to him to prove that he did not do what is alleged he has done in the indictment'.

20. Parliament is presumed not to have intended to legislate in a manner which is absurd.[3] It is also presumed to have intended to pass legislation that works.[4]

21. Section 117 presents as a blind and blunt instrument. Blind because it fails to specify what it is an accused is required to prove or disprove. Blunt because it sits alone within the Act bereft of any indication of Parliament's intention as to its

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[3] *Vaikona v Fuko (No. 2)* [1990] Tonga LR 68; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 at [28] (CA).
[4] *Edwards v Fifita* [1999] Tonga LR 75.

necessity, purpose or scope. A cursory comparison with the provisions of the other legislation referred to above illustrates that point.

22. For those reasons, and while s.117 remains in its current form, we endorse Mr Tu'utafaiva's interpretation (referred to in paragraph 6 above) to the effect that it is not for the defendant to prove all the elements of the offence; that burden is on the Prosecution. Once the Prosecution has established a prima facie case, the defendant is entitled to raise a positive defence on the balance of probabilities. The onus then reverts to the Prosecution to disprove that defence beyond reasonable doubt. So interpreted, there is no potential for inconsistency with clause 11.

23. Beyond that, the shortcomings in the drafting of s.117 are best addressed through amendment by the Legislature.

Section 95(1)

24 Section 95(1) of the Act provides:

> **95 Prohibited or restricted imports or exports**
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> (1) Any person who imports or exports or causes to be imported or exported any prohibited goods or who unlawfully imports or exports restricted goods commits an offence and shall be liable upon conviction to a fine not exceeding $100,000 or to a term of imprisonment not exceeding 10 years, or both.

25. The trial judge interpreted s.95(1) of the Act as follows.

26. Firstly, he accepted[5] Mr Tu'utafaiva's submission that the provision creates six separate offences, namely:

(a) importing any prohibited goods;

(b) exporting any prohibited goods;

(c) causing to be imported any prohibited goods;

(d) causing to be exported any prohibited goods;

(e) unlawfully importing any restricted goods;

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[5] [29]

(f) unlawfully exporting any restricted goods.

27. His Honour then identified, from the plain and ordinary meaning of those permutations, that s.95(1) does not include any offence of causing to be imported any restricted goods.[6]

28. During the trial, the Prosecutor submitted that the definition of "prohibited goods" in s.2 as '*any goods the importation or exportation of which is prohibited or restricted by law*' meant that causing prohibited goods to be imported includes causing restricted goods to be imported. In response, his Honour considered that if that was correct, the words in the section "*or who imports or exports any restricted goods*" would be rendered superfluous.[7]

29. He then resolved that issue as follows:

> *"[38] ... But the Legislature must have meant to include those words in the provision of S.95 (1) to mean something.*
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> *[39] I must therefore apply the provisions of S.2 to mean what the Legislature had meant for it to mean, namely, that S.2 should only be applied* ***unless*** *the term means something else* ***in the context*** *in which the term appears in the Act, as S.2 itself so provides: "In this Act,* ***unless the context otherwise requires*** *– ". If I do that, as I should, then the words which would otherwise be superfluous would be meaningful and S.95(1) would mean what I have stated they were intended and provided to mean.*
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> *[40] Accordingly, I agree with Mr Tu'utafaiva that S.95 (1) does not provide that it is an offence for any person* ***to cause to be imported any restricted goods,*** *and that the two charges against the accused, which are both for causing to be imported prohibited goods, be dismissed, because guns and ammunitions, such as the rifle and the bullets are, are not prohibited goods but are restricted goods, and it is not an offence to cause such restricted goods to be imported."*

30. Before us, and after reciting a number of general principles of statutory interpretation,[8] Mr Lutui submitted that:[9]

(a) Niu J placed too much emphasis on whether the context of the phrase "prohibited goods" in s.95(1) was different to the context in which it is defined in s.2;

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[6] [31]
[7] [38]
[8] As discussed in *Rex v Tu'ivakano* [2020] TOSC 5; CR 7 of 2019 (11 February 2020).
[9] [20] and [21] of the Appellant's Synopsis of Submissions.

(b) the Judge failed to consider the fact that, outside s.2, the phrase "prohibited goods" only appears in s.95 of the Act;

(c) therefore, the sole purpose of defining the term "prohibited goods" in s.2 was for the purpose, and within the context, of s.95;

(d) on that basis, the term "prohibited goods" in s.95(1) can only mean "goods the importation or exportation of which is prohibited or restricted by law";

(e) it was unnecessary and erroneous for the Judge to refer to the provisions of s.45 and the Orders made thereunder[10] to determine the context of the use of the term "prohibited goods" in s.95(1);

(f) to disregard the definition of "prohibited goods" in the application of s.95(1) would effectively mean that the Legislature did not intend the definition to be applied on the only occasion the term is used in the Act which would thereby render the definition unnecessary and of no use at all in the Act;

(g) such an interpretation would reduce the scope of the offences created under s.95(1) and would effectively mean that it is not an offence under s.95(1) to cause to import or export a restricted good; and

(h) Parliament should not be taken to have intended that a person who causes prohibited goods to be imported or exported commits an offence but a person who causes restricted goods to be imported or exported does not.

31. The modern common law approach to statutory interpretation by consideration of the text, context and purpose of the relevant enactment has been discussed by this Court on a number of occasions.[11] The resolution of this question requires consideration of a number of other principles. The overarching directive, of course, is that the Court must give effect to the ascertained purpose of the legislature when it enacted the contested law. Statutory provisions and common law rules in courts of high authority repeatedly lay emphasis on the need to go

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[10] Section (1) of the *Customs and Excise Management Act Order* 2007 provides that the goods specified in Schedule 1 of the Order shall be prohibited and restricted from importation into Tonga. Within that Schedule, the "List of Restricted Imports" includes "Firearms and ammunition except with a licence issued in accordance with the law".

[11] For example, see *Wiebenga v 'Uta'atu* [2005] TOCA 5, *Crown v Schaumkel* [2012] TOCA 10 and *R v 'Atoa* [2019] TOCA 16.

beyond a purely semantic approach to the discovery of statutory meaning.[12] Strict grammatical meaning must yield to sufficiently obvious purpose.[13]

32. The trial judge's approach was based on his apparent concern that if he interpreted the term "prohibited goods" in s.95(1) in accordance with its definition in s.2, it would render certain words within the operative provision superfluous or surplusage.

33. On the presumption that Parliament does nothing in vain, the Court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded. This applies *a fortiori* to a longer passage, such as a section or subsection.

34. It may happen, however, that no sensible meaning can be given to some word or phrase. It must then be disregarded.[14] The use of tautologous expressions is not uncommon in statutes. A statute is always allowed the privilege of using words not absolutely necessary.[15] Further, it may not always be possible to give a meaning to every word used in an Act of Parliament, and many instances may be found of provisions put into statutes merely by way of precaution.[16] There is no such presumption against fulness, or even superfluity of expression, in statutes, or other written instruments, as amounts to a rule of interpretation, controlling what might otherwise be their proper construction.[17]

35. Therefore, in our view, the Judge's concern for potential superfluity was not, of itself, a sound basis for his conclusion that s.95(1) did not include an offence of causing restricted goods to be imported.

36. The other basis for the trial judge's conclusion, as we understand it,[18] was that the words in the chapeau to s.2 – "unless the context otherwise requires" – led his Honour to the view that the context in which the term "prohibited goods"

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[12] *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56 at [96].
[13] *Crown v Schaumkel*, (ibid).
[14] "Statutory interpretation" by Francis Bennion, Butterworths, second edition, at p.807, citing *Stone v Corpn of Yeovil* (1876) 1 CPD 691 at 701.
[15] *Auchterarder v. Lord Kinnoull* 26 Cl. & F., 646, per Lord Brougham at p. 686.
[16] *Yorkshire Insurance Co. v. Clayton* 18 Q.B.D., 421, Jessel M.R. at p. 424.
[17] *Minister for Lands v Priestley* (1911) 13 CLR 537 referring to *Maxwell on Statutes*, 3rd ed., at p. 445; *Craies' on Statutes* (2nd ed.) at p.111.
[18] [39] of the reasons.

appeared in s.95(1) meant that the expanded definition of that term to include restricted goods did not have to be applied in interpreting s.95(1).

37. There are a number of problems with that approach.

38. Firstly, the judge did not explain what it was about the context in which the term "prohibited goods" appeared in s.95(1) which justified not applying its definition in s.2.

39. Secondly, the judge's reasons did not disclose a consideration of the fact that, outside s.2, the term "prohibited goods" only appears in s.95. Therefore, the only context in which the definition of the term fell to be considered was within s.95.

40. Thirdly, in circumstances where the judge concluded that s.95(1) did not include an offence of causing restricted goods to be imported, his focus on the definition of "prohibited goods" was misplaced. Restricted goods were already specified in the second limb of s.95(1), albeit limited, on a literal interpretation, to only importing (or exporting) them. By only considering the term "prohibited goods", the judge failed to consider the second limb – "unlawfully imports ... restricted goods" – by reference to the definition of the word "import" in s.2. Curiously, it was only in the context of the s.117 issue that his Honour referred fleetingly to the definition of "import" as meaning 'to bring goods *or cause goods to be brought* into the Kingdom'.[19] In the absence of a contextual basis for not applying it, that expanded definition provided a complete answer to the issue his Honour was grappling with and would have produced a diametrically opposite result.

41. Definitions are not to be treated as substantive provisions. Their function in a statute is merely to indicate that when particular words or expressions, the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense. Alternatively, they are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way.[20]

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[19] [13] of the reasons.
[20] *Gibb v FCT* (1966) 118 CLR 628 at 635.

42. The true purpose of an interpretation or definition clause is that it shortens, but is part of, the text of the substantive enactment to which it applies. However, the meaning of the definition depends on the context and object of the substantive enactment. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment.[21]

43. Wherever the term appears, it must then be understood in the stipulated sense,[22] and the text must be read as if the full definition was substituted for it.[23] Once the definition applies, the only proper course is to read the words of the definition into the substantive enactment and then construe the substantive enactment, in its extended or confined sense, in its context and bearing in mind its purpose and the mischief that it was designed to overcome.[24]

44. The above general principles may be modified by 'a clear contrary legislative intent',[25] such as when an enactment implies that in certain circumstances a definition is not to apply.[26]

45. The definitions of "prohibited goods" and "import" in s.2 were compound, enlarging definitions in that they brought in other terms which had, or needed, definitions of their own. They also had more than one limb.[27] For instance, in relation to "prohibited goods", s.2 does not contain any related definition of "restricted goods". The reader is referred by s.45 to the *Customs and Excise Management Act Order* to understand what they might be and how they differ from prohibited goods proper.[28]

46. Be that as it may, apart from the possibility of exclusion by reason of context as provided by s.2, the Act does not express any 'clear contrary intent' that the

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[21] *Kelly v The Queen* (2004) 218 CLR 216 at 253 at [103].
[22] E.g., *R v Britton* [1967] 2 QB 51.
[23] *Suffolk County Council v Mason* [1979] AC 705, per Lord Diplock at 713.
[24] *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 per McHugh J at [12] - [13].
[25] *Moreton Bay Regional Council v Mekpine Pty Ltd* (2016) 256 CLR 437.
[26] See eg *Strathern v Padden* 1926 JC 9, 1925 SLT 650.
[27] Bennion at p.413.
[28] Instead of including the definition in the Act where the term is used, it is sometimes found convenient to leave it to be laid down in later, delegated, legislation. This allows the term to be given different meanings in different contexts, and provides flexibility: *Chief Adjudication Officer v Foster* [1993] 1 All ER 705, HL.

definitions are not to be applied, especially in s.95(1), the only operative provision in which "prohibited goods" appears. Accordingly, the text of the section was to be read as if the full definitions were substituted for the terms "prohibited goods" and "import".

47. For completeness, it appears that the Judge's approach to the interpretation exercise may also be characterised, although not expressed as such, as an application of the linguistic maxim *expressio unius est exclusion alterius* (to express one thing is entirely to exclude another). As an aspect of the principle *espressum facit cessare tacitum* (to state a thing expressly ends the possibility that something inconsistent with it is implied), the *expressio unius* principle is applied where a statutory proposition might have covered a number of matters but in fact mentions only some of them.[29]

48. Although all canons of construction have to be applied with circumspection, *expressio unius* has to be used with particular caution if it is not to produce a doubtful result.[30] It has been said that there are perhaps few maxims of interpretation that "have been more frequently misapplied and stretched beyond their due limits" than the the *expressio unius* principle. [31] Like all canons of construction, the expressio unius principle operates only where not outweighed by other interpretative factors.[32]

49. Need to apply the *expressio unius* principle is usually a symptom of what is called 'disorganised composition'. Such 'sloppy drafting' calls for special care in applying the principle, since it cannot be assumed that logically impelled implications were truly intended. The failure to make the *expressio* complete very often arises from inadvertence or accident and the maxim ought not to be applied where its application, in regard to the subject matter to which it is to be applied, leads to inconsistency or injustice.[33]

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[29] Bennion at 873.
[30] *HM Advocate v Grant* [2007] HCJAC 71, 2008 SLT 339
[31] *Spence v Queensland* [2019] HCA 15 at [302] referring to *Colquhoun v Brooks* (1887) 19 QBD 400 at 406, quoted in *Rylands Brothers (Australia) Ltd v Morgan* (1927) 27 SR (NSW) 161 at 169 and *George v Federal Commissioner of Taxation* (1952) 86 CLR 183 at 206. See, further, *Forge v Australian Securities and Investments Commission* [2006] HCA 44; 80 ALJR 1606; 229 ALR 223 and Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 178-181 [4.33]-[4.35].
[32] Benn on, infra.
[33] *Dean v Wiesengrund* [1955] 2 QB 120.

50. In the instant case, we consider it likely that the Judge implicitly resorted to the *expressio unius* principle by identifying that because the text of s.95(1) did not specify as potentially the seventh and eighth offences of unlawfully causing restricted goods to be imported or exported, Parliament intended that such acts should not be offences under that Part of the Act. However, we consider it more likely that that omission in the drafting was due to inadvertence or oversight in failing to apply the relevant defined terms within the text of s.95(1). Infelicities in drafting,[34] including any tautologies, repetition or surplusage in the text, ought not be permitted to obscure or undermine Parliament's clear intention. Another prime principle in statutory construction is a presumption that the legislator intended common sense to be used in construing the enactment.[35]

51. We conclude therefore with what we consider to be the correct interpretation of s.95(1). Had the extended definitions of "prohibited goods" and "import" been transposed by the drafter, s.95(1) could simply have been reduced to, and should be interpreted as:

> "Any person who imports or exports prohibited goods commits an offence ...".

52. That, in our view, is a common sense interpretation of what Parliament clearly intended by the offence provision in s.95(1). The proposition may be tested by asking whether, when read as a whole, the Act offers any rational justification for including as offences the acts of importing prohibited or restricted goods or causing prohibited goods to be imported but should be read as excluding any act of causing restricted goods to be imported. In our view, there is none.

53. Further, such a condensed or attenuated interpretation, even if it renders some of the words in the text otiose or superfluous, does not contradict, qualify or detract from the obvious intent of s.95(1). It gives effect to the s.2 definitions, within the singular context of s.95, and the evident purpose of Part 12 of the Act by including the importing and causing to be imported of both prohibited and restricted goods as offences under the Act.

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[34] As a further example of patent drafting errors, see s.95(2): "*Any person who knowingly offers for sale any prohibited or unlawfully imported restricted goods on those goods commits an offence ...*".
[35] *Din v London Borough of Wandsworth* [1981] 3 All ER 881 at 897, HL; *Edwards v Fifita* [1999] Tonga LR 75.

Contradictor

54. During the course of the hearing, we raised with Mr Lutui the desirability, and arguably, the necessity, of a contradictor being appointed. In future cases involving questions stated pursuant to s.17D, particularly those which raise Constitutional challenges to the validity of legislation, the Court will consider prior to the hearing whether a contradictor should be appointed. The Attorney- General will be expected to address this issue in a memorandum filed with the application under s 17D.

Answers to questions stated

55. For the reasons stated, we answer the questions stated as follows:

(a) Question: Was Niu J correct when he ruled that s.117 of the Act is void because it is inconsistent with clause 11 of the Constitution?

Answer: No.

(b) Question: Does a charge of causing to be imported prohibited goods under s.95(1) of the Act include causing to be imported restricted goods, by virtue of the definition of "prohibited goods" in s.2 of the Act?

Answer: Yes.

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Whitten P

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Moore J

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Randerson J

COURT OF APPEAL TONGA