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IN THE COURT OF APPEAL  
CRIMINAL JURISDICTION  
NUKU'ALOFA REGISTRY

AC 8 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 Viliami Malolo E Hau Talivakaola* (CR 43 of 2020)

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## JUDGMENT

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Coram: Whitten P  
Moore J  
Randerson J

Counsel: ✓ Mr J. Lutui DPP for the Attorney General  
No appearance for Mr Talivakaola

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

1. In Supreme Court proceedings CR 43 of 2020, Viliami Talivakaola 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 4 September 2020, Niu J acquitted Mr Talivakaola on both counts.<sup>1</sup> 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**

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<sup>1</sup> *R v Talivakaola* [2020] TOSC 66.

01 APR 2021  
*[Signature]*

(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.

...

(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?
5. The verdict below was delivered the day after Niu J delivered his verdict in *R v Vaipulu Ikamanu* (CR 53 of 2020).<sup>2</sup> Mr Ikamanu was similarly charged with causing to import restricted goods in the form of a firearm and ammunition contrary to s.95(1) of the Act. Niu J also acquitted Mr Ikamanu. His Honour's reasons in both cases were substantially identical although in Talivakaola, there was no finding of lack of evidence that Defendant caused the importation of the consignment or that he was the consignee.
6. In appeal AC 7 of 2020, the Attorney General stated the same questions arising from the *Ikamanu* trial and her submissions in both appeals were substantially identical.
7. This judgment should therefore be read in conjunction with the Court's judgment in AC 7 of 2020. For the reasons stated in that judgment, we also answer the questions on this appeal 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?

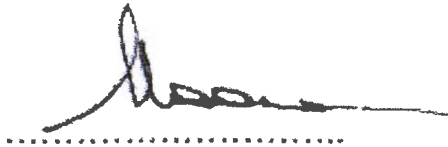
Answer: No.

- (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?

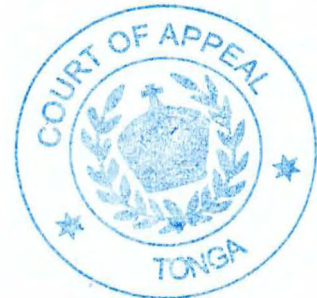
Answer: Yes.



Whitten P



Moore J



Randerson J