

IN THE COURT OF APPEAL OF TONGA  
CRIMINAL JURISDICTION  
NUKU'ALOFA REGISTRY

ATTORNEY GENERAL'S OFFICE	
INITIALS: <i>Jh</i>	DATE: <i>27/5/22</i>
<input checked="" type="checkbox"/> File	<input checked="" type="checkbox"/> Website
<input checked="" type="checkbox"/> Database	<input checked="" type="checkbox"/> Social Media
<input checked="" type="checkbox"/> Email internal	<input type="checkbox"/> _____

AC 22 of 2021  
(CR 281 of 2021)

BETWEEN:

ATTORNEY GENERAL

Appellant

-and-

VOLA TUAIMEI'UTA

Respondent

---

## JUDGMENT OF THE COURT

---

Court: Whitten P  
Blanchard J  
Randerson J

Counsel: Mr J. Lutui DPP with Mrs A 'Aholelei for the Appellant  
Mrs D E Stephenson KC as Contradictor

Hearing: 16 May 2022

Judgment: 27 May 2022

### Acquittal at trial

1. The respondent arranged to import into Tonga two firearms, a 12-gauge shotgun and a .22 magnum rifle. He applied for an import licence but that could not be granted until some formalities were completed, including firearms training. Before any import licence was issued to the respondent, the firearms arrived by ship at the port at Ma'ufanga. On 14 January 2020, they were discovered in a crate imported by the respondent during a routine inspection by Customs Officers who contacted the Police and handed the firearms over to them.
2. The respondent was charged with two offences under section 95(1) of the Customs and Excise Management Act 2007 ("*the 2007 Act*"), namely:
  - (a) causing the importation of prohibited goods; and

- (b) (in the alternative) importing restricted goods without an import licence under the Arms and Ammunition Act 1968 (“*the 1968 Act*”).
3. At the conclusion of the trial, Cooper J acquitted the respondent of both charges.
  4. Pursuant to section 17D of the *Court of Appeal Act*, the Attorney General now submits for our determination two questions of law arising in connection with the acquittal:
    - (a) Was Cooper J correct to depart from the interpretation of the Court of Appeal in *Attorney General v Ikamanu* [2021] TOCA 3 (“*Ikamanu*”) and dismiss count 1 of the indictment on the basis that arms and ammunition are not “prohibited goods”?
    - (b) Is a person charged under section 95(1) of the *Customs and Excise Management Act* with importing an arm or ammunition without an import licence, entitled to a defence under section 15(1) of the *Arms and Ammunition Act 1968*?
  5. Because ss 17D(5) provides that the determination of this Court of the questions submitted shall not in any way affect or invalidate any verdict or decision given at trial, the respondent has no incentive to defend the trial Judge’s decision. Therefore, Mrs Dana Stephenson KC was appointed as a contradictor and filed helpful submissions.

### The statutory provisions

6. Section 95(1) of the 2007 Act provides:
 

**95 Prohibited or restricted imports or exports**

(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.
7. Relevantly, the subsection establishes two offences. The first is the import etc. of prohibited goods. The second is the *unlawful* import etc. of restricted goods. We are concerned with the second.
8. The term “prohibited goods” is defined in section 2 of that Act as “any goods the importation or exportation of which is prohibited *or restricted by law*”. [emphasis added]
9. Also defined is “time of importation” which means “the time that an aircraft or ship carrying imported goods with the intention to discharge cargo, arrives at the first airport or port within the Kingdom”. “Import” means “to bring any goods or cause goods to be

brought into the Kingdom”.

10. Section 45 of the 2007 Act authorizes the Chief Commissioner [the Minister of Finance or the Treasurer], with the approval of His Majesty in Council, by Order, to prohibit or restrict the importation or exportation of goods into or from the Kingdom. Schedule 1 of the *Customs and Excise Management Act Order 2007* (“*the Order*”) contains a list of Restricted Imports, which includes:
  - (a) “1. Firearms and ammunition except with a licence issued in accordance with law”; and
  - (b) “5. Goods, the importation of which is restricted by any other law in force in the Kingdom except in accordance with such law.”
11. Section 15 of the 1968 Act provides, relevantly:

**15 Licence to import**

- (1) No person shall import any arm or ammunition or parts of arms and ammunition into the Kingdom from a place without the Kingdom unless he holds a licence in that behalf:

Provided that when any arm or ammunition is imported into the Kingdom without any import licence or interim licence under this section having been obtained authorizing the importation thereof, such importation shall not be deemed to contravene the provisions of this section while such arm or ammunition on importation is left in the possession of the Tonga Police Force.

- (2) Such licence may be obtained on application to the Minister of Police on payment of the prescribed fee and shall be in the prescribed form.

12. Section 19 requires a consignee of any arm or ammunition imported into the Kingdom to make a declaration thereof to a Customs Officer and to produce a licence issued under section 15 before clearing it through Customs.
13. Section 50 says that the provisions of the 1968 Act are not in derogation of the provisions of any other law for the time being in force relating to the importation of firearms and ammunition.

**The first question**

14. After referring briefly to section 95 and the Order, Cooper J held that guns and ammunition were not “prohibited” items and thus a count that pleaded that they were wrong in law. He said that *Ikamanu* in no way changed that position “dealing, as it does, with a different issue”. He did not identify, and we cannot comprehend, what that

different issue was.

15. In our view, the answer to the first question is to be found in this Court's reasoning in *Ikamau*, which may be summarised in this way. The term "prohibited goods" as defined in section 2 of the 2007 Act includes goods the importation of which is restricted by law. The second limb of s 95(1) creates an offence of unlawfully importing restricted goods. Restricted goods are those restricted by an Order authorized under s 45. Under the 2007 Order, firearms and ammunition are restricted imports except where the importation is licensed in accordance with law i.e., licensed under s 15 of the 1968 Act. Therefore, in the absence of a licence to import them, they are prohibited goods.

### **The second question**

16. The second question is whether someone who imports restricted goods in the form of an arm or ammunition contrary to s 95 of the 2007 Act can raise a defence under the proviso to s 15 of the 1968 Act.
17. Cooper J said that there was evidence of the respondent applying for an import licence "in October" and discharging "all aspects of the process for his part" by the end of the first week of November 2019. But his application "was not duly processed within the administration of the Ministry". He had done all he could to ensure no issue arose. On the day the goods arrived in Tonga, he was in touch with his broker and had "declared the guns" before the consignment (his crate) was opened, and before the Police seized them.
18. The Judge said that it was the lack of the licence that made the importation unlawful. Referring to the proviso to ss 15(1) of the 1968 Act, Cooper J said that the respondent had done everything in his power to get a licence in a timely way. He had declared the exact contents of the goods before the consignment was opened and the goods passed into Police custody "as soon as they arrived in the Kingdom and were found". He therefore found that the proviso applied, and the respondent was deemed not to have committed an offence under "this section.", i.e. s 15, and that, by virtue of Schedule 1 of the Order, point 5, he had also not committed an offence under s 95 of the 2007 Act.
19. We have reached the conclusion that Cooper J was correct that the proviso to ss 15(1) does apply when someone is charged with unlawfully importing arms and ammunition. As noted, under the 2007 Order, firearms are a restricted import "except with a licence issued in accordance with law". The law governing the issuance of a licence is ss 15(2)

of the 1968 Act. We do not accept Mr Lutui's submission that, in determining whether an offence has been committed under the second limb of ss 95(1), read with para 1 of the list of Restricted Imports in the Order, the only part of s 15 which comes into play is what he called "the administrative provision" in subsection (2). That is because the importation is not unlawful in terms of the second limb unless an offence is committed under that section. So, it is necessary to look to subsection (1) to see if it has been committed, and when one does so, it is clear that there is no offence under the subsection if the proviso applies. It is true that the proviso says that the importation, while the arm or ammunition is left in the possession of the Tonga Police Force, is not to be deemed to contravene "the provisions of this section". Obviously, ss 95(1) is not such a provision. However, as we have explained, the second limb can create an offence in relation to an arm or ammunition only by reference to the offence provision under s 15 which in turn provides for a defence where the proviso applies. In that indirect way, the proviso must be considered when an offence is charged under the second limb of ss 95(1).

20. That brings us to the question of the operation of the proviso. It provides that an importation of an arm or ammunition is not a contravention "while such arm or ammunition is left in the possession of the Tonga Police Force". There is an immediate difficulty if, as the Crown argued, the definition of "time of importation" found in s 2 of the 2007 Act is to be read into the proviso because by that definition, the time of importation is "the time that an aircraft or ship carrying imported goods with the intention to discharge cargo arrives at the first airport or port within the Kingdom". Obviously, when an aircraft first lands, or a ship first docks, goods on board are not likely to be in the possession of the Police. That alone suggests that the definition is not applicable to charges involving s 15, in which case, the proviso would not be workable. Mr Lutui ingeniously suggested that it would suffice if the Police had been informed by the importer that he or she had no licence and that they should take physical possession after clearance through Customs. But between the arrival of the aircraft or ship and the clearance of the goods, they could not really be said to be "left" in Police custody as the Police would not have possession.
21. We consider, however, that the definition of "time of importation" has no operation under the 1968 Act and under s 15, in particular. There is nothing in the 2007 Act to indicate that it should apply to the 1968 Act by way of some unstated (implied)

amendment of that Act. Furthermore, the definition is of a phrase, “time of importation”, not of the word “importation” or “import”. That phrase is merely a definition, not a substantive provision laying down a rule, and it does not appear in s 15 or elsewhere in the 1968 Act. (Curiously we have been unable to find the phrase actually used in the 2007 Act, which continues to refer to the “arrival” of goods: see section 2 definition of “importer”.)

22. In the context of s 15, importation is better understood as a process which begins on the arrival of goods into the Kingdom and does not end until they are cleared through Customs. That has long been the approach taken in New Zealand cases dealing with the importation of drugs. In *R v Hancox* [1989] 3 NZLR 60 (CA) at 62, Richardson J said:

*“‘To import’ involves active conduct; and the bringing of goods into the country or causing them to be brought into the country does not cease as the aircraft or vessel enters New Zealand territorial limits. Importing into New Zealand ... is a process. It does not begin and end at a split-second of time. The element of importing exists from the time the goods enter New Zealand until they reach their immediate destination... the process does not end so long as the goods remain in transit, that is until any shipping and customs formalities are completed, and the consignment is available to the consignee at its immediate destination... The goods have reached their immediate destination when they have ceased to be under the control of the appropriate authorities and have become available to the consignee or addressee.”*

23. In *R v Malu* [2005] Tonga LR 226, Ford J found that reasoning compelling and did not see why the same principles should not apply in Tonga.
24. In fact, s 19 of the 1968 Act expressly envisages a process of importation starting with the “arrival” of the goods and ending on clearance:

**19 Declaration of arms and ammunition on importation**

Every person entering the Kingdom who has in his possession or among his baggage any arm or ammunition and every consignee receiving any arm or ammunition imported into the Kingdom shall make a declaration thereof to a customs officer on arrival and before clearing such arms or ammunition through the customs shall produce to such customs officer a licence issued under section 15 of this Act.

25. In our view, nothing in the 2007 Act can be read as intended to disturb that position under the 1968 Act. Importation continues to be a process. Consequently, if an importer has no licence for an arm but it has come to the attention of Customs as a result of a declaration made by the importer and the importer has, prior to the point when it would

otherwise be released by Customs (clearance), made arrangements with the Police for Customs to deliver it into the possession of the Police, the item can properly be said to have been “left” with the Police for the purposes of the proviso. On the other hand, if the item has not been declared, but has simply been found by Customs as the result of a search and subsequently handed over to the Police by Customs, it could not fairly be said to have been “left” in their possession in terms of the proviso.

### Answers to the questions

26. The questions are answered as follows:

- (a) Was Cooper J correct to depart from the interpretation of the Court of Appeal in *Attorney General v Ikamanu* AC 7 of 2021, [2021] TOCA 3 and dismiss count 1 of the indictment on the basis that arms and ammunition are not “prohibited goods”?

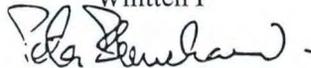
Answer: “No”

- (b) Is a person charged under section 95(1) of the *Customs and Excise Management Act* with importing an arm or ammunition without an import licence, entitled to a defence under section 15(1) of the *Arms and Ammunition Act* 1968?

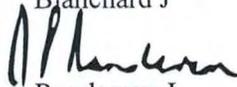
Answer: “Yes”



Whitten P



Blanchard J



Randerson J

