IN THE COURT OF APPEAL
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 25 of 2022
[CR 322/2020]

BETWEEN:

REX Appellant

AND

MA'ILI FINAU Respondent

JUDGMENT OF THE COURT

Court: Whitten P
White J
Morrison J

Appearances: Mr J. Fifita for the Appellant ✓
Mr T. 'Aho for the Respondent

Hearing: 28 March 2023
Judgment: 6 April 2023

Introduction

[1] The respondent to this appeal, Ma'ili Finau, pleaded guilty to two counts: (i) unlawfully importing a restricted good, namely two .22 rifles, contrary to s 95(1) of the *Custom and Excise Management Act*; and (ii) not declaring the rifles to Customs, contrary to s 97 of the *Custom and Excise Management Act*.

[2] He was sentenced on 14 October 2022. The learned sentencing judge exercised the power under s 204 of the *Criminal Offences Act* to discharge the respondent without conviction, and order him to pay $200 in costs.[1]

[3] The Crown appeals the sentence on grounds which include that the learned sentencing judge erred in law by:

(a) wrongly applying s 204 of the *Criminal Offences Act*;

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1 *R v Finau* CR 322/2020.

(b) not applying the decisions of this Court in *R v Tu'iha'ateiho*[2] and *R v Loleini 'Ala*;[3]

(c) applying *R v Fanguna*;[4]

(d) failing to take into account the seriousness of the offending and the aggravating circumstances, namely that: (i) the respondent knew he imported the firearms from New Zealand without an import licence; (ii) he concealed the firearms in his baggage; and (iii) he intended to deceive the Customs Office by not declaring the firearms on the Importer Authorisation & Declaration Form;

(e) giving excessive weight to the respondent's mitigating factors; and

(f) imposing a sentence inconsistent with sentences for similar offending.

[4] The appellant seeks that this Court re-sentence the respondent.

The Crown's submissions below

[5] For the sentencing hearing the Crown filed a schedule of facts,[5] which included that:

(a) the respondent declared in the Importer Authorisation and Declaration Form that he knew the contents of his consignment did not contain prohibited or restricted goods;[6] and

(b) he told the Customs that he knew the contents of the consignment and it did not contain a gun.[7]

[6] The Crown made a submission below as to the factual basis of the offending. It was that the respondent "intentionally failed to declare" the rifles, did not tell the Customs officer before his consignment was inspected, and "concealed them inside his consignment to avoid being found".[8]

The respondent's submissions below

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2 [2015] Tonga LR 44.
3 AC 19/2018.
4 CR 229/202.
5 Appeal Book (**AB**) 48.
6 AB 48, paragraph 4.
7 AB 48, paragraph 7.
8 AB 37, paragraph 15.

[7] The respondent submitted that the court should exercise power under s 204 of the Criminal Offences Act to discharge the respondent without conviction on each count.[9] There is no present need to set out the submissions on the law, and I deal with the factual submissions below: see paragraph [17] and following. The submissions attached affidavits from the respondent and the to friends for whom he said he was importing the rifles.

The learned sentencing judge's approach

[8] The learned sentencing judge noted the plea of guilty to the two counts, then recited the essential facts.

[9] On 10 June 2019 a cargo box bearing the respondent's name arrived in Vava'u on the sea vessel Imua II.[10]

[10] On 13 June the respondent attended to have the cargo cleared and released to him. When asked by a Customs officer if he had restricted cargo, the respondent said he did not, and went further to state that his cargo did not contain a gun. That was untrue as the cargo contained two .22 rifles.[11]

[11] On 5 August 2019 the respondent was arrested and taken to the police station. He cooperated with police and admitted his offending.[12]

[12] His Honour then turned to the respondent's background, working history and antecedents.[13] I shall return to discuss those matters.

[13] His Honour referred to a pre-sentence report which included what the respondent told the author as to the offending:[14]

> " ... he had been asked by two of the residents of Falevai to bring these rifles into the country for them. He did that. But, not wishing to fall foul of the law, told the police this would happen.
>
> ... the police advised him not to declare the rifles, as they were for other people and all he had to do was arrange for the rightful owner's licences to be produced."

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9 AB 16-27.
10 Sentencing reasons paragraph 3.
11 Reasons paragraphs 4-6.
12 Reasons paragraphs 7-8.
13 Reasons paragraphs 9-13.
14 Reasons paragraphs 15-16.

[14] The learned sentencing judge then referred to *Fanguna*, characterising it as a case of sentencing for "the same offence of importation without a licence where they had made a genuine error and was not wilful disregard of the law".[15]

[15] His Honour then said:[16]

> "In the instant case I have carefully considered [the respondent's] character, that he is someone of positive good character, that is to say he not only has never been convicted of an offence in the past, but he leads a laudable life, supporting his wider family, managing a significant team of people in his work, playing a key role helping his employer keep the business afloat through the pandemic and his work with the church."

[16] His Honour then said: "When I consider all of this I am minded to accept his explanation regarding the circumstances of the offence".[17] His Honour said he had "carefully considered" his "powers under section 204 Criminal Offences Act",[18] and went on:

> "23. Both the circumstances of the offences and his character mean it is inexpedient to punish him and that a probation order would not be appropriate.
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> 24. This is a very rare case where I feel I am able to take this step."

State of the evidence at the sentencing hearing

[17] The respondent's submissions at the sentencing hearing noted that no statement had been tendered by the police.[19] The submissions then set out the following as to the circumstances of the offending:[20]

(a) the respondent agreed to a request from two friends (Viliami Lea'aekona) and Sitiveni Fononga) to buy two .22 rifles (one for each friend) in New Zealand and import them; in return he was to receive a cow and gift;

(b) the friends lent the respondent "their Arms import licence", which he used to buy the rifles; they were put in a box addressed to the respondent;

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15 Reasons paragraph 17.
16 Reasons paragraph 18.
17 Reasons paragraph 19.
18 Reasons paragraphs 21-22.
19 Respondent's submissions below, AB 17, paragraph 2.
20 AB 17, paragraphs 2.3-2.8.

(c) before the box arrived in Vava'u, the respondent spoke to a (now deceased) Inspector of Police "to declare to him that he is bringing a gun belonging to [the two friends] on his cargo box"; the Inspector told him "it's alright, bring the Arms import licence to the wharf when the cargo arrived";

(d) on 13 June the respondent did so, but was told by Customs that there was a problem because he "did not declare on the Bill of lading and Customs document that I brought a gun in the box"; and

(e) when he returned on 21 June, with the two friends, he was told the guns had already been surrendered to the police.

[18] At the sentencing hearing affidavits were tendered from: (i) the respondent;[21] (ii) Mr Fononga;[22] and (iii) Mr Lea'aekona.[23]

[19] Each affidavit deposed to the essential details contained in the respondent's submissions below. Importantly, the affidavits deposed:

(a) the respondent failed to declare the guns on the Customs document;[24]

(b) each of the friends gave the respondent their import licence;[25] inferentially, the respondent did not hold his own

(c) import licence for firearms;

(d) the police Inspector told him to bring the gun licence to the wharf, but did not tell him to go to the Customs manager;[26]

(e) Mr Fononga's own import licence had been surrendered to the police but he had possession of the licence in the name of his late cousin, Tonga Kemoe'atu; he had been told by police that his cousin's licence would be assigned to him; he have that licence to the respondent;[27] and

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21 AB 21.
22 AB 27.
23 AB 30.
24 Respondent's affidavit, AB 21-22, paragraphs 4, 8.
25 Respondent's affidavit, AB 21, paragraph 6.
26 Respondent's affidavit, AB 21, paragraph 7.
27 Mr Fononga's affidavit, AB 28, paragraph 6.

(f) Mr Lea'aekona had an import licence, which he gave to the respondent to buy a gun.[28]

[20] More importantly, the respondent's affidavit did not depose to the following facts:

(a) as recorded in the pre-sentence report,[29] that the police advised him not to declare the rifles, as they were for other people; and

(b) that when asked by a Customs officer if he had restricted cargo, the respondent said he did not, and went further to state that his cargo did not contain a gun.[30]

Import licence and declaration

[21] The licence granted to import firearms[31] was personal to the licensee. It granted a licence to import to "Viliami Tu'akalau Lea'kona". The respondent was not a licensee under that licence.

[22] Further, as the licence states on its face, "Private persons (not being licenced Arms Dealers) must obtain a "Licence to acquire a firearm" before the arm/ammunition can be withdrawn from customs".

[23] By pleading guilty to the two counts the respondent must be taken to have admitted that:

(a) he had no licence to import the firearms and unlawfully imported them; and

(b) he did not declare the importation of the firearms.

[24] The sentencing hearing appears to have proceeded on the basis that those two facts were not controversial.

The test on this appeal

[25] The appeal is by the Crown, seeking to persuade this court that the sentence imposed was inadequate. The established principles applicable to such an appeal are:[32]

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28 Mr Lea'aekona's affidavit, AB 30, paragraphs 2-3; Annexure 1, AB 32.
29 See paragraph [13] above.
30 See paragraph [10] above.
31 Mr Lea'aekona's affidavit, Annexure 1, AB 32.
32 *R v Misinale* AC 13/99 (u reported, 23 July 1999).

(a) it is not sufficient that the appellate court considers that a more severe sentence could properly be imposed, or that the sentence imposed is inadequate or inappropriate;

(b) the court must be satisfied that the sentence is so inadequate or inappropriate that the sentencing judge erred in acting on a wrong principle, or wrongly assessed a relevant circumstance, or failed to take into account relevant factors, or has imposed a sentence that is inconsistent with sentences that the court has imposed for like offending;

(c) if the court is left with no alternative but to impose a more severe or a different sentence, the sentence should be increased only to the lower end of the appropriate sentencing range; and

(d) the appellate court should take into account that it is an added penalty to have to face a sentence a second, and to have hope deferred, and perhaps dashed, in the result.

The relevant test under s 204

[26] This Court has held that the application of s 204 of the *Criminal Offences Act* requires that in considering whether to exercise the discretion to grant a discharge without conviction:[33]

(a) the Court must have regard to:

(i) the seriousness of the particular offending; and

(ii) the circumstances of the particular offender, including the direct and indirect consequences of a conviction; and

(b) only if the direct and indirect consequences of a conviction were out of all proportion to the gravity of the offence is it proper for a discharge to be granted;

(c) before the Court may grant a discharge under s 204, it must be of the opinion that it is "inexpedient to inflict punishment and that a probation order is not appropriate".[34]

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33 *R v Tu'iha'ateiho* [2015] Tongs LR 44; *R v Loleini'ala* at [7].

34 *R v Loleini'ala* at [9].

[27] The sequence of reasoning to be applied when considering the application of s 204 was laid down in *R v Loleini'ala*:[35]

(a) first the Court must assess the seriousness of the offending including the gravity with which it is viewed by parliament, along with all relevant aggravating and mitigating factors;

(b) secondly, the Court must consider the character and circumstances of the offender, which will include any previous offending, the effect of the entry of a conviction on his career, his finances, his reputation, any civil disabilities that flow from the entry of a conviction as well as indirect consequences;

(c) thirdly, the Court must be satisfied that the consequences of entering a conviction are out of all proportion to the gravity of the offending;

(d) fourthly, the Court must stand back and consider whether in all the circumstances of the case the granting of a discharge without conviction is the appropriate result;

(e) the circumstances where it will be appropriate to grant a discharge without conviction will rarely arise and the discretion should be exercise sparingly; and

(f) it will not be sufficient that an offender is generally a person of good character, has no prior convictions, is a young person or that the victim has forgiven them.

Consideration

[28] As is evident from the discussion above there was a contest as to the factual basis of the offending. The principal matter was whether, as the pre-sentence report suggested, the respondent was told by police that he did not have to declare the rifles, or whether, as submitted by the Crown, he did not declare the rifles on the relevant form and lied to the Customs Officer about whether the consignment contained guns.

[29] For the reasons which follow, in our view, the learned sentencing judge made findings that seem inconsistent with established facts.

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35 *R v Loleini'ala* at [10]-[11].

[30] His Honour found that when the respondent was "asked by a Customs officer if he had restricted cargo, the respondent said he did not, and went further to state that his cargo did not contain a gun". However, in paragraphs [15] and [16] of the sentencing comments his Honour used the pre-sentence report to set out "the description of how the offence arose", or the "explanation", as it was termed. Relevantly, that was: (i) the respondent told police he was to bring rifles into the country; (ii) police advised him not to declare them as they were for other people; and (iii) police told him that all he had to do was produce the rightful owners' licences. It is that explanation that his Honour referred to when he said, "I am minded to accept his explanation".[36]

[31] There are difficulties with that approach.

[32] First, the respondent's affidavit did not depose that the police advised him not to declare the rifles because they were for other people. All that was said was that the late Inspector of Police told him to "bring the gun licence to the wharf".[37]

[33] Secondly, the respondent's submissions on sentencing did not say that either.[38]

[34] Thirdly, the pre-sentence report was hearsay, and whilst such a report might commonly be received on a sentencing hearing, that is subject to the relevant facts being properly established if there is a contest about them. Here the assertion that the police had told the respondent not to declare the guns was contradicted by the respondent himself. It could not be acted upon in that state of affairs.

[35] Fourthly, the underlying explanation, i.e. that police told the respondent not to declare the guns, is inconsistent with the other finding by his Honour, namely that when the respondent was asked by a Customs Officer if he had restricted cargo, the respondent said he did not, and went further to state that his cargo did not contain a gun. The statement to the Customs Officer was made subsequently to the meeting with the late Inspector of Police.[39]

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36 Sentencing remarks paragraph [19].
37 AB 21, paragraph 7.
38 AB 17, paragraph 2.6.
39 The respondent's submission below put the sequence as: first the conversation with the Inspector of Police; and then later (13 June 2019), the meeting with the Customs Officer: paragraphs 2.6 and 2.7. That is the same sequence as in the respondent's affidavit: paragraphs 7-8.

[36] Fifthly, the respondent's affidavit was sworn on 10 October 2022, well after the statement of facts by the Crown, filed on 8 February 2021. Those facts plainly asserted that the respondent falsely declared on the Importer Authorisation and Declaration Form, and to the Customs Officer in person, that the consignment did not contain prohibited or restricted items, and (to the Customs Officer) that it contained no gun. There was ample time to respond to those serious allegations of fact. Neither of those facts was directly contradicted by the respondent in his affidavit.[40]

[37] In our view, the learned sentencing judge therefore fell into error by sentencing on an incorrect factual basis.

[38] For that reason his Honour's apparent characterisation of this case as being similar to *R v Fanguna* miscarried. Once it is accepted, as we consider it must be, that the respondent lied on the Customs form and to the Customs Officer, this cannot be said to be a case of genuine error or one not involving wilful disregard of the law.

[39] There are, in our respectful view, other difficulties accepting the approach taken below.

[40] The learned sentencing judge referred to s 204 of the *Criminal Offences Act*, saying it had been carefully considered. However, the relevant finding as to its application was expressed thus:

> "Both the circumstances of the offences and his character mean it is inexpedient to punish him and that a probation order would not be appropriate".

[41] As to that, there are several matters to be observed.

[42] First, the finding above, that the sentence proceeded upon an incorrect factual basis, removes an essential plank in his Honour's application of s 204. That applies not only to the circumstances of the offending but also an assessment of the respondent's character. That he lied twice about the contents of the consignment seems not to have figured in his Honour's assessment.

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40 Except to the extent that such might be inferred from the failure to address it in paragraph 8 of the affidavit.

[43] Secondly, there is no examination of the reasons why a probation order was inappropriate in the circumstances, nor any reasons offered for that finding.

[44] Thirdly, that finding is also eroded by the fact that the sentencing proceeded upon a incorrect factual basis.

[45] Fourthly, this Court has held that in order to exercise the power in s 204 the sentencing court must be able to conclude that the direct and indirect consequences of a conviction are out of all proportion to the gravity of the offence, such as the offender being morally blameless, the offending merely technical, or minor or trivial, or there are special circumstances justifying mercy.[41] The sentencing remarks do not disclose a consideration of the principles in those authorities or the basis upon which s 204 was activated.

[46] In those circumstances this Court can satisfied that the sentence imposed was inappropriate as it proceeded upon an erroneous factual and legal basis.[42]

[47] It therefore falls to this Court to re-sentence the respondent.

[48] The Crown submits that the appropriate sentence is one that is non-custodial, and consists of (i) the imposition of a fine on each count, namely $400 on Count 1, and $300 on Count 2, in each case after any discounts are applied for the guilty plea; and (i) a forfeiture order in respect of the rifles, pursuant to s 108 of the *Customs and Excise Management Act*.

[49] The offending conduct has been outlined above in sufficient detail to allow it to be summarised for present purposes. It is serious conduct involving the illegal importation of two firearms and false statements being made to Customs. Each of the offences attracts a penalty of a maximum fine of $100,000 or imprisonment for a maximum of 10 years. Whilst the origin of the offending may have been a desire to assist friends, that does not explain away (i) the concealment of the firearms; (ii) the false statements to Customs on the declaration form and in person, and (iii) the fact that the respondent knew he had no import licence. Further, the disparity between what was told to the author of the pre-sentence report and what was said in in the affidavit, only adds to a sense of unease as to the respondent's conduct.

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41 *R v Loleini'ala* AC 19/2018, at [7]-[10]; *R v Tu'iha'ateiho* [2015] Tonga LR 44..

42 *R v Minisale* AC 13/99, unreported, 23 July 1999.

[50] In the respondent's favour are the fact that he has no prior convictions, pleaded guilty at an early stage, cooperated fully thereafter with police, and is remorseful.

[51] Apart from this incident the respondent's work history and personal life were creditable. His support of his wider family, church activities and steady employment history in jobs of significant responsibility, are all matter that weigh in his favour.

[52] There is some reason to conclude that a conviction will have an impact upon the respondent's employment in New Zealand. In the respondent's sentencing submissions it was asserted that a conviction would mean the loss of his New Zealand job because of the alteration in his immigration status. Further, it was said that his ability to travel overseas would be affected, thus impacting on his career.[43] However, no proof of those matters was offered. It remained as mere assertion short of acceptable proof.[44] Further, the respondent's affidavit took the matter no further, deposing only to his worry that a conviction might impact upon the trust his employer had in him.[45] Nor does the employer's and the pre-sentence report's expression of concern in that regard amount to sufficient proof upon which the court can act.[46]

[53] Further, there was no finding by the learned sentencing judge that a conviction would have the suggested impact on the respondent.

[54] Otherwise, the consequences of recording a conviction will have the same consequences on the respondent as it does on all offenders. There is nothing particular to warrant special treatment.

[55] In our view, it cannot be concluded that the consequences of recording a conviction out of all proportion to gravity of the offending. In the circumstances, s 204 of the *Criminal Offences Act* is not engaged.

[56] Taking into account all of the above matters it is our view that a conviction should be recorded in respect of each count, and a fine imposed. The fines should be at the lower end of penalty range to recognise the respondent's mitigating factors, including the lack of impact on the public of the importation of the rifles.

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43 AB 18, paragraph 4.
44 *R v Maile* [2019] TOCA 17; AC 23 of 2018.
45 Respondent's affidavit, AB 29, paragraph 15.
46 AB 32, AB 52.

[57] We would order:

(a) on Count 1: record a conviction and impose a fine of $400.00;

(b) on Count 2: record a conviction and impose a fine of $300.00;

(c) pursuant to s 108 of the *Customs and Excise Management Act* the rifles are forfeited to the Crown.

Whitten P

White J

Morrison J

COURT OF APPEAL TONGA