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IN THE MAGISTRATE COURT
ENHANCED JURISDICTION
NUKU'ALOFA

FIKA 'OE HOPO; CM 61,62,63,64/2014

BETWEEN : REX
AND : 1. 'EPELI VAINIKOLO
2. SIONE TAU'ALUPE.

Sisifa & 'Aho for Crown

W. Edward Jr for Defendand.

INTRODUCTION.

The cases were committed to the Supreme Court last year but were remitted back to be dealt with in the enhanced jurisdiction of the Magistrate court. I heard the cases starting 30th/09/14.

These cases involved the unloading of goods at sea, from, an international vessel; the *St Theresa*, that had just sailed into Tonga, from New Zealand, onto a coastal vessel, the *Princess Royal*. This transfer of goods took place near the island of Ataata. The *Princess Royal* then proceeded to Fuaa wharf and unloaded the goods there.

A customs officer stopped the goods there and called other officers and the goods were seized. Briefly, the crown is alleging that the *St Theresa*, unlawfully imported goods from outside Tonga, that is from New Zealand, and had the goods unloaded at an area not authorized by the Customs people as a sufferance wharf and without following the proper procedure of dealing with imported goods. The *captain of the Princess Royal*, became an accompish when he accepted the goods on board his vessel and proceeded with it to Fuaa wharf and unloading it there' without authorization from customs..

The Crown called 5 witnesses and the defence called only one witness, and written closing submissions were filed. I started to work on my decision but upon looking at the sentencing part of section 92....., I thought that there was a compulsory sentence prescribed by y the Act so I referred the matter back to the Supreme Court. I have been advised that there is in fact a discretion that I could exercise and so the case have been send back again. The materials that I send to the Supreme Court went astray and did not get back to me, hence the delay in my

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AMC

completing my judgment. I have now obtained copies of the submissions from counsels, and I am now able to make a decision.

Originally, at the Preliminary Inquiry stage:

The captain of the St Theresa, 'Epeli Vainikolo, was charged with two offences:

- Summons 139/12- smuggling contrary to S. 92(1)(a), Customs and Excise and Management Act 2007(CEMA 2007)

- Summons 140/12- allowing unauthorized unloading of goods contrary to S104 (CEMA 2007)

The captain of the Princess Royal, Sione Tau'alupe, was charged with two offences:

- Summons 741/12, acceptance of customs controlled goods, contrary to S 89, (CEMA 2007) .

- Summons 742/12, smuggling, contrary to S 92(1)(a), Customs and Excise Management Act 2007.

These are indictable offences and on the preliminary inquiry proceedings, I held that for Vainikolo, there was sufficient evidence to commit both 130/12 and 140/12, up to the Supreme Court for trial. For Tau'alupe, there was sufficient evidence to commit 741/15, but I held there was no sufficient evidence to send him up for trial on the smuggling charge.

In the Supreme court,

Charges against 'E Vainikolo, are brought under Indictment 113/14

Count 1) smuggling, contrary to S 92(1)(a) Customs and Excise Management Act 2007(CEM Act 2007)

2) unauthorized, unloading of goods contrary to S 104 CEM Act 2007/12

The two counts are given Enhanced Jurisdiction numbers 62/14 & 63/14

Against S Tau'alupe- two counts under Indictment 114/13.

1) acceptance of customs controlled goods, contrary section S 89, and

2) possession of smuggled goods contrary to S 92(1) (c) CEM Act 2007

The cases have been remitted to me to deal with under the Enhanced Jurisdiction of the Magistrate Court.

Enhanced Jurisdiction numbers are, 60/ 2014 & 61/2014.

THE LAW:

The charges are brought under The Customs and Excise management Act 2007 (CEM Act 2007).

92 Smuggle

1) Any person who knowingly —

(a) smuggles;

(b) unlawfully conveys any smuggled goods; or

(c) has in his possession any smuggled goods, commits an offence and shall be liable upon conviction to a fine of not exceeding treble the value of the goods or \$100,000 whichever is the greater, or to a term of imprisonment not exceeding 10 years, or both.

S.2 defines smuggling as – the importation of goods with the intention to defraud the revenue and includes importation or exportation of prohibited or restricted goods.

Export – is defined as the transportation of goods beyond the Kingdom.

Import – means to bring goods or cause goods to be brought into the Kingdom. “

coastal ship ” means a ship that is not engaged in making an international voyage;

S.104. Unauthorized loading and unloading.

The master of any aircraft or ship, contrary to this Act, allows any unauthorized loading or unloading of goods subject to Customs control onto or from that aircraft or ship commits an offence and shall be liable upon conviction to a fine not exceeding \$100,000. 00, or 10 years imprisonment, or both.

S 89. Acceptance of customs controlled goods

A master of an inter-island aircraft or coastal ship who knowingly accepts on board Customs Controlled goods or leaves a port or place contrary to this Act commits an offence and shall be liable upon conviction to a fine not exceeding \$10,000 or a term of imprisonment not exceeding three years or both.

S.5. Goods subject to Customs Control

The following goods shall be subject to custom control until release in accordance to customs laws.

(a). imported goods;

(b). in transit goods;

(h) goods onboard an aircraft or ship involved in an international voyage, that aircraft is in or over Tongan territory or while that ship is in Tongan waters: ...

S. 2 Coastal ship means a ship that is not engaged in making an international voyage.

Other relevant sections.

SS 14,15,16, 24. CEM Act 2007. These sections talk about the obligations of Ship masters and set out what they must do or not do when dealing with international travel or goods.

Burden of proof.

The burden of proof, in a criminal trial is normally on the prosecution .

Standard of proof.

This is a criminal trial and the burden of proof, **is proof beyond reasonable doubt.**

However for smuggling.

S 117. Smuggling prosecutions

The onus of proof shall lie with the accused in any smuggling prosecution.

The offence of smuggling S 92.- 730/12

The elements for the prosecution to prove are;

- The accused
- Was master of a ship,
- Knowingly imports goods
- With intention of defrauding revenue.

Unauthorised unloading of goods subject to Custom Control S 104, 740/12.

- The accused
- Was master of a ship
- Allows the unlawful unloading
- Of customs controlled goods

EVIDENCE:

Epeli Vainikolo.

The evidence against Vainikolo comes mostly from his own cautioned statement. He confirmed that he was the Master of the St Theresa on the relevant date. He knew of the goods being loaded in Auckland.

He gave permission at Ataata, in Tonga for the crew to unload these goods to the Princess Royal. He also stated that this is not the usual way of dealing with such goods. The usual way was to have Customs officers check them and clear them. He also apologized.

Except for the one witness of the defense who produced the Registration of the Princess Royal, there was no evidence called by the defense.

Sione Tau'alupe.

Evidence against Tau'alupe, also, mostly from his cautioned statement. He confirmed that he was the master of the Princess Royal, a coastal ship, at the relevant time. He was aware of goods from the St Theresa on his ship, and although he not directly accepted the goods on board his vessel, he did not order them returned to the *St Theresa*. In his record of interview, Tau'alupe, claims that he was not aware that the unloading of goods from, the St Theresa onto his ship was against the law. I cannot believe this allegation from Tau'alupe. Part 3 of The Customs and Excise Act 2007 deals with the arrival and departure from Tonga, of International vessels. Almost every section therein talks about the responsibilities of a ship master, when his ship has just arrived or is about to depart Tonga. Mr Tau'alupe in his statement to the Police say that he have been a master/captain since 1974. I do not believe he is unaware of these provisions. In addition Mr Tu'ihakavalu Talivakaola, from customs, say that Tau'alupe as master of Princess Royal had taken them, more than 3 times, the customs, immigration, and guarantee officers to the St Theresa when it comes in from overseas to clear it.

Applying THE LAW TO THE FACTS.

Vainikolo;-

On the Smuggling :

The prosecution have provided evidence that the accused on the 3rd or 4th Sept 2012, was the master of a foreign going vessel , namely the St Theresa. There is, from his own admission, evidence that he was aware of goods loaded in Auckland, New Zealand for his employer Sefo Ramanral and others. There is evidence that he gave permission for these goods to be unloaded in Tonga, at Atata, to the Princess Royal, without the normal customs clearance or permission. I am satisfied that as the master of an international vessel, bringing goods from a foreign country, (New Zealand,) and unloading it in Tongan waters onto a Coastal ship,(the

Princess Royal), without going through the proper customs clearance, he knows that his actions amounts avoiding revenue and therefore, to smuggling.

Also, from his own statement, he gave permission for these goods to be unloaded onto the Princess Royal at Ataata, without waiting for customs clearance.

The relevant sections from the Act that are listed above, talk about things that the master must do before his ship arrives in Tonga, or before his ship is cleared by customs. Note that s177 of the Act puts the burden of proof on the accused to prove his defence. He called no evidence to prove that he tried to comply with any of these requirements. That persuades me to infer, that he did what he did knowingly and with intention to defraud revenue.

Findings.

Vainikolo did not give evidence in the hearing, and taking into account s177

I find the smuggling count against Vainikolo, - 62/2014 is proved.

and

- the allowing of unauthorized unloading of custom controlled goods,- 63/2014,

Have also been proved.

The Counts Against Tau'alupe, under indictment 114/13.

The two counts are given Enhanced numbers 60/2014 & 61/2014

- 1). Acceptance of Customs Controlled goods, contrary to S 89 CEM Act 2007: - 60/2014
- 2). Possession of customs controlled goods, contrary to section 92(1)(c) of CEM Act 2007: - 61/2014

Prosecution needs to prove;

- The accused
- As master of a ship
- Accepts on board the ship Customs Controlled goods.

From his own statement he admits he is the master of the *coastal ship*, Princess Royal and he became aware of the goods from the St Theresa when he come up from the engine room, but did not return them or order them returned. He also admits that he was aware of the St Theresa coming from New Zealand and will be near this location, around this time. That is why he called them for help, from that ship's engineers. In his record of interview, Tau'alupe claims

that he was not aware that the unloading of goods from, the St Theresa onto his ship was against the law. I do not believe this. He states that he had been a ship master since about 1974. That is a long time to be in the position of a ship's master.

Part 3 of the Customs and Excise Act 2007 deals with the arrival and departure from Tonga, of International vessels. Almost all sections talk about what a ship master have to do when his ship has just arrived or is about to depart. I believe that Tau'alupe, although he did not say whether has been a master for international vessels or only coastal vessels, is well aware of these provisions of the law and he was fully aware of the legal position he put himself in when he chose not to order the return of the goods to the St Theresa. He knew that the St Theresa, came from New Zealand; he knew that the goods unloaded onto his ship came from the Princess Royal; he knew that there was no customs officers around to clear the goods.

I note that the defense called only one witness, and she produce the certificate /license of the Royal Princess. Defence Exhibit I. This exhibit shows that the Princess Royal has a NZ registration that runs from 30th September/ 2010 – 30th September/2015. I believe what matters is that the ship was operating in Tonga, and, as a coastal ship. Tu'alupe say that he is from Kameli, Neiafu, Vava'u, but he live on the Princess Royal. Also, as the custom officer said he knew that Tau'alupe is master of the Royal Princess because he had carried them, up to 3 times to meet the St Theresa when it came from overseas, so they can clear it. In other word, he was using the Royal Princess to perform the funtions of a coastal ship.

Findings.

I find that the charge of acceptance of goods under Custom's Control, have been proved.

I also am satisfied that the possession of smuggled goods is proved.

Case adjourned for mitigation and sentencing submissions both to be filed by And I will sentence 1 week later.


Principal Magistrate Salesi Mafi



Sept.
He
Chamber