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**IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY**

CR 93 of 2017

BETWEEN:

R E X

- Prosecution

AND:

TEVITA FIFITA

- Defendant

BEFORE THE HON. JUSTICE CATO

Mr Lutui for the Prosecution

Mr Tu'utafaiva for the Accused

VERDICT

[1] The accused, Tevita Fifita, who, at the material time, was a Chief Superintendent of Police in charge of the Central police station at Nuku'alofa had been charged with a number of charges arising out of an incident that occurred at the Salote wharf in Nukualofa in the early hours of the 18th – 19th November, 2017. These charges were;

- i) Attempted interference with the course of justice contrary to section 65 of the Criminal Offences Act, particulars of which were that on the 21st November, 2016 at Nukualofa he called Sikuvea Taulaki to remove a licence plate C7582 from a motor vehicle that he had driven on 18th November 2016 which had collided with the entrance gate to the Queen Salote Wharf and had replaced it with licence plate

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P1591, in order to conceal the identity of the motor vehicle from being identified.

- ii) Reckless driving contrary to section 25(2) of the Traffic Act, particulars of which were that on or about the 18 November 2016 at Ma'ufanga he did drive a motor vehicle on a road recklessly when he drove with the licence plate C7582 at a speed and without keeping a proper lookout, north across the intersection of Alaivahamama'o Bypass and Vuna Roads and crashed through the entrance gate into the Queen Salote Wharf.
- iii) Using a vehicle with an unauthorized licence plate contrary to sections 9 and 41 of the Traffic Act when he caused to be affixed to a motor car that he drove, the licence plate C 7582 which was not a licence plate issued for that vehicle.

[2] At the conclusion of the Crown case, Mr Tu'utafaiva submitted that count 2 reckless driving could not succeed because the Prosecution had not issued a summons within 14 days of the offence as required by section 28(2) of the Traffic Act. Although the accused had been suspended by the police from the 24th November 2016 and it seems charged, a summons had not been issued to him until 3rd April 2017. Mr Lutui asked for time to consider this matter and discuss it with his superiors and the next day indicated that he could not proceed with the prosecution of this count. Accordingly, without further argument I dismissed this count, the effect of which is that the accused was acquitted.

[3] I do not intend to canvass the evidence more than is necessary. Much of it related to a police drug operation for which, at the

material time, the accused was the commanding officer who had given approval for the operation to take place, and police practice. The salient points that emerged from the evidence, much of it given by the accused, was that, since about the 16th November 2016, he had been engaged in this operation. Documentary evidence was produced which supported this. Although he was present in Nuku'alofa as the Chief Superintendent in charge of the Central police station, he had sanctioned the operation as Acting Deputy Commissioner. He gave evidence that he had taken an active role in surveillance of the ferry leaving for and returning from 'Eua where the operation took place. This was required because certain suspects he had been informed were not on Eua and also, he said, because the information was sensitive he had decided to personally undertake surveillance at times of ferry arrivals and departures, it seems from the 16th to the 18th November when, late in the day, the investigating team arrived back in Nuku'alofa with a container of seized marijuana plants.

- [4] In order to maintain a covert presence, the accused determined that his police vehicle which he had been given for the purpose of use during his employment and travelling to and from work, should have the police registration number plate removed and another number affixed. At the time of the accident in the early hours of the 19th November, 2016, his vehicle had the private plate still affixed. After the accident which occurred about 1am in the morning, he had returned home and on the next morning had directed a police officer, Sikuvea Taulaki, who was in the mechanical engineering division of the police to replace the damaged windscreen. Taulaki gave evidence that he had to order a new windscreen because no suitable replacement was immediately available in Tonga and that it would take about a week for that to arrive. Because the accused had said he would pay for the windscreen, he had kept the car at his residence

pending receipt of a replacement windscreen and completion of repairs. He said that the accused had told him, when Taulaki had asked, that he had an accident with the gate at Queen Salote wharf. In the morning, of the 21st November, 2016, he was asked by the accused to replace the plate on his car with the police plate which was in his boot and to bring the private plate to his office.

[5] It seems that senior police officers learned of the accident by the 24th November 2016 because Taulaki was directed to take the car from his private residence and it was driven back to the Longolongo police station. Later, on the 24th November, the accused had been charged and suspended from duty. It seems from the evidence I heard that police attending a police function at a venue near the wharf were aware shortly after the accident that the accused had been involved and indeed, police had checked out the wharf area where the accident happened. Wharf security employees had filed a report on the accident, but the responsible authority had not made any complaint to Police.

[6] The accused, in his evidence, said that he had been employed as a police officer for 35 years. He was a Superintendent in charge of the Central police station and had held that position and rank for four years. He spoke of being in charge of an operation concerning drug plantations at 'Eua. He said that another senior officer, Chief Inspector Fakateli, had been in charge of the operation on 'Eua but had reported to him. He had learned of two suspects being absent from Eua and had himself attended to surveillance of the wharf from the 16th November, 2017. He had changed the plates to assist the surveillance and he had approved this kind of activity that is authorising plate switches, before. He denied knowledge of there being a policy that the Commissioner had to approve a plate change. He said that he knew that the practice had been adopted because he had

done this, himself. He said ordinarily it was changed back when he had conducted his surveillance because other police used the car, but on the 18th he had not done so. He had intended to change the plate back the next day, after he had returned home and rested.

[7] He said that Fakateli and the others returned back at about 8pm on the 18th November, and the operation had been successful. A container of cannabis had been secured and he had attended the container and given instructions to the rest of the men to take time off. He had been at the police station with the container around 10pm. He left the station about 11pm and he went home. He wanted to rest and would change the plate the next day. He had remembered he had to attend a police fundraising dance at Dupencia bar near the wharf, and went there. There were many police officers there and he said he had one beer. As he was leaving some beers were placed in his car; about 5-6 bottles. He then went back to the police station and checked the container was secured and the guarding officers were present. That was about 12.30pm. He went home and was about to have food when an informant rang and told him of a problem in Fangaloto. He was travelling to Fangaloto and fell asleep around the Vuna road. He hit the cross bar on the gate at the Salote wharf and that woke him up. He then proceeded to drive to where the swimming pool was but thought it better to get home and rang and apologized to his informant. He got home between 1.30am and 2.30am.

[8] He disputed aspects of evidence of witnesses at the wharf as to conversations relating to the problem with Fangaloto and whether he had said it was his car. He said that he had said it is Ok because this is a car for my own use and I will fix it myself. He had mentioned to one of them a name Toki because he was concerned with a complaint concerning the Toki family. He

denied ever saying he was in the wharf area in order to be safe or to put ammunition into his magazine. For reasons which I will give in my findings, I do not consider it necessary to resolve any conflicts of credit on these issues, aside from one which I shall mention later.

- [9] The Crown called in rebuttal Chief Inspector Fakateli who was in charge of the operation on Eua. He confirmed that he had given information to the accused concerning two suspects who were still he thought on Tongatapu. He said he gave the names to the accused and he expected further work to be done on them. He considered they were a major part of the operation.

FINDINGS

- [10] I heard and considered closely the evidence of the accused and his cross-examination which was a careful cross-examination conducted by Mr Lutui at considerable length. I found the accused a credible witness. He is plainly a person of good character having served the Tonga police for 35 years and being of a very distinguished rank and in charge of the largest police station in Tonga. In relation to both the credit of his answers in evidence and on the central issue of whether he was involved in attempting to pervert the course of justice, I direct myself that I am entitled to and indeed should take into account his good character. In relation to these issues Archbold (2016) para 4-484, R v Vye and others 97 Cr App R 134 (CA); R v Hunter and others [2015] 2 Cr App R 9 ; also Murphy v The Queen (1989) 167 CLR 94(HCA). Irrespective of this, in any event, I add that, having seen and heard the accused for a long period, in chief and under cross-examination I found him a reliable witness. I particularly concentrated on the contention that he had changed the plates around the 16th November as part of a covert

operation, and on the 21st after the accident, when he had directed the police plate be restored to the vehicle.

[11] I accept his explanation for the plate change was that he was undergoing covert surveillance and the evidence given by Chief Inspector Fakateli went a long way in my mind to confirming his reason for carrying out surveillance. I accept he had been provided with sensitive information and had decided to carry this out himself. I accept his reasons for not changing them after surveillance on the 18th November, 2016 which appears to have been a long and very heavy day with the accident being in the early hours of the 19th. There was no other suggestion for changing the plates advanced by the Crown that could contradict his evidence. I accept his evidence for changing the plates. I also accept that perhaps mistakenly but in good faith he considered that he was in a position to authorise this, and that he had done so before.

[12] I accept his explanation when he said he fell asleep momentarily when approaching the Vuna road en route to Fangaloto, and the evidence did not suggest to me any basis for suggesting otherwise. There was no evidence led which would suggest that he had other than a long and hard day on police business. I do not accept and, indeed it was not suggested by the Crown, that he had been drinking to excess that evening. He had attended a police function, but the evidence revealed that he had arrived about 11.30 pm. There is no evidence that he left the bar adversely affected by alcohol and no evidence to contradict his evidence that he only consumed one drink. The fact that a witness at the scene of the accident smelt alcohol on him and viewed some bottles in the car which he admitted being given as he left the function does not mean that alcohol was a relevant causative factor in the accident.

[13] In relation to the Crown case on count one, attempted interference with the course of justice, I accept his evidence that he wanted to attend to the damage himself and get the car back into working condition as soon as possible, and took steps to do so on the 19th November, 2016. I fully accept that this was an acknowledgement by him that he was to blame for the damage to the car and accepted responsibility to pay for that, which was quite a considerable sum. I do not find that he said to security officers that it was his car which he had disputed in evidence maintaining that he had said that it was a car which he was entitled to use and he would pay for the damage which I accept. As to his actions of asking for the plates to be exchanged on the morning of the 21st November, 2016, I observe that he had not withheld from the mechanical engineer who was a member of the police force that he had been involved in an accident and he said he had told a senior police officer Fua of this also on the Monday morning after the accident, which had occurred early on the Saturday morning. In any event, he must have known, as a very high profile officer, that it would be very unlikely his actions would escape attention of police prosecuting authorities, and the car he drove would be well known amongst Police. There was no damage to the wharf or its gates and nobody was hurt, and so I accept that it was also his belief that it was unlikely that he would be prosecuted for what had occurred, embarrassing though it likely was.

[14] Although it seems that directing Taulaki to replace the police plate triggered a suspicion of deception amongst prosecuting officers, as Mr Lutui said in his closing argument, when referring to Archbold, at paras 28-18 and 19, on the topic of "tending to pervert", it also is conduct consistent with no more than a genuine desire to place the car back in the position it was before surveillance commenced. I do not consider having listened at length to the accused and his cross-examination that he made

the request to change plates for any ulterior reason. Accordingly, applying the well-known dictum of Pollock B in R v Vreones [1891] 1 QB 360 at 369, approved by the Court of Appeal in R v Rowell 65 Cr App R 174, that the "real offence ... is the doing of some act which has a tendency and is intended to pervert the administration of justice", I am satisfied that the accused did not intend by his actions on the 21st November, 2016 in giving a direction to change the plate to pervert the administration of public justice. I decline to draw the inference beyond any doubt that he acted for an ulterior reason with the intention to pervert the course of justice. For these reasons, I consider he is not guilty on count one.

[15] As to the remaining charge of using a motor vehicle with a unauthorized plate attached, under section 9 (1) of the Traffic Act, I consider that Mr Lutui is correct in his submission that the provision sanctions only the use of plates authorized by the Act or regulations and it is an offence to affix or cause to be affixed a plate which is not issued for that vehicle for the current period. I observe that the penalty under section 41 is \$200.00 or to imprisonment for more than one year, or to both. No, statutory or regulatory exception or permission was cited to me by Mr Tu'utafaiva or Mr Lutui which would justify an otherwise unauthorized plate being used here for covert purposes, although I accept that the accused was genuine in mistakenly believing he could do so for covert reasons. As Mr Lutui submitted, police must act within the provisions of the law unless they have some exemption from doing so. I do not accept Mr Tu'utafaiva's argument, however, that the charge in the indictment inaccurately described the offence. The heading to section 9 refers to penalty for use of motor vehicle with unauthorized or obscured registration plates or licences and the particulars relating to affixation in the charge make it very clear what the

nature or substance of the offence is. Accordingly, the accused is convicted of count 3.

Verdicts

Verdict count one – not guilty

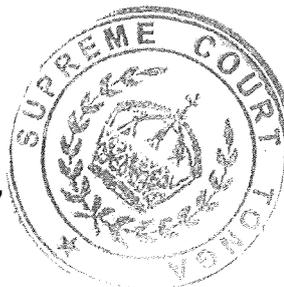
Verdict count three – guilty

The accused was discharged at the request of the prosecution on count 2 reckless driving and his discharge operates as an acquittal.

Sentence

At the conclusion of my verdict, I indicated to the Crown that I would consider this to be an appropriate case where a discharge without conviction on count 3 should take place on the basis that the accused paid \$200 forthwith for prosecution costs. The circumstances of the offending I am satisfied took place in conjunction with a successful police operation. I am satisfied that the officer held a genuine belief that he was entitled to change plates and for that reason and taking into account his excellent service record no conviction should be entered. Mr Lutui took a few minutes to take instructions and returned to say, quite properly in my view, that the Crown had no opposition to this course of action. Accordingly, the accused is discharged without conviction on count 3 on the basis that he pays forthwith into Court \$200 by way of compensation. I understand that he has paid the amount ordered.

DATED: 17 NOVEMBER 2017



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