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IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY **CR 68 of 2019**

BETWEEN:

R E X

-Prosecution

AND:

MULI VEHIKITE

-Accused

RULING ON THE ADMISSIBILITY OF EVIDENCE

BEFORE: JUSTICE CATO

Counsel: Mr. 'I. Finau for the Prosecution
Accused – Self represented

Date of Verdict: 22 April 2020

1. The accused, Mr Muli Vehikite, was charged with three counts relating to drug offending; first a charge of unlawful import of illicit drugs under section 3(c) of the Illicit Drugs and Control Act, secondly engaging in any dealings with any other person for the import of illicit drugs under section 4(b) of the Act, and possession of illicit drugs under section 4 (a) of the Act.

2. During the opening, it became clear that the Crown case depended on evidence gained from an informant by a former senior police officer, Officer Tu'utafaiva who was unavailable as

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a witness. He had been the Officer in charge of the case. I was informed by Mr Finau that the admissibility of his unsworn evidence was crucial to the Crown case. I had intimated that I would allow other officers to give evidence that they were directed by Officer Tu'utafaiva to take certain action, but that I would not allow evidence to be given of his conversations with an informant unless the prosecution could persuade me that there was some evidential basis for doing so contained within an exception to the hearsay rule. I adjourned the trial before any evidence had been called because it seemed to me to be essential to the prosecution case that this issue be resolved before proceeding further with evidence. Mr Finau candidly admitted that without this evidence the Crown case could not proceed. The accused, who was plainly aware of the unavailability of Tu'utafaiva and was representing himself, indicated that he opposed any evidence being given of a hearsay nature.

3. I learned also from Mr Finau that Tu'utafaiva could not be called as witness because his location was unknown. He was overseas and had not returned to Tonga for some time. He had been under suspicion for possible serious criminal offending arising from his police work, had not returned to Tonga and was no longer a member of Tonga Police. I knew something of this because a previous prosecution over which I had presided also faced difficulties because he had been unavailable to give evidence.

4. The hearing resumed in the afternoon and Mr Finau said that he relied on sections 89 (e) and 89 (f) of the Evidence Act to justify the evidence of Tu'utafaiva as it related to what he had been told by the informant. Section 88 of the Act defines hearsay evidence as;

> "where it is sought to prove any fact by evidence of an oral or written statement made by a person not called as a witness, such evidence is called hearsay evidence."

Section 89 provides;

> "The Court shall not admit hearsay evidence except in the following cases;
>
> **Exceptions**

(e) where the knowledge, intention, motive, or state of mind or of body of any person is a fact in issue and the statement proves of disproves the said knowledge, intention, motive or state of mind or body;

(f) where the statement refers to a fact in issue or a fact relevant to a fact in issue and is contained in any official book, register or record and was made by a public servant in discharge of his official duty or by any other person in performance of a duty enjoined by the law of the country in which such book, register or record is kept."

5. Mr Finau contended that the evidence came within section (e) because the informant had given Tu'utafaiva information which had referred to the role of the accused and another man in the importation on a ship of a packet of methamphetamine weighing 275.6 grams which was contained in a drum. This evidence was relevant to establish the accused's knowledge of the drug and participation in the importation. The packet was in the name of the other man but contained in a drum which was offloaded and taken by the accused from the wharf area, elsewhere. The prosecution, in earlier proceedings, had offered no evidence against the co-accused who had been tried separately. Further, Mr Finau referred to section 89 (f) because Tu'utafaiva, he argued, had made an entry in the police diary of events recording the nature of what he had been told by the informant. He contended as a consequence the diary entry was admissible.

6. I adjourned the proceedings to the next day to allow Mr Finau further time to support his case after hearing his submissions. I indicated to him that I had very real concern about admitting the evidence of Tu'utafaiva concerning the information he had from an informer because essentially the relevant information the Crown was seeking to introduce from him was second hand hearsay and I doubted that section 89 (e) or (f) was intended to apply, in these circumstances. I indicated that I had reservations, in any event, about the prosecution relying on evidence from Tu'utafaiva in circumstances where he had failed to return to Tonga and to the Tonga police and had, it seemed left, under a serious cloud of possible criminal offending that obviously tainted his reputation. The allegation of misconduct was one that, had he given evidence, would have been raised by the accused and thus the

reliability of any second hand account given by him would have been placed in issue. Mr Finau, when Court resumed the next day, indicated that he had considered the matter over night and the Crown would not proceed. I consider that Mr Finau took the correct course of action, and acquitted the accused discharging him from the indictment. Whilst there was to be evidence of surveillance of the accused by other officers and evidence that he uplifted the drum containing the packet, his involvement with and knowledge of the contents of the packet which was addressed to the co- accused was, although very suspicious, no more than that.

7. I indicated that I would record my views in writing at Mr Finau's suggestion, although Mr Finau's decision not to proceed meant that it was unnecessary for me to give a ruling. I took up his invitation, however, because it might be helpful to do so in the absence of authority or guidance on these issues in Tonga.

8. If Tu'utafaiva had given evidence he would not have been able to give hearsay evidence concerning what he was told about the accused's participation in drug offending by the informant, because this is plainly hearsay. In my view, sections 89 (e) and (f) are intended to allow hearsay evidence to be given in evidence where first hand hearsay is involved that goes to the issues mentioned in those subsections. That will generally mean that the maker of the statement, although unavailable to give evidence, had first hand knowledge of the relevant matters, and not second hand information, as Tu'utafaiva had.

9. Nor does the fact that Tu'utafaiva recorded the informant's observations implicating the accused in a diary entry assure its reliability. Tu'utafaiva was a witness whose credibility, subsequent events suggest, was plainly very questionable. I note the accused's objection to unsworn statements from Tu'utafaiva being given in evidence. In any event, the record is also an account of second hand hearsay, and in my view does not qualify for admission under section 89 (f) for this reason.

10. The section does not contain any discretion to allow a judge to rule inadmissible an otherwise qualifying hearsay statement under the Act which, to my mind, is a failing,

especially where factors exist which a judge objectively feels might affect the reliability of the evidence. However, it has long been recognized that there exists a judicial discretion at common law to exclude evidence which although technically admissible is lacking in probative value or similarly I would suggest where there exist factors which, in the view of the trial judge, cause serious disquiet about the reliability of the evidence that is given of a hearsay quality. In my view, a discretion exists to allow a judge to mitigate the operation of rules of evidence (be they common law or statutory rules) in order to ensure a trial is fair and accords with due process. In R v Christie [1914] AC 545, at 560, Lord Moulton said of evidence having little probative value but potentially significant prejudicial value;

> "In my opinion..., a Judge would in most cases be acting in accordance with the best traditions of our criminal procedure if he exercised the influence which he rightly possess over the conduct of a prosecution in order to prevent such evidence being given in cases where it would have very little or no evidential value."

11. In the circumstances now known to exist, I consider that there exists, aside from any issue of admissibility under the Evidence Act, sufficient concern about the credibility of former officer Tu'utafaiva to uphold the accused's objection that hearsay evidence should not be led concerning his involvement in discussions with an informant about the accused. I also take into account section 30 of the Illicit Drugs Control Act which assures the informant of anonymity. I would, accordingly, exercise my discretion to exclude this evidence, even if technically it had qualified for admission under section 89(e) or (f) in the interests of justice and a fair trial.

SUPREME COURT TONGA

C. B. Cato

JUDGE

NUKU'ALOFA: 21 April 2020