

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 43 of 2020

BETWEEN : REX

- Prosecution

AND : VILIAMI MALOLO E HAU TALIVAKAOLA

- Accused

BEFORE HON. JUSTICE NIU

Counsel : Mr. S. Lutui & Ms. S. 'Eliesa for the Crown.

Mr S. Tu'utafaiva for the accused.

Trial : 3 and 4 August 2020.

Submissions : by Ms. 'Eliesa on 11 August 2020.

by Mr. Tu'utafaiva on 24 August 2020.

by Ms. 'Eliesa on 24 August 2020.

Ruling : 4 September 2020

RULING (VERDICT)

The charges

[1] The accused is charged with 2 counts:

- (1) **Count 1:** that on 3 July 2019 at Ma'ufanga, he caused to be imported prohibited goods by causing to be imported 1 12 gauge

shotgun (serial no. G356448) without an import licence under the Arms and Ammunition's Act contrary to S.95(1) of the Customs and Excise Management Act (the Act).

- (2) **Count 2:** that on 3 July 2019 at Ma'ufanga, he caused to be imported prohibited goods by causing to be imported 900 .22 Remington ammunitions without an import licence under the Arms and Ammunitions Act contrary to S.95 (1) of the Act.

The evidence

- [2] Two boxes were shipped from the United States and they arrived on the 24 May 2019. They were unloaded by the shipping agent S. F. Oceania at their premises at Ma'ufanga. Both boxes were to be transshipped by them to Vava'u, where the consignee of the boxes was. The accused was the consignee. However, only one of the boxes was shipped to Vava'u, the 8 x 4 box and it arrived there on 1 July 2019. The other box, a 4 x 4 box, was left in the warehouse of S. F. Oceania at Ma'ufanga.
- [3] On arrival of the 8 x 4 box at Vava'u, the accused went to collect it. Upon opening it, the Customs Officers at Vava'u found several firearms in it, and upon confirming that there should be 2 boxes, the Customs contacted the Customs in Nuku'alofa to check out the 4 x 4 box at S. F. Oceania.
- [4] The Customs and the police in Nuku'alofa checked out the 4 x 4 box and found that there were 2 guns and 1500 bullets in it. One gun was a 12 gauge shotgun and the other was a .22 rifle. The 1500 bullets were all .22 bullets. The name of the Accused was written on the outside of the box. These 2 charges only concern the 4 x 4 box.
- [5] The accused had an import licence issued by the police under the Arms and Ammunitions Act for import of a .22 rifle and of 600 .22 bullets only.
- [6] The accused was arrested at Vava'u on 3 July 2019 and charged with several offences. He was interviewed on 5 July 2019. He said that the 4 x 4 box was packed by his wife and by his father. He said that he was there

- himself and had begun shopping to pack the box but that it had not been packed. He said that after he returned to Tonga he was told that there were 2 guns in the box and that there were many bullets in there too. He said that he had been told that on the 18th of May.
- [7] When he was charged with the several offences, the accused admitted that the charges were true, and he stated in his statement, "I confess to the allegation against me about the 12 gauge gun and the .22 bullets found in my 4 x 4 box, they are true and I apologise for them".
- [8] The bill of lading of the 4 x 4 box had the shipper as "Fe'ao Talivakaola" of San Jose, California, and the consignee as "Viliami Maloloehau Talivakaola" of Vava'u, who is the accused. The bill was issued on 15 May 2019 in Oakland, California.
- [9] The manifest of SF Oceania had the 4 x 4 box of the accused as it is in the bill of lading but with the wrong ETD (estimated time of departure) as 28 May 2019 and ETA (estimated time of arrival) as 1 July 2019 because the boxes had already arrived on 24 May 2019. The manifest of SF Oceania for transshipment to Vava'u included this 4 x 4 box of the accused to be shipped on 5 July 2019 but it was seized by the Customs on 3 July 2019.
- [10] The shotgun and the bullets were inspected by the armourer, Eliki Tomu, who confirmed that they were in working order and condition, and that the accused had had no import licence to import them.

Defence submissions

- [11] Mr. Tu'utafaiva made his submissions after the Crown made its submissions, and he conceded that he was not pursuing his submissions that the record of interview, answer to the charges and statement of the accused be excluded as evidence.
- [12] He submits however firstly that the shotgun and the 900 bullets are restricted goods, not prohibited goods, because they are not prohibited to be imported, like all the goods which are listed in the list of prohibited

goods which was made by the Minister with the consent of Cabinet under S.45 of the Act. They are listed instead as restricted goods in the list of restricted goods made by the Minister with the consent of Cabinet, in the Customs and Excise Management Act Order 2007.

- [13] Because the shotgun and the bullets are not prohibited goods, he submits that it is not an offence under S.95 (1) to cause to import them. The offence under S.95 (1) is to cause to import prohibited goods. The offence of "to cause to import" only applies to 'prohibited goods'.
- [14] He accordingly submits that the two offences with which the accused are charged in the indictment do not exist under S.95 (1) and they should be dismissed.
- [15] He also submits secondly that the Crown has not proven beyond reasonable doubt that the accused caused the gun and the bullets to be imported on 3 July 2019 as stated in the indictment. He said that the documents show that the date of arrival of the goods in Tonga was the 24 May 2019, not the 3 July 2019, but that the charge is that he caused them to be imported on 3 July 2020.

Crown Submissions

- [16] In reply to Mr. Tu'utafaiva's first point, Ms. 'Eliesa for the Crown, submits that restricted goods are included in the definition of prohibited goods in S.2 of the Act which provides:

"prohibited goods" means respectively any goods the importation or exportation of which is prohibited or restricted by law."

She then says:

"However, the Crown submits that "restricted goods" is not included in the definition of the term "prohibited goods" but the term "restricted by law" is used. Therefore any goods restricted by law is a prohibited goods for the purposes of section 95 (1) of the Act.

Accordingly, there is no offence under section 95(1) of causing to be imported "restricted goods".

- [17] She says that because the accused had an import licence to import a .22 gun and 600 bullets, the excess gun and bullets became prohibited goods. She therefore submits that because S.2 defines prohibited goods as including goods restricted by law, the accused is correctly charged with "causing to import prohibited goods", namely, the excess gun and bullets.
- [18] In reply to Mr. Tu'utafaiva's second point, Ms. 'Eliesa says that the date on the indictment is not restricted to a specific date because it states the date as "on or about" the 3 July 2019.
- [19] She also submits that the accused did not deny and has still not denied importing the excess gun and bullets. She points to paragraph 6 (c) of Mr. Tu'utafaiva's submissions which says:

"(c) The arm and ammunitions in this case, it is submitted, are in the possession of the police and they have been possessed since about 3 July 2019 when the box was opened at SF Oceania in Ma'ufanga."

And to paragraph 10 (iii) – but wrongly typed by Mr. Tu'utafaiva as "(iv) – which says:

"(iv) The defendant was in Vava'u on 3 July 2019 which was the date that customs officers and the police opened the box that contained the alleged prohibited goods."

and says that it is clear that the Defence admits that the Accused did import the arm and ammunition but that he claims that he could not have committed an offence because they were in the possession of the police, and also because the accused is only disputing the date of importing the goods rather than the fact of importing them.

Consideration

[20] Section 95 (1) of the Act provides as follows:

“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.”

[21] That provision provides for six separate and distinct offences as follows:

- (1) Any person who **imports** prohibited goods.
- (2) Any person who **exports** prohibited goods.
- (3) Any person who **causes to be imported prohibited goods**.
- (4) Any person who **causes to be exported prohibited goods**.
- (5) Any person who **unlawfully imports** restricted goods.
- (6) Any person who **unlawfully exports** restricted goods.

[22] That provision only makes it an offence to cause to be imported, or to cause to be exported, prohibited goods. It does not make it an offence to cause to be imported, or to cause to be exported, restricted goods. That provision clearly distinguishes “prohibited goods” from “restricted goods”. Whereas causing to import or to export only applies to prohibited goods, it does not apply to restricted goods.

[23] There is therefore a necessary requirement which flows from that that the Act must be clear as to what it provides to be prohibited goods and what it provides to be restricted goods for the purpose of the provision of S.95 (1). Section 45 of the Act provides for that and requires, as follows:

“45. **Prohibitions and restrictions**

The Minister may, with the approval of Cabinet by Order prohibit or restrict the importation or exportation of goods into or from the Kingdom.”

[24] In pursuance of that provision, the Customs and Excise Management Act Order 2007 was made and it provides as follows:

“(1) That the goods specified in Schedule 1 of this Order shall be prohibited and restricted from importation into Tonga.

(2) That the goods specified in Schedule 2 of this Order shall be prohibited and restricted from exportation from Tonga.”

[25] Schedule 1 lists 8 types of goods as “Prohibited Imports”, none of which includes arms or ammunitions, and it also lists 5 types of goods as “Restricted imports” and the first of that list is as follows:

“1. Firearms and ammunitions except with a licence issued in accordance with the law.”

[26] Neither the words “prohibited goods” nor “restricted goods” appear in that Order. Neither do they appear in S.45 either.

[27] However, I do not think that there can be any doubt in any person’s mind that the words “prohibited goods” and “restricted goods” in S.95 (1) mean respectively the goods listed as “Prohibited Imports” and as “Restricted Imports” in the Order of 2007. I therefore do not think there can be any doubt that the words “prohibited goods” appearing in S.95 (1) mean the goods which are listed as “Prohibited Imports” in that Order.

[28] The goods which are listed as prohibited imports are goods that should not be imported at all because of the nature of those goods, namely, counterfeit money, counterfeit goods, indecent and obscene publications and articles, toxic and hazardous wastes, etc. The simple fact of importing them is already unlawful, and it is an offence under S.95 (1). Restricted

goods on the other hand, such as guns and bullets, explosives, etc, should only be imported in accordance with laws relating to the same, because they serve useful purposes if used in accordance with the laws for the same. Only if they are imported without an import licence is the act unlawful and is an offence under S.95 (1).

S.2 definition

- [29] The Crown submits that the words "prohibited goods" in the offence in S.95 (1) of "causes to be imported ... any prohibited goods" should include the words "goods restricted by law" because section 2 of the Act defines "prohibited goods" as "any goods the importation or exportation of which is prohibited or restricted by law."
- [30] But S.95 (1) has already provided that a person commits an offence if he "unlawfully imports or exports restricted goods". Those are the offences no. 5 and 6 in paragraph 21 above.
- [31] It is also relevant that in S.95 (1) the word "unlawfully" has only been used in respect of the import or export of "restricted goods", the reason being that it is already unlawful to import or to export prohibited goods.
- [32] If we were to expand the provision of S.95 (1) by applying the definition of the words "prohibited goods" as contained in S.2 of the Act, then the first offence in S.95(1) would become:

- (1) Any person who imports prohibited goods commits an offence.
- (2) Any person who imports goods prohibited by law commits an offence.
- (3) Any person who imports goods restricted by law commits an offence.

So that whereas (1) and (2) may be alright because such goods are already prohibited by law to be imported, (3) would be wrong because import of restricted goods are not unlawful, and that is why S.95 (1) expressly

provides that it is an offence if they are unlawfully imported, by having the words “unlawfully imports or exports restricted goods” in its provision.

[33] And if we were expand the first offence like that, then what happens to the fifth and sixth offences? That is, the offences of “unlawfully importing restricted goods” and “unlawfully exporting restricted goods”? Those offences would be rendered superfluous. But they have been expressly provided to be the offences – as separate offences from the offences in respect of prohibited goods which have been expressly provided for.

[34] I therefore do not consider that it was intended by the legislature that the definition of “prohibited goods” in S.2 was to be applied to the term “prohibited goods” in S.95 (1), because the context of S.95 (1) is such that “prohibited goods” mean the goods listed by order under S.45 as “prohibited imports” instead. S.2 only applies if the context of the term defined in S.2 “does not otherwise require”. In the present case, the context “otherwise requires”.

[35] Accordingly, I agree with the submission of Mr. Tu’utafaiva that there is no offence in S.95 (1) of causing to import restricted goods such as the two charges which the Crown has brought against the accused in this case.

Correct date of importation

[36] As to the date of importation, the correct date of importation was the 24 May 2019, and the Crown agrees with that, but submits that the words “On or about 3 July 2019” are such that they include and should include the 24th May 2019.

[37] The Court has the power to amend the date of the offence in accordance with the evidence but I do not consider it makes any difference in view of my finding that the indictment is bad.

Constitutional prohibition

[38] Clause 13 of the Constitution prohibits the changing of a charge in a criminal trial and the conviction of an accused person of a different offence from the offence with which he has been tried except certain specified offences. It provides as follows:

"13. Charge cannot be altered

No one shall be tried on any charge but that which appears in the indictment, summons or warrant for which he is being brought to trial:

Save and except that –

- (a) where the complete commission of the offence charged is not proved but the evidence establishes an attempt to commit that offence the accused may be convicted of this attempt and punished accordingly; and
- (b) where an attempt to commit an offence is charged but the evidence establishes the commission of the full offence the accused may be convicted of the attempt; and
- (c) on the trial of any person for embezzlement or fraudulent conversion the jury shall be at liberty to find such person not guilty of embezzlement or fraudulent conversion but guilty of theft and on the trial of any person for theft, the jury shall be at liberty to find such person guilty of embezzlement or fraudulent conversion.
- (d) any Act may provide that a person charged with an offence may be convicted of another offence (not being a more serious offence) arising out of the same circumstances."

[39] Because the Act under which the accused is charged, does not provide that the accused may be convicted of another offence arising out of the same circumstances such as clause 13 (d) provides, I cannot amend the charge against the accused and convict him of another offence in S.95 (1) or elsewhere in the Act.

Onus of proof

[40] In its opening address and in its closing submissions, the Crown emphasised that the Act places the burden of proof upon the accused. S.117 provides as follows:

"117. Smuggling prosecutions

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

[41] Smuggling is defined in S.2 of the Act as meaning "the importation or exportation of goods with the intention to defraud the revenue and includes the importation or exportation of prohibited or restricted goods." That means, as the Crown argues, that the prosecution in the present case is a smuggling prosecution, and that the onus of proof lies upon the accused to disprove the case for the Crown. It submits that the accused has failed to do that because he has given no evidence and has called no evidence.

[42] There are three problems with this submission of the Crown. Firstly, the definition of smuggling does not include "**causing** the importation of prohibited goods" which is the specific offence in S.95 (1) with which the accused is charged. S.95 (1) provides for offences of import, export and causing to import or export prohibited goods. Yet S.2 only refers to import and export of prohibited (and restricted) goods. I do not see how I can say that the legislature has intended that the offence of causing the importation of prohibited goods be included when it had not expressly said so itself.

[43] Secondly, what is the onus of proof that shall be with the accused? The proof of what? It is unfortunate that the Act is silent about what it is that

the accused has the burden of proving. It leaves both the prosecution and the defence to speculate as to what it means. Despite what the provision says, the Crown has not relied upon it and has instead prosecuted its case against the accused as if the burden of proof lies upon it instead, and then merely says that the accused has the burden of disproving the case against him. On the other hand, the defence says that the provision is no more than the reverse onus principle which is that as long as the accused has established a positive defence, upon a balance of probability, the onus reverts to the prosecution to disprove it beyond a reasonable doubt.

[44] The position would therefore have been clear if S.117 had clearly provided for what it is that the accused or the prosecution has to prove, such as what is provided in the provisions in the United Kingdom, which are as follows:

"Customs and Excise Management Act 1979, S.154

Proof of certain other matters

"154 –(1) An averment in any process in proceedings under the Customs and Excise Act –

- (a) that those proceedings were instituted by the order of the Commissioners; or
- (b) that any person is or was a Commissioner, officer or constable, or a member of Her Majesty's armed forces or coastguard; or
- (c) that any person is or was appointed or authorised by the Commissioners to discharge, or was engaged by the orders or with the concurrence of the Commissioners in the discharge of, any duty; or
- (d) that the Commissioners have or have not been satisfied as to any matter as to which they are required by any provision of those Acts to be satisfied; or
- (e) that any ship is a British ship; or

- (f) that any goods thrown overboard, staved or destroyed were so dealt with in order to prevent or avoid the seizure of those goods,

shall, until the contrary is proved, be sufficient evidence of the matter in question.

- (2) Where in any proceedings relating to customs or excise any question arises as to the place from which any goods have been brought or as to whether or not -

- (a) any duty has been paid or secured in respect of any goods; or
- (b) any goods or other things whatsoever are of the description or nature alleged in the information, writ or other process; or
- (c) any goods have been lawfully imported or lawfully unloaded from any ship or aircraft; or
- (d) any goods have been lawfully loaded into any ship or aircraft or lawfully exported or were lawfully waterborne; or
- (e) any goods were lawfully brought to any place for the purpose of being loaded into any ship or aircraft or exported; or
- (f) any goods are or were subject to any prohibition of or restriction on their importation or exportation,

then, where those proceedings are brought by or against the Commissioners, a law officer of the Crown or an officer, or against any other person in respect of anything purporting to have been done in pursuance of any power or duty conferred or imposed on him by or under the Customs and Excise Act, the burden of proof shall lie upon the other party to the proceedings."

[45] Thirdly, S.117 may be ultra vires clause 11 of the Constitution, if it intends that the accused shall bear the burden of proving his innocence in a smuggling or counterfeiting prosecution. That is because the prosecution in

such prosecution does no more than to present the accused with the appropriate indictment and leaves it to him to prove that he did not do what is alleged he has done in the indictment. If he cannot prove it, then he is convicted.

[46] Clause 11 provides on the other hand as relevant, as follows:

"11. Procedure on indictment

"No one shall be tried ... unless he have first received a written indictment ... Such written indictment shall clearly state the offence charged against him and the grounds for the charge. And at his trial the witnesses against him shall be brought face to face with him (except according to law) and he shall hear their evidence and shall be allowed to question them and to bring forward any witness of his own and to make his own statement regarding the charge preferred against him"

[47] The words in brackets "(except according to law)" in that clause were inserted to enable the admission of evidence of experts overseas who have analysed drugs forwarded by the police in Tonga without the experts having to attend at great costs, unless the accused gives reasonable notice that he wants to cross-examine such witness, and the accused, if convicted may be ordered to pay for the costs of the expert in attending for that purpose. They certainly do not mean that the Legislature could thereby enact a law that the onus of proof of guilt of an accused person be shifted altogether so that he has to prove his innocence instead. That would render the whole of the above quoted provision of clause 11 pointless.

[48] To me, that provision of clause 11 is the foundation upon which the rule of law, due process and natural justice are based. It is the basis upon which the fundamental law of the presumption of innocence is based. For the Act to provide that in respect of smuggling and counterfeiting prosecutions that foundation is to be put aside, and that the accused person is to bear the

onus of proof instead, I find that difficult to accept, in view of the fact that clause 11 still requires the burden of proof in criminal trials to rest on the prosecution instead. I must consider the provisions of clause 82 which provide as follows:

“82. This Constitution is the supreme law of the Kingdom and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency be void.”

[49] Because S.117 does not provide what it is that the accused person has the burden of proving, I can only interpret it as meaning that it provides that the accused person has the burden of proving his innocence of the charge that is made against him. That is inconsistent with clause 11 of the Constitution as I have stated and I therefore find that S.117 is void.

Conclusion

[50] Accordingly, I find that the indictment against the accused is bad because it charges the accused with two counts of offences under S.95 (1) of the Act which are not offences under that section of the Act, and I cannot convict him of another offence under S.95 (1) because clause 13 of the Constitution prohibits me for doing so. I therefore must dismiss the two charges against the accused and discharge him.




Niu J
J U D G E

NUKU'ALOFA: 4 September 2020.

