

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 53 of 2020

BETWEEN : REX

- Prosecution

AND : VAIPULU IKAMANU

- Accused

BEFORE HON. JUSTICE NIU

Counsel : Mr Joe Fifita for the crown

Mr Siosifa Tu'utafaiva for the accused

Trial : 19 August 2020

Submissions : 20 August 2020

Ruling : 03 September 2020

RULING (VERDICT)

Outline of the evidence.

- [1] An 8 X 4 wooden box with the name "Sione Litoki" was among several boxes which were left in the premises of shipping agent, SF Oceania, at Ma'ufanga, uncollected by the consignees of those boxes. Those premises have been approved as an approved place for customs purposes, such that although the boxes were removed from the Wharf, they were still subject to customs control in that they could not be released to the consignees unless approved

by the Customs after inspection and payment of the relevant duties and charges.

- [2] Because these several boxes had not been collected by the consignees, the Customs decided to have them checked for any prohibited or restricted goods. They called the police to have their trained dog check out these boxes. The police brought their dog and the dog was agitated by the contents of this 8 X 4 box of "Sione Litoki". No other box there agitated him.
- [3] The Police and the Customs opened the box and found, amongst its contents, 2 point 22 rifles and 7, 136 point 22 bullets. Then they closed the box again and left it to see who would come to collect it.
- [4] On 22 July 2019, the accused came to collect it. He had an import license to import 1 point 22 rifle and 600 point 22 bullets and a bill of lading for the box. The bill stated that the box was "said to contain" clothing and scooter.
- [5] The import licence had been issued to the accused on 18 October 2017. No expiry date is stated on it.
- [6] Customs called the police and the box was opened and the 2 rifles and the 7,136 bullets were shown to the accused. He said that he did not know about the other rifle or about the extra bullets.
- [7] The two rifles and all the bullets were transferred from Customs to and were taken by the Police, and the police arrested and charged the accused with offences in the Magistrate Court on the same day:
- (1) No.449/19 - importing restricted goods contrary to SS.45 and 95 of the Customs and Excise Management Act by importing 6,801 point 22 bullets.
 - (2) No.450/19 - importing restricted goods (as in no (1)) by importing 1 point 22 Ruger rifle no. 000985637.
 - (3) No.451/19 - possessing the Ruger rifle no. 000985637 without licence.

- (4) No.452/19 - possessing 7,401 point 22 bullets without licence.
- (5) No.453/19 - possessing the (other) point 22 rifle no. MM33621G without licence.
- (6) No.454/19 - importing a firearm without licence contrary to S.15 and S.20 (1) of the Arms and Ammunition's Act by importing the Ruger no.000985637 rifle.
- (7) No.455/19 - importing without licence 6,801 point 22 bullets.

[8] The accused was kept in custody and two days later on 24 July 2019, he was questioned by the police and he answered as follows:

"no. 12. Whose are the guns and bullets?

Sione Leveni Toki's.

13. To whom were the guns and bullets to be given?

To me.

14. How were the guns and bullets given to you?

By box.

15. Whose box?

Sione's.

16. Where was the box sent from?

From America but I do not know where.

17. How many guns were brought in the box?

There were two.

18. Do you know how many bullets were brought in the box?

No.

19. Do you already have a licence to keep and look after a gun or bullet?

No.

20. Were there lawful steps taken for bringing these two guns and the bullets sent to you?

I was given an import (licence) for one gun.

21. And what about the other gun and the extra bullets?

It was intended for a boy.

22. For whom was the other gun intended?

Uai, but I do not know his surname.”

[9] He was then charged with each of the 7 offences I have summarized in paragraph 7 above and he said in respect of each of them as follows:

No.449/19 – importing of 6,801 bullets – “I do not know about the rest of the bullets.”

No.450/19 – importing the Ruger rifle (under the Custom Law) – “I have not yet been licenced.”

No. 451/19 – possessing the Ruger rifle – “It was not intended for me.”

No. 452/19 – possessing 7,401 bullets – “I have not yet been licenced.”

No. 453/19 – possessing the MM rifle – “Yes, the reason is because there is no licence.”

No. 454/19 – importing the Ruger rifle (under the Arms Law) – “Yes, I was the one who released the box (from Customs).”

[10] He was then asked if he wanted to make a statement and he said:

“I feel punished for this is the first time this has happened in my life.”

The charges

[11] The accused is charged with only two counts in the indictment in this trial:

Count 1: that on or about 22 July 2019, at Ma’ufanga, you did cause to be imported a prohibited good, when you caused to be imported a .22 rifle (serial no.MM3621G) without an import licence under the Arms and Ammunition Act, contrary to section 95(1) of the Customs and Excise Management Act.

Count 2: that on or about 22 July 2019, at Ma'ufanga, you did cause to be imported a prohibited good, when you caused to be imported 6,801 .22 rifle ammunition without an import licence under the Arms and Ammunition Act, contrary to section 95(1) of the Customs and Excise Management Act.

The arguments

[12] The evidence were only given by the 6 witnesses for the Crown. The accused gave no evidence and called no witness. Both counsel gave their submissions and arguments in Court a day afterwards.

Onus of proof

[13] Normally, and it is law, the prosecution carries and bears the burden of proof in criminal trials, such as the present trial, unless express provision is made in a particular law concerning the trial that it does not bear that burden. S.117 of the Customs and Excise Management Act (the Act) provides:

"117. Smuggling prosecutions.

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

and the term "smuggling" is defined in the Act to include the importation of prohibited or restricted goods and "import" is defined to mean:

"to bring goods or cause goods to be brought into the Kingdom."

[14] Mr Tu'utafaiva argues that (despite the provisions of S.117) it is not for the accused to disprove all the elements of the offence. He says that S.117 is no more than the "reverse onus" principle which he says is that: the accused is entitled to raise a positive defence, and that if he is able to establish that defence on a balance of probability, the onus then reverts to the prosecution to disprove that defence beyond reasonable doubt.

[15] Mr Fifita made no submission about this issue which Mr Tu'utafaiva has referred to but he had stated in his opening for the Crown at the commencement of this trial that the accused shall bear the burden of proof in a smuggling or counterfeit prosecution, which this case is, as is provided in S.117 of the Act.

[16] There are three problems with S.117 in the present case. 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.

[17] 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.

[18] 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.”

[19] Thirdly, S.117 may be ultra vires clause 11 of the Constitution, because 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.

[20] 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 shall be allowed to question them 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”

[21] 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.

[22] To me, 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.”

[23] 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.

Charge of prohibited goods

[24] The two charges against the accused both state that the accused “**did cause to be imported a prohibited good**”, namely the **MM rifle** in count 1 and the **6,801 bullets** in count 2.

[25] Mr Tu'utafaiva argues that the Act expressly provides that guns and ammunitions are restricted goods, not prohibited good, but that the prosecution has specifically charged the accused with causing to import prohibited goods instead and that therefore the charge cannot be sustained under S.95(1) under which he is charged and that the charges should be dismissed.

[26] Mr Fifita argues that the Crown has the choice to charge the accused with either causing to import prohibited goods or to charge him with causing to import restricted goods. He puts his argument in his submissions in Tongan like this:

- “ • Section 2 of the Act means “any goods the importation or exportation of which is prohibited or restricted by law”.
- That prohibition or restriction means being prohibited or restricted by other laws separate from the Act.
- But the definition in the Customs and Excise Management Act Order of 2007 (as empowered by S.45) has no relevance to the choice which the prosecution can make to charge prohibited goods in this case.
- The prosecution chooses to use Section 2 because of the offence of Causing to import prohibited goods, which there is no such offence in respect of restricted goods.
- It is not obligatory for the prosecution to follow the definition in the Order because the prosecution has chosen the definition in Section 2.”

[27] I understand him to say that although the Order of 2007 specified what are prohibited goods and what are restricted goods (which order expressly provides that arms and ammunitions are restricted goods) the accused is being charged with causing to be imported prohibited goods instead because S.2 of the Act defines “prohibited goods” as “any goods the importation or exportation of which is prohibited or restricted by law”.

[28] Section 95(1) under which the accused is charged provides as follows:

“95(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.”

[29] Mr Tu'utafaiva says that S.95 (1) provides for 6 separate offences and I agree with him. They are as follows:

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

The underlined words show the differences in all the 6 separate offences.

[30] So S.95(1) makes it two separate offences if prohibited goods are either

- (a) **imported** by a person or are
- (b) **caused** to be imported by a person.

[31] And S.95 (1) also makes it an offence if **restricted goods** are unlawfully imported by a person. It does not make it an offence if restricted goods **are caused** to be imported by a person. Only when a person unlawfully **imports restricted goods** that he is liable for an offence under S.95(1).

[32] In other words, if a person causes another person to unlawfully import restricted goods that person is not liable for an offence under S.95(1). It is

only when he causes another person to import any prohibited goods that he is then liable for an offence under S.95(1).

[33] S.95(1) makes it clear that both persons, that is, the person who imports **and** the person who causes him to import, **prohibited goods**, are penalised for the importation of prohibited goods. That is not the case if the imported goods are only **restricted goods**. Only the person who has unlawfully imported them is penalised.

[34] The end result is that S.95 does not make it an offence for a person to cause another person to import any restricted goods. That is the plain and ordinary meaning of S.95(1), and it is consistent with the meaning of S.45 of the Act which provide for the determination of what is to be **a prohibited goods** or what is to be **a restricted goods**. The order of 2007 has properly listed what has been determined under S.45 to be prohibited goods for the purpose of importation and what are to be restricted goods for the purpose of importation.

[35] What Mr Fifita argues is that the provisions of S.2 of the Act should be applied to S.95 (1) so that S.95 (1) makes it an offence for a person to cause to be imported any restricted goods because S.2 defines prohibited goods as “prohibited goods or restricted goods”.

[36] S.2 of the Act provides as follows:

“2. **Interpretation**

In this Act, unless the context otherwise required –

...

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

[37] That definition means that the term "prohibited goods" wherever it appears in the Act, would mean **both** "prohibited goods" and "restricted goods", or "either prohibited goods **or** restricted goods" as the case may be.

[38] If that definition was to be applied to S.95 (1) such as Mr Fifita argues, S.95(1) would then read as follows:

"(1) Any person who imports or exports or causes to be imported or exported any prohibited goods or restricted goods or who imports or exports any restricted goods commits an offence..."

That would mean that the existing provision of S.95 (1) which I have underlined would be rendered superfluous. There would be no need for them because the definition of "prohibited goods" in S.2 has already included "restricted goods" in the definition of "prohibited goods". But the Legislature must have meant to include those words in the provision of S.95 (1) to mean something.

[39] I must therefore apply the provisions of S.2 to mean what the Legislature had meant for it to mean, namely, that S.2 should only be applied **unless** the term means something else **in the context** in which the term appears in the Act, as S.2 itself so provides: "In this Act, **unless the context otherwise requires** - ". If I do that, as I should, then the words which would otherwise be superfluous would be meaningful and S.95(1) would mean what I have stated they were intended and provided to mean.

[40] Accordingly, I agree with Mr Tu'utafaiva that S.95 (1) does not provide that it is an offence for any person **to cause to be imported any restricted goods**, and that the two charges against the accused, which are both for causing to be imported prohibited goods, be dismissed, because guns and ammunitions, such as the rifle and the bullets are, are not prohibited goods but are restricted goods, and it is not an offence to cause such restricted goods to be imported.

Particulars of "cause to be imported"

[43] Mr Tu'utafaiva also argues that the indictment is bad because it does not specify or give any particular of what the accused is alleged to have done to have caused the restricted goods (although stated to be prohibited goods) (the rifle in count 1 and the bullets in count 2) to have been imported. I agree with Mr Tu'utafaiva. That is what the particulars of the offence in an indictment is supposed to inform the accused. An indictment is not an indictment unless it states the act (or omission) which the accused is alleged to have done that constitutes the offence with which he is charged. That is the essence of a fair trial, that the accused is informed before the trial, what it is he alleged to have done, in order that he can properly prepare to defend the charge which is brought against him.

[42] The indictment against the accused in the present case simply states:

"you did cause to be imported a prohibited goods..." in both counts 1 and 2. That tells him nothing at all.

That does not tell him what he is alleged to have done which is said to constitute "cause to be imported".

[43] Mr Tu'utafaiva did not raise this point at the commencement of this trial and I have to see if the Crown has proved that the accused did cause the extra gun and bullets to be imported.

Did the accused cause the goods to be imported?

[44] I have to be satisfied that the accused did cause the MM rifle and the 6,801 bullets to be imported. At the end of this trial, the Crown has not proved when it was that these goods were imported into Tonga. It could have and it ought to have done so, but it did not. The evidence is that this 8 x 4 box had not been collected by any person. Several other boxes were uncollected. The only explanation given was what the accused told the customs officer, Seluini 'Iloa. The accused told him that he was made a consignee of the box because the shipper, who was also consignee, had died, and that the wife had asked

him to be consignee with 2 other persons to try and collect the box from customs in Tonga. The bill of lading, which was issued on 19 April 2019, then had the consignee as

“Sione L. Toki
c/o Tokemoana Mahafutau
c/o Ikamanu Vaipulu (the accused)
c/o Waikato Tupou.”

- [45] The bill of lading also stated, at the time of printing out of the bill, that \$800 was paid on 8 July 2019 towards the freight of the box leaving a balance of \$50, and that the balance of \$50 was paid on 12 July 2019. It therefore appears that although the bill is stated to have been issued on 19 April 2019, it was not printed out and sent to the accused here in Tonga (from the United States) until after the payment of the \$50 was made on 12 July 2019. So that the accused would have only received it sometimes shortly before he went with it to SF Oceania premises on 22 July 2019.
- [46] It is therefore not clear when it was that the 3 names, one of which is the accused’s, were typed into the Bill of Lading. If that was known, it may then be known when it was that the accused was asked to be a co-consignee to collect the box.
- [47] It is established that on 16 May 2019 the box had already been imported into Tonga and been left for sometimes, together with several other boxes in SF Oceania premises uncollected because it caused Customs to become concerned and decided to have the police dog come and check them out.
- [48] The officer, Fa’one Bloomfield, who was present on 16 May 2019 when the box was opened, did not say anything about the condition of the contents of the box then, but the Customs Officer, Seluini `Iloa, who was there on 22 July 2019 said that the box had signs that it had been there for a long time because there were many goods in the box which were expired and the contents were wet.

- [49] I also add that on the bill of lading it had the name of the shipper as "Sione L Toki" with his address in Taylorsville, Utah, but it also has in brackets after the phone numbers given "Sela/wife". That may indicate that that bill was issued after Sione L. Toki died as the accused told the officer Seluini 'Iloa.
- [50] The import licence of the accused to import 1 .22 rifle and 600 bullets was issued to him on 18 October 2017. Although that was 21 months before the accused went to collect the box, that is evidence that he caused one of the .22 rifles and 600 bullets to be imported. It cannot be evidence that he caused the other rifle and the other 6,801 bullets to be imported.
- [51] It is clear that the MM rifle and 600 of the 7,401 bullets were accepted by both the accused and the police to have been the .22 rifle and 600 bullets for which the accused's import licence had been intended, and he was therefore not charged in the Magistrate Court with any offence of importing those 2 things.
- [52] Yet count 1 of the indictment in this trial charges the accused with causing the MM rifle to be imported without an import licence under the Arms and Ammunitions Act, contrary to section 95(1) of the Act instead. No charge is made in this Court in respect of the Ruger rifle or in respect of 600 bullets of the 7,401 bullets which were imported at all.
- [53] That does not make sense and no evidence or explanation is given about it. If the accused was not charged in the Magistrate's Court with any offence in respect of the importation of the MM rifle, then no case in respect of such offence was committed from the Magistrate's Court to be tried in this Court at all.
- [54] What he was charged with in the Magistrate's Court in respect of the MM rifle was that he was in possession of it without a licence. It is clear that that charge was not proceeded with in this Court because the accused never had possession of the MM rifle (or of the Ruger rifle or of any bullet) at any time.

- [55] The Crown can charge the accused with another offence in this Court provided that it can be based on the evidence at the committal. The evidence in the committal was that the MM rifle and 600 bullets were lawfully imported because there was an import licence to import them. If that is the case, and I accept it is the case, then there is no justification for the charge which is presently made in Count 1 against the accused.
- [56] Furthermore, if the accused is acquitted of count 1, he will not be entitled to apply to be granted a licence to use the MM rifle because he was already allowed to import the Ruger rifle under his import licence. The MM rifle would therefore be forfeited to the Crown instead. But that MM rifle was the rifle that the accused had wanted to import and which he did import.
- [57] Finally, as to the answers and statement which the accused gave to the police when he was questioned at the SF Oceania premises and at the police station, which I have stated above, the information which the accused gave could equally have been given by Sione L. Toki to him before he shipped the box or after he had shipped the box and before it arrived in Tonga or after the box had arrived in Tonga. It could also have been conveyed to the accused by the wife after Sione L. Toki died after the goods had already landed in Tonga. It is not even known if Sione had died before the box arrived in Tonga because we do not know when it was that Sione died or when the box arrived in Tonga.
- [58] I believe the accused was being truthful when he was asked who the other gun and extra bullets were for. He said that they were for a boy named Uai but that he did not know Uai's surname. I believe that that name was conveyed to him by Sione L. Toki's wife (widow) when she made him one of the "c/o" consignee for Sione L. Toki, because one of the three c/o consignees is "Waikato Tupou". Waikato may be called "Uai" for short which is maybe the name which the widow had conveyed to the accused as the one to whom the other rifle and bullets were for. That does not make the accused the one who had caused Sione L. Toki to have sent the extra rifle and bullets

to Tonga because we do not know whether or not the box was still overseas at the time that the widow had told the accused of the extra rifle and bullets.

[59] I am therefore not satisfied that there is evidence that the accused did cause the extra gun and bullets to be imported.

[60] The offences in S.95(1) are serious offences because they carry a heavy penalty of a fine of up to \$100,000 and of imprisonment of up to 10 years or either one of them. The evidence required to prove the commission thereof must be strong, such that despite evidence produced or given by an accused, it is proof beyond reasonable doubt.

[61] As it is, I find that the Crown has not proved that he did anything which caused the extra rifle and bullets to be imported.

Conclusion

[62] Accordingly, I come to the only conclusion, for the reasons I have given, that the Crown has failed to prove the two charges it has brought against the accused, and I dismiss them and discharge the accused.



[Handwritten Signature]
Niu J

J U D G E

NUKU'ALOFA: 3 September 2020.