

Sim + fl

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

CR 178 of 2020

REX

-v-

VILIAMI MANUOPANGAI HINGANO

BEFORE HON. JUSTICE NIU

Counsel : **Ms. L. Fakatou for the Crown.
Mr. S. Taione for the accused.**

Submissions : **by Mr. Taione on 18 January 2021.
by Ms. Fakatou on 2 February 2021**

Hearing : **in Court on 28 January 2021.**

Submissions hearing : **5 February 2021.**

Verdict : **17 March 2021.**

VERDICT

The charge

[1] The accused is charged that on 20 March 2020 at Nuku'alofa he was in possession of 198 kg of turtle meat out of the shell without it being certified by an authorised officer that it came from a turtle of legal size, contrary to regulation 24 (g) of the Fisheries Management (Conservation) Regulations.

I
read 17/03/21
JTB

Plea and election

- [2] The accused pleaded not guilty and elected trial by judge alone on 11 August 2020.

Crown Evidence

- [3] The Crown called 4 witnesses and I set out their evidence in the paragraphs following.
- [4] **Talia'uli Moa**, 22 years of age, police constable of 3 years, said that on 20 March 2020, he and another police officer were in a joint operation with 3 fisheries officer at the Queen Salote Wharf to see if there were any unlawful marine produce in the cargo of the vessel, MV. 'Otuanga'ofa, which had just arrived that morning from Vava'u and Ha'apai, in order to enforce the fisheries laws. He said that they were there at about 10:00 am.
- [5] He said that a man who was standing by one of the ship's container on the wharf asked him what work they were doing. He told him that they were inspecting the ship's cargo for unlawful marine produce, and he jokingly said to the man, "May be you are one of those who ship up unlawful fishing produce", and then he asked the man, "Do you have any cargo?" He said the man said, "Yes, it's a small cooler of fish and turtle (meat)". He said he asked the man again whether it had turtle (meat) and that the man said yes. He said he asked for the man's driver's licence and after the man gave it to him, he asked the man whether it would be alright to inspect his cargo and that the man said yes. The man was the accused.
- [6] He said that he called the fisheries officers and that they inspected the man's cargo. The cargo were a cooler and stand up freezer and both were full of fresh turtle meat in crushed ice and that there were also 2 crayfish and 6 small fish.
- [7] He said he took 7 photographs of the contents with his telephone. He produced those photographs as **Exhibit 1**.
- [8] He said that the man was not asked whether he had any permit for the turtle meat and that the man did not produce any. He said that they arrested him and took him and the cargo to the police station.

- [9] He said that later in the day he was present whilst another police officer, Selemaia Kisina, interviewed the man and that he himself signed the record of interview as witness.
- [10] **In cross-examination**, he said that there was a turtle shell (back) in the freezer and that the turtle had been a large turtle. He said if the man had told them not to touch or inspect his cargo, they would still have inspected it although he said he did not know the fishery law concerning it.
- [11] There was **no re-examination** and **I asked** and he identified his signatures on the record of interview of the man which he had witnessed.
- [12] **Taufa Fainga'anuku**, 38 years of age, fishery officer, said that he was the Officer in charge of the Fishery Office at Pangai, Ha'apai. He said that a fishery officer in Tongatapu, Losilini, telephoned him and that he went and looked in their record of permits which they had issued for killing of turtles at Ha'apai, and found that no permit to kill any turtle had been issued to or in the name of the accused, Vili Manuopangai, whom he knew as a person.
- [13] He said that the law is that only male turtles with shells (backs) of 45 cm or more are allowed to be killed and only in the period from March to July in each year, and that before any male turtle is killed, an authorised officer must certify in writing that the turtle is of legal size. He said they have forms for giving such approval and that in addition to the fisheries officers, the town officers are also authorised to give the required approval.
- [14] He produced a blank form for such approval as **Exhibit 2**. It provides for a number to be inserted, as well as for the date and time and place of inspection and for the name of the owner of the item(s) inspected. It then requires 3 things to be stated:
- (a) details of authorisation granted (if granted);
 - (b) names and details of fish or article inspected;
 - (c) status of the inspection.

Finally, it is to be signed by the owner of the items and by the authorised officer.

[15] He said that subsequent to the call from Losilini, the accused telephoned him and asked if he could give a letter that the turtle meat be released to him. He said that he told the accused no. He said that he told the accused that he had already told the fishery officer in Tongatapu that he, the accused, had had no permit to kill any turtle and that furthermore he, the witness, had not seen the turtle that was killed before it was killed. He said that no one had asked for any permit to kill a turtle up to that day.

[16] **In cross-examination**, he said that he knew a man named Mohokoi Tongile’o of Lofanga, Ha’apai. He said that the town officer of Lofanga had the form for approval of killing of a turtle and that his name had been gazetted in February 2020 as an authorised officer and that he could issue approval to kill a turtle.

[17] He said that the town officer of Lofanga had not been contacted to see if he had issued any permit for the turtle in question. He also said that at that time they had not as yet received the monthly reports from the town officers for the month of March 2020.

[18] (The evidence was then deferred and by agreement, the witness and both counsel were to attend at the fisheries premises and inspect the meat and measure the turtle shell).

[19] He said that after looking at the meat, it was clear that the meat was turtle meat of legal size and that the shell was measured and was found to be 69 cm long.

[20] He said that he had not looked to see if any approval had been given to kill the turtle in the name of Mohokoi Tongile’o.

[21] He said that the accused did not say anything in his telephone call to him to the effect that “he was contacting him because he had only found out that there was no permit for the turtle meat”. He also said that it was well known that such permits were required, and that a man from ‘Uiha, Ha’apai telephoned him for a permit and that the

man brought the live turtle to Pangai and that he inspected and gave written approval to him before he killed it to send to Vava'u.

[22] **In re-examination**, he said that the town officers' report must include any approval given to kill a turtle. He said that the report from the town officer of Lofanga for the month of March 2020 did not have or indicate any approval had been given to kill a turtle, and that it was the same for the April report.

[23] **Tolu Fa'au**, 30 years of age, fishery officer for 3 years, said that he was one of the fisheries officer who had been at the wharf on 20 March 2020 and who had taken and weighed the turtle meat. He said that it weighed 198 kg altogether and that the shell was weighed separately and was 7 kg. He said that the meat was packed into bags and there were 9 bags, and that the fishery officer, Losilini Loto'aohea, filled in and signed a form which he identified and which he produced as **Exhibit 4**. He said that although the owner was Vili Manuopangai Hingano, he was not there and he did not sign the form.

[24] He said that amongst the meat there were 3 turtle heads, that is 2 big ones and 1 small one, and that he could tell that the back (shell) belonged to one of the big heads.

[25] He was asked questions by Mr. Taione and by myself but nothing of substance was revealed.

[26] **Selemaia Kisina**, 28 years of age, police sergeant, said that he questioned the accused and he produced the record of his interview as **Exhibit 2**, but subject to objection which Mr. Taione raised, namely, that the interview was unlawful because it was in breach of S.149 of the Tonga Police Act, and which was agreed to be the subject of submissions together with closing submissions at the end of the evidence.

Defence evidence

[27] **Viliani Manuopangai Hingano**, 46 years of age of Tofoa, the accused, said that at about 8:00 pm. Thursday 19 March 2020, Mohokoi Tongile'o telephoned him and asked if he could receive his

(Mohokoi's) cargo arriving on the boat the next morning, and told him that there was some fish in it for him too. He said that he told him he would do it.

[28] He said that he went to the wharf area of the vessel in the following morning. He said that he saw officers wearing highlight vests looking at people's cargoes, and that it was unusual for him to see that happening. He said he asked one of the officers what they were doing and that the officer told him that he was police officer Moa and that they were inspecting the cargoes for any unlawful seafood, including turtle meat, shellfish and crayfish.

[29] He said that he told the officer that he was there to receive a cargo inside the container and that it had turtle meat, crayfish and fish. He said that the officer asked him if he wanted them to look at his cargo and that he told him yes. He said that the officer then called the other officers and that they entered the container and did their work. He said that they were taking photographs and that he was not happy with that because they had not asked to do so and he had not agreed that they could do so.

[30] He said that the police told him that they were seizing the cargo and were taking it and him to the police station. He said that whilst they were travelling to the police station he overheard one of the officers saying that what was needed was a letter of approval to release the cargo. He said that because of that, he telephoned the fishery officer at Ha'apai, Taufa, from the police station. He said that he told Taufa that the cargo had been seized by the police and that they needed a letter from him approving the release of the cargo to him. He said that Taufa told him that the fishery officer should have inspected the turtle before it was killed and that because no officer saw the turtle whilst it was still alive, he could not give any such letter.

[31] He said that he did not know that an authorised officer must see the turtle and approve its killing before it is killed.

[32] **In cross-examination**, he said that he works as director in the Ministry of Public Enterprises for 4 months then but had been a

construction contractor and that he had been member of Parliament representing District 12 which was 'Uiha, Lifuka and Lofanga.

- [33] He said that it was not true that the officer had said to him that may be he was one of those who ship unlawful fish produce. He said that he was sitting on a box of cargo by the container from which it had been brought, and that the container only had his cooler and freezer left in it. He said that he told officer Moa that there was turtle meat and fish in his cargo. He said that he did not know he had breached any law and that he only knew on the way to the police station that the law required approval for turtle.
- [34] He said that he telephoned Taufu and then Mohokoi Tongile'o. He said that he had called Taufu first rather than Mohokoi first because he knew there was no document from Mohokoi because if there was a document, Mohokoi would have given it to him. He said that he thought that such document was only needed if the produce was to be sent overseas. He said that there was no difference in telephoning Taufu rather than Mohokoi first, and that he had understood from their telephone talk the night before that there was no document. He denied that he ought to have telephoned Mohokoi first and asked if there was any document with him. He said that he did ask at the police station and the police officer said that he needed to contact Fisheries at Ha'apai for the required document. He said he did not know until then that such document was required.
- [35] He said that he did not mean to get the officer Taufu in Ha'apai to give the document unlawfully. He said that he talked by telephone with Mohokoi several times after that.
- [36] He said that he had not expected there would be a police and fishery operation on the wharf that morning, and that he had innocently asked the officer what they were doing and that he had not intended to obtain the meat unlawfully.
- [37] He said that he knew by heart (ma'u loto) the time that turtle fishing was allowed because he grew up in Ha'apai, that it was from March to July, and that he also knew of the requirement that the turtle back (shell) be no less than 45 cm ever since he grew up. But he said that

he did not know that the turtle was required to be certified by an authorised officer before it was killed.

[38] He said that his answers to question 24 and 25 in the record of interview were correct, namely, "I went and received my cargo at the Queen Salote Wharf" and that "the cargo was male turtle (meat)". When asked how he knew that, he said that he understood that only male turtles were allowed. He said that it was true that he answered to question 28 that the turtle meat was intended for consumption and for sale and for taking to 'Eua for the Conference. He said that he had been told to receive the cargo, take some turtle meat and the fish for himself, and to hand over the cargo to a couple who would arrive from 'Eua at the wharf for 'Eua to take it. He said he knew that the turtle had been killed and that the meat was in the cargo.

[39] He said that the cargo of turtle meat was not intended to be his or that it belonged to him.

[40] **In re-examination**, he said that Mohokoi had told him that the night before, and that the couple from 'Eua would be late arriving from 'Eua and that he was to receive the cargo and to hand it over to the couple at the wharf for 'Eua when they arrived.

[41] **I asked questions** of the accused and he said that both doors of the container were open and that people had already taken their cargoes from it. He said that there was no name written on either the cooler or freezer. He said that Mohokoi had told him the number of the container and the description of the cooler and freezer, that they were tied together, the only ones being tied together like that. He said that that was how the cargo was before the officers untied them. It was the only cargo left in the container.

[42] He said that before taking delivery of the cargo, he had to pay and to obtain a receipt. He said he had gone and paid \$50 or \$60 into the office and had obtained his receipt to take the cargo. He said that he had first looked into the container and found the cargo before he went paid the money. He said he would have to show the receipt at the gate before he could take it out from the wharf.

Exclusion of hearsay evidence of the accused.

[43] I have stated in the evidence of the accused the statements which he said Mohokoi Tongile'o told him over the telephone, both in his evidence-in-chief and in cross-examination. I now consider that they cannot be included as evidence because Mohokoi Tongile'o has not given evidence, and so they are hearsay evidence. Section 89 of the Evidence Act provides that the Court shall not admit hearsay evidence, except in the list of cases contained in that section. The statements of Mohokoi Tongile'o do not fall within any of those cases.

[44] I had allowed the accused to give that evidence when he was giving evidence because Mr. Taione had stated to me that Mohokoi Tongile'o would be called as witness and that he would be confirming those evidence. That was not to be because Mr. Taione closed the case for the accused after the accused finished giving his own evidence. He stated to me in Court: "We elect not to call our witness. So the Defence now closes".

[45] Accordingly, I exclude any evidence given by the accused which purports to be anything which Mohokoi Tongile'o had said to him.

The defence raised by the accused.

[46] The defence which the accused has raised to the charge and to the evidence which the Crown has given is as follows:

- (a) that he had no guilty intent (mens rea) to commit this offence, which he says is an essential ingredient of a criminal offence such as this offence, and that he did not know that the law required that there be prior approval to kill a turtle;
- (b) that he did not have possession of the turtle meat because:
 - (i) he never got to inspect or see the meat at all before he was arrested and the meat seized, and
 - (ii) he never had possession of it.

I will deal with each of those defences.

Guilty intent (mens rea)

[47] Mr. Taione submits that the accused had no intent that is, guilty intent, to commit the offence with which he is now being charged when he went to receive the cargo at the wharf. He says that all that the accused did was what Mohokoi Tongile'o had asked him to do, namely: "There is some fish there for you, take some turtle meat for yourself, pick up the cargo and take it to the wharf for 'Eua because a couple will take it for the food preparation for the Conference". He says that the accused innocently accepted that request because he just wanted to help his friend in (or from) Ha'apai and that he did not intend to violate any law. He says that had the accused known that by agreeing to do as he was asked he would thereby be arrested and put in the cell and charged, he would not have agreed to do as he was asked. He accordingly submitted that the accused had no guilty intent to commit this offence and that the Crown has failed to prove that he had guilty intent.

[48] The wording of Regulation 24 (g) of the Fisheries Management (Conservation) Regulations under which the accused has been charged is as follows:

"24. **Turtles**

No person shall –

...

(g) possess or sell turtle meat out of the shell, unless it has been certified by an authorised officer that it came from a turtle of legal size;"

[49] The word "possess" in the provision "No person shall possess ..." means that there must be possession in the person before the person can be held to have committed this offence. And possession requires a mental element and that mental element is the knowledge by the person of the presence of the prohibited thing in his control. For example, in the case of **Warner v Metropolitan Commissioner** [1968] 2 All ER 356, the appellant, who was a floor-layer by occupation, sold scent as a side-line. He went to a cafe and inquired whether anything had been left there for him and the proprietor told

him to go and get it from under the counter. The appellant went and found two boxes there and he opened the bigger box and found that it contained scents and assumed that the smaller box also contained scents and so he took them both and drove away in his van. A police officer stopped him on the road and found that the smaller box contained 20,000 tablets of methamphetamine. The relevant law in the UK provided:

“... it shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to this Act unless ...”

The schedule to the Act specified methamphetamine.

- [50] The House of Lords held in that case by a majority decision, that the word “possession” required a mental element, namely, the knowledge by the person that he had methamphetamine in his possession, and that his control alone of the methamphetamine was insufficient to constitute the offence of possession of the methamphetamine. It accordingly held that the direction which the trial judge had given to the jury that knowledge was not required was wrong. It however held that despite that mis-direction there was no miscarriage of justice because it held that the appellant had had the opportunity, if he had wanted to, to inspect the contents of the smaller box, but he did not avail himself of it.
- [51] So that, if, in the present case the accused did not know there was turtle meat out of the shell in the cargo that he had agreed to receive and that he never had any opportunity to look and inspect the contents of the cargo, there may be merit in Mr. Taione’s submission. But the accused did know because he told the police officer, before he had looked inside either the cooler or freezer, that there was turtle meat (out of shell) in the cargo.
- [52] I therefore find that the accused did have the mental element, the knowledge and guilty intent, required, to commit this offence.
- [53] The remainder of the provisions of Regulation 24 (g), namely, “unless it has been certified by an authorised officer that it came

from a turtle of legal size” is part of the actus reus, the act which is the offence.

[54] This law therefore prohibits the possession (or sale) of turtle meat out of the shell unless “it (the turtle meat) has been certified by an authorised officer that it came from a turtle of legal size”.

[55] No evidence was given that the turtle meat in the present case “has been certified by an authorised officer that it came from a turtle of legal size”. The actus reus has been accordingly proved.

[56] Accordingly, the mens rea and the actus reus of this offence have both been proved by the Crown.

Ignorance of requirement

[57] Mr. Taione however submits that the accused did not know that the law required that there be prior approval to kill a turtle. I find that hard to believe when the accused said in his evidence that he had always known (ma’u loto) since he grew up in Ha’apai the time that turtle fishing was allowed, that is from March to July, and that the back be no less than 45 cm long. The fishery officer in charge in Ha’apai, Taufa Fainga’anuku, confirmed in his evidence that every town officer in Ha’apai was provided with the forms for approval by the officer as an authorised officer, of the killing of a turtle. He also said that the people in Ha’apai were aware that permits were required and that it was well known in Ha’apai and he cited a man calling from ‘Uiha for a permit and bringing the live turtle to Pangai for the permit before killing it and sending it to Vava’u.

[58] Having heard the accused’s background, he being a director in the Ministry of Public Enterprises, and he had been a member of Parliament representing District 12 of Ha’apai which included Lofanga, and having grown up and living in Ha’apai, I do not believe his evidence that he did not know that an approval was required before a turtle was killed. If he genuinely thought that no such approval was required, how did he think a fishery officer would know, looking at the turtle meat only, that

(a) the turtle was a male turtle and

(b) the male turtle had a back or shell of 45 cm or more, if the back and the part of the turtle which showed its gender are not there? How would he expect the law with regard to turtles be enforced if there was no such requirement for prior written approval? I do not believe his evidence about that at all.

[59] In any event, it is not a requirement of this law that the person knew that an approval was required. The regulation 24 (g) does not so provide. It simply provides that:

“ (g) No person shall possess or sell turtle meat out of the shell, unless it has been certified by an authorised officer that it came from a turtle of legal size.”

[60] And it is not a defence for any person, including the accused, to say that he did not know that the law required that the prior approval of an authorised officer was required before a turtle was killed. Ignorance of the law is not a defence to any offence.

[61] I therefore do not agree that the first defence of the accused is valid.

Possession

[62] The second defence of the accused is that he says that he did not have possession of the turtle meat at all because it was always in the possession of, firstly, the shipping company and then, it was in the possession of the police and fishery officers, as well as the Port Authority, but not in himself. He says that he never even got to open the cooler and the freezer at all because the police and the fishery officers took possession of them before he had the possession or control to do so.

[63] I am afraid that that is not correct. There was no evidence given by any witness that the police and fisheries officers had given any direction that no cargo was to be removed from the area until they, the officers, had inspected each one of all the cargoes of the vessel. They have the power to do that under S.71 (2)(c) of the Fisheries Management Act. It provides that an authorised officer may “give directions to ... any persons in the place or premises entered ...”. If there was such a direction given, then possession of all the cargo, or

at least the remaining cargo at the moment of the announcement, may be said to have thereby vested in the officers instead, because no cargo could then have been removed without their consent. But there was no such vesting of possession because there was no evidence of such direction having been given.

[64] I therefore have to accept, on the evidence, that the officers were only carrying out their "inspections" with the consent of each individual owner of each cargo. And that is evident in the evidence of the witness, Talia'uli Moa, the police officer. He said that he asked the accused, "Do you have any cargo?" and that the accused said, "Yes, it's a small cooler of fish and turtle (meat)". He said he asked the accused again whether it had turtle (meat) and that the accused said yes. He said that he asked for the accused's driver's licence, and that after the accused gave it to him, he asked the accused whether it was alright for them to inspect his cargo and that the accused said yes. Even the accused confirmed that evidence in his own evidence. That evidence confirmed that possession and control was in the accused because the officer had to ask him if he agreed that they could inspect it.

[65] Accordingly, I am satisfied, on the evidence, that each cargo owner, was at liberty to take his cargo and leave if he wanted to, unless he is stopped by the officer, (which the officer can do at any time, any where) but subject to having paid the shipping office and receiving his receipt which he had to show at the gate of the area.

[66] I am also satisfied that the accused had paid the required amount to the shipping office and had received his receipt as he stated in his evidence and I am satisfied that he could, if he had wanted to, have left. He had already received his receipt before he decided to speak to the police officer.

[67] I am therefore satisfied that before the accused spoke to the police officer, Talia'uli Moa, as to what they were doing, he had already had complete possession and control of the turtle meat out of the shell and that he had already known that it was turtle meat out of the

shell because he told the police officer so, before he himself (the accused) had looked inside the cooler and the freezer.

Conclusion

[68] Having considered all the evidence given and the submissions of both counsels, for which I am grateful, I am satisfied beyond reasonable doubt that the accused did possess, at Nuku'alofa, on 20 March 2020, 198 kg of turtle meat out of the shell without it being certified by an authorised officer that it came from a turtle of legal size.

Verdict

[69] Accordingly, I find the accused, Vili Manuopangai Hingano, guilty and I convicted him of the charge with which he is charged in this trial.

NUKU'ALOFA: 17 March 2021.



A handwritten signature in blue ink, appearing to read "Niu J", is written over the seal.

Niu J

J U D G E