

*Sean + Jb.*

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

**CR 178 of 2020**

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**REX**

**-V-**

**VILI MANUOPANGAI HINGANO**

**BEFORE HON. JUSTICE NIU**

**Counsel** : **Mrs. L. Aonima for the Crown.  
Mr. S. Taione for the accused.**

**Plea** : **Not guilty, convicted on 17 March 2021.**

**Report** : **by Probation Officer, Tito Kivalu on 4 May  
2021.**

**Submissions** : **by Mrs. Aonima on 21 April 2021.  
: by Mr. Taione on 3 May 2021.**

**Hearing** : **5 May 2021.**

**Sentencing** : **19 May 2021.**

**SENTENCING**

**Offence**

[1] Viliami Hingano, you have committed the offence of possessing turtle meat without it being certified by an authorised officer to have come from a turtle of legal size on 20 March 2020. You pleaded not guilty to having committed it but I found, on the evidence given at the trial and on the law applicable to the offence, that you did commit it.

- [2] According to your own evidence at the trial, you were asked by one, Mohokoi Tongile'o, by telephone from Ha'apai in the evening of 19 March 2020, to receive for him a cargo which he had sent on the vessel, M.V. 'Otuanga'ofa, which would arrive at Queen Salote Wharf in the following morning, and to hand it over to a couple who would arrive on the vessel from 'Eua, but later in the day, so that they would take it to 'Eua for the Church Conference which was being held there. You said that Mohokoi told you that the cargo included turtle meat and that the fish in it was for you, and that you could have some of the turtle meat for yourself as well. He told you the number of the container in which the cargo was shipped.
- [3] You agreed to do that for him and you went the following morning to Queen Salote Wharf and received that cargo. You found the cargo in the specified container of the vessel, M.V. 'Otuanga'ofa, which were a big cooler bin and a freezer box still being tied together, no doubt as described to you by Mohokoi. You then went and paid the costs of the ship which was about \$50 or \$60 and took the receipt given for it with you to show at the gate of the wharf when you would drive out with the cargo.
- [4] You were then free to take the cargo from the container and to leave that wharf and go with the cargo to the wharf where the vessel from 'Eua would arrive later that day. But you did not take the cargo out of the container, although the doors of it were open and the cargo was the only one left in it. Instead you asked a police officer what he and other officers were doing at the wharf, and he told you that they were inspecting the cargoes of the vessel for unlawful sea food and produce, and he asked you whether you wanted your cargo inspected and you told him that you did and that you had turtle meat in your cargo.
- [5] Your cargo was accordingly inspected and it was found and confirmed that there was 198 kg of turtle meat out of the shell inside both the cooler and the freezer box. It was also confirmed that that turtle meat had not been certified by an authorised officer to have come from a turtle of legal size.

[6] The legal size of a turtle is that it be a male turtle with a back or shell no less than 45 cm long. The certification of that legal size must be made, and in writing, before the turtle is killed.

[7] It was established at the trial that no such certification was done before the turtle or turtles from which this turtle meat had come was or were killed. Accordingly, in accordance with the law, I found that you were in possession of turtle meat out of the shell without it having been certified by an authorised officer to have come from a turtle of legal size and convicted you of that offence.

**No previous conviction**

[8] It is accepted by the Crown that you have no previous conviction.

**Probation report**

[9] The probation officer says that you are 46 years of age and that you are married and that you have 2 children who are both boys. He says that you have a Master degree in Business Administration from the Hawaii Pacific University and a Bachelor of Science degree in International Management from BYU.

[10] He says that you own and operate your own construction business and that you are a member of the Government board which looks after the Government markets and the Small Industries Centre, and that as from February 2021, you have been appointed as Governor of Ha'apai. He also says that you had formerly been a member of Parliament representing the people in District 12 at Ha'apai.

[11] He says that you told him that this incident has brought shame to and has ruined your reputation and your family. He says that you told him that although you accept the court's decision, you still maintain your position of innocence of the offence which you maintained during the trial. He says that you do not show or convey any sign of genuine remorse or regret of what you did because you still deny that you have done wrong.

[12] He recommends that you be sentenced by way of a fine.

[13] He attached letters from:

- (a) The District Officers of 'Uiha, Lifuka and Foa and town officers of Koulo, Tongaleleka and Faleloa, who ask that any sentence that is imposed on you be such that it does not affect your work as Governor of Ha'apai because you are dedicated and devoted to the well-being of Ha'apai. It was just one letter but was signed by all of them.
- (b) Mohokoi Tongile'o, who says that the turtle meat was never intended for you and that you were only to take some of the meat and the fish and crayfish for yourself and to give all the rest of the turtle meat to the couple from 'Eua, and that he never meant or intended that you be prosecuted and convicted for an offence in respect thereof.
- (c) The Town Officer of 'Uiha who says that you are the director of the development works of 'Uiha and that you have helped build up the economy of the island by seeking aid for an ice block making machine for the fishermen and a fuel station and agricultural plough for the farmers and fishermen. He says that you have also helped with the youth's sports and agricultural involvements as well as the food crops of the people.
- (d) The bishop of your ward at Nuku'alofa who says that you and your family are strong members of the Church of Jesus Christ of Latter Day Saints and that you are the Vice President of the Elders and that your wife, Enna, is the President of the Primary School and that you are a trustworthy and responsible member of the Church.
- (e) Your wife Enna who says that you are most helpful to all people and that by offering to be helpful to this man, you have come to have committed this offence without meaning or ever intending to commit it. She is most worried as to what would happen to you, and to her and the two children. She says that this has become an eye opener for you, not to just trust anyone.

### **Crown submissions**

- [14] Crown counsel, Mrs. Aonima, says that this is the first case that has come before the Court in respect of the conservation laws for marine life ever since its enactment in 2008. She says that it would appear that the type of sentence which the Act provides or intends is that it be dealt with by way of a fine, because it only provides a very high maximum fine of \$250,000 for breach of any of the Regulations.
- [15] She says that the Officer in Charge of Fisheries in Ha'apai has advised that turtle meat was being sold at between \$10 and \$20 per kg, and that a big sized turtle was about \$800 per turtle and that a small sized turtle was about \$300.
- [16] She says that considering the circumstances in the present case, a fine of \$5,000 would be appropriate and that the turtle meat and the shell be forfeited to the Crown.
- [17] During the hearing of the submissions in Court, Mr. Tevita 'Aho, who appeared for Mrs. Aonima, submitted that the sentence of this Court must be such that it denounces such action that was done in this case, and that it must be such that it is a deterrent in order that others would not commit such offence again. He says that the sum of \$5,000 first proposed was not very much higher than the actual market value of the meat which was  $\$20 \times 198 \text{ kg} = \$3,960$ . He suggests that the starting point be \$5,000 and that another \$5,000 be added to make \$10,000 as the denunciation and deterrent aspects. From the total, a deduction of \$2,500 may be made for having no previous conviction and further \$1,000 be deducted for rehabilitation leaving a final fine of \$6,500.
- [18] He agrees that, given your circumstances, you be given time to pay that fine.

### **Your counsel's submissions**

- [19] Your counsel, Mr. Taione, says that your fine be in the range from \$1,000 to \$3,000 but that it be more towards the lower end because you were not the one who had killed and cut up these 3 turtles. Your involvement was only that you were asked to receive the meat and pass it on to a

couple who were to arrive from 'Eua to take it for the Church Conference there.

[20] He says that you pleaded not guilty because you felt you were innocent of this offence and that you wanted to tell your reason for your involvement, especially because this is the first time a prosecution has been done under this new law. He says that you did not act in disregard of the law but that you innocently relied on what the other person at Ha'apai had told you.

[21] He says that because this is the first case under this law, and because the law does not specify what fine is to be imposed in respect of each offender for the killing of the turtle, for the selling of the meat or for simply possessing the meat, the fine in respect of your offence, which is simply possessing the meat, should not be as much as the fine in respect of killing the turtle or of selling the turtle, and I take it to mean, for profit.

[22] I asked him and he told me in Court, after speaking with you first, that your salary is paid to you fortnightly in the sum of \$1,400, and that you would want time to pay off a fine with which you would be sentenced.

**Consideration:**

**Seriousness of the offence**

[23] In considering your sentence, I have to consider the purpose of the enactment of this law by the Parliament. That purpose is the protection and conservation of marine life because of its importance to the livelihood, as a source of food, for the people of Tonga. Because of commercialisation and endless demand, not only locally but also overseas, and because of depletion and possible extinction of certain species strong measures are required to be taken to ensure that those species are not depleted or become extinct in our waters. Turtles are one of those species.

[24] Turtles are naturally rare themselves, unlike the fish or other sea life. The female turtles lay and bury their eggs in the dry sand of remote and uninhabited islands to hatch on their own. Whilst buried, the eggs may

be dug up and eaten by land animals and even humans. If the eggs get to hatch, and the baby turtles begin to crawl towards the water, they are killed and eaten by birds and land animals, and only a few are able to get to the water. When they get to the water, there are other predators waiting in the water to eat them. So that only a very few turtles which were hatched out of the eggs laid get to live and become big turtles, and only about half of those very few turtles may be female turtles to reproduce and lay more eggs in the sand.

[25] If we have no law, or if we do not enforce our law, to protect and conserve turtles, we will no longer have turtles in our waters. We will lose a very important source of food we presently have. It is a delicacy and is a much sought after food. The backs or shells of certain species of turtle also provide material for ornaments like earrings, rings, necklaces, combs and hair holds, etc. They are rare and valuable and they bring revenue to the country.

[26] This law makes it an offence to kill a female turtle at all for obvious reason, namely, because it is the one that lays the eggs. And to ensure that the fisherman does not kill the female turtle, and dispose of its parts which shows its gender, and then comes to shore and claim that the turtle was a male turtle, the law requires that **before any turtle**, male or female, is killed, an authorised officer must inspect it and certifies it in writing that the killing of the turtle is approved. Of course, if it is a female turtle, no approval can be given and it must be released back to sea.

[27] That was what was wrong in the present case. These 3 turtles were killed without any authorised officer having verified that they were male turtles. No parts amongst the meat shipped down to Tongatapu indicated that they were male or female turtles. Even Mohokoi Tongile'ō was silent about the gender of the turtles when he wrote his letter which I have summarised above. He did not even come to give evidence at the trial.

[28] The offence with which you have been charged, tried and convicted, is that you had possession of turtle meat out of the shell without it having been certified by an authorised officer that it came from a turtle of legal

size, because no authorised officer had seen the 3 turtles to confirm that they were male turtles and were of legal size.

[29] This law places the burden of care and attention upon the fisherman and upon the agent of the fisherman, such as yourself, and upon the recipient of the cargo, the couple from `Eua, to ensure that an authorised officer had approved and certified in writing that the turtle be killed, **before** it was killed. If that requirement is not followed and upheld, then turtles would continue to be killed and sold without check and much sooner than later, Tonga will have no more turtles in its waters.

[30] I have spoken at length about the seriousness of your offence because, according to the probation officer, you appear to think that you did not do anything wrong, that you were quite innocent. I want to assure you that what you did wrong was that you failed to ask Mohokoi whether an authorised officer had certified the killing of the turtles. The law requires that you make that inquiry and if you are not shown the certificate of approval of the killing of the turtles, then you ought to have refused to have possession of the turtle meat, because it is an offence to have possession of such turtle meat. You did not ask Mohokoi such question and you did not require him to provide you with such document before you went to collect the meat from the wharf. You ought to have refused Mohokoi's request but you did not. You thereby chose to have possession of the turtle meat when you knew or ought to have known there was no certificate for that meat.

### **The fine**

[31] I agree that your sentence be by way of a fine because that is what the law provides for the offence, and I do not accept that you were not aware that an authorised officer was required to have certified the killing of these turtles in writing before they were killed. I consider that you knowingly went to collect the turtle knowing that it had no certificate. That is because you did not ring Mohokoi to ask him for the certificate; you rang the fishery officer at Ha'apai to ask him to issue the required certificate instead. You already knew there was no certificate.

## **Possession for commercial purpose**

- [32] I also consider that the quantity of the meat was such that it was not just for personal consumption but for commercial purposes, namely, sale to the public for profit. I do not think it was intended to be taken for the Church Conference at 'Eua at all. You did not tell in Court when you gave your evidence who the names of the couple from 'Eua were. Even in your mitigation you never mention their names. You have provided no letter from them to confirm that they were the intended recipients of the meat. Mohokoi makes no mention of the names of that couple.
- [33] In your evidence in Court as to what Mohokoi had informed you on the telephone on the evening of the 19 March 2020, you made no mention that the meat or any of it was for sale at all. But in answer to question 28 which the police asked you during your interview by them after your arrest on 20 March 2020, you said that "the turtle meat was intended for consumption **and for sale** and for taking to 'Eua for the Conference". That means to me that Mohokoi had told you in the evening of 19 March 2020 that the meat was for sale as well, but you did not say anything about that when you related what Mohokoi had told you on the telephone in your evidence.
- [34] That opens up a whole lot of other questions. Who is to do the selling? For how much per kg? Where is the meat to be sold? At Nuku'alofa? At 'Eua? Or both? Who is the owner of the meat for the purpose of the sale? How much is the person selling the meat to retain and how much is to be paid to the owner? What about the costs of freight, the costs of freezing, transport, handling etc?
- [35] I am sure such questions were discussed and agreed between you and Mohokoi because you went and paid the costs of \$50 - \$60 to the ship's office the next morning and obtained the receipt for it and took delivery of the cargo.
- [36] Three things therefore aggravate your position. First, you were a party to the proposed sale of the turtle meat. Second, you tried to hide that fact from me whilst giving your evidence. And third, this was a commercial operation for profit.

[37] And because you have not been frank with the facts relating to this matter, I am left to wonder whether there have been other shipments of cargoes of turtle meat in the past. That appears to be consistent with the fact that Mohokoi only made his contact to you to receive this substantial cargo of turtle meat after he had already loaded it on to the vessel and after the vessel had left Ha'apai for Tongatapu. No explanation was given by you or by Mohokoi why the request to you was made only after the vessel had left Ha'apai.

[38] In any event, I have to take into account that this turtle meat was for sale for profit. The large amount of turtle meat itself confirms that.

### **Relevant cases**

[39] In *R v Finau* [2008] Tonga LR 106, that accused purchased 9,000 sea cucumber from fishermen and processed them for sale to overseas markets towards the end of a 10 year Government moratorium on fishing or processing of sea cucumber. In sentencing him for operating a fish processing establishment without a licence and for attempting to export fish product without licence, the learned Judge said:

"I suppose it can be said that the accused was operating at close to the finish of the ban (in 2007) and I understand that harvesting and export licences have now been granted as the 10 years has passed. To the extent that he was operating at near the end of that period probably means that his activities were less harmful than they might otherwise have been.

I do not consider that the accused was a commercial operator who blatantly set out to plunder a scarce resource but rather he appears as an amateur operator who was a bit naive in doing what he did.

He appears as an otherwise decent person. He is aged 62 and appears not to be in good health. He is married with 2 children and appears to have led a useful and industrious life. He has never been in trouble before.

Nevertheless, the offences are serious and in balancing all of the objective and subjective circumstances I propose to pass a fine of \$1,000 on each of the two counts.

Penalty. You are fined and ordered to pay \$1,000 on Count 1 and \$1,000 as well on Count 2 making a total fine of \$2,000 to be paid within 28 days from today.”

[40] In *R v Polelei* [1999] Tonga LR 110, the Court held that it was a fundamental principle of sentencing that a Court should not impose a fine when it is clearly outside the means of the person ordered to pay. Because the salaries of both accused in that case were only between \$7,000 and \$9,000 per year, each, the Court fined the accused who was more involved \$1,000 and the other accused was only fined \$750, or 3 months imprisonment in default. Their offences were against the Customs and Excise Act.

### **Ability to pay**

[41] I consider that you have the ability to pay a fine because you say, through your counsel, that you receive a salary, no doubt as Governor, of \$1,400 per fortnight. That comes to a total salary of \$36,400. But you have other income as well namely, as board member of the Government markets and Small Industries Center and you also own and operate your own Construction business.

### **Amount of the fine**

[42] The amount of fine that has to be imposed is one that is befitting the seriousness of the offence of knowingly possessing turtle meat (out of the shell) without a certificate confirming that the meat was from a turtle of legal size, so that no one would choose to have possession of turtle meat without certification at all, ever, because it would not be worth it. This is especially so because there is no other penalty provided by the law for this offence except a fine of up to \$250,000.

[43] And I agree that it must be such that it is a deterrent to any person wishing to do the same thing in future.

[44] I have considered the figures which Mrs. Aonima has suggested, namely, \$5,000. And I have also considered the figure of \$10,000 which Mr. 'Aho has suggested, but which he has also watered down to \$6,500, but I do not consider that it is deterrent enough, considering the unique rarity and

difficult circumstances of the life of a turtle as I have outlined above and the maximum sentence which this law has provided for its protection.

[45] I consider that I would not be enforcing this law properly to achieve its purpose to conserve the turtles to save them from extinction in our waters, if I do not impose a fine which is about 3 times the market value of the turtle meat in the present case, which is only 5% of the maximum fine directed by the law, that is, a sum of \$12,500. Considering the equivalent value of money today to its value back 13 years ago when the sea cucumber case was dealt with by way of \$2,000 fine in 2008, I do not think this sum of \$12,500 is unreasonable. Indeed, I consider it imperative that I do so in order that our meagre resources in our waters are properly conserved.

### **Sentence**

[46] It is therefore the sentence that I order, that you pay a fine of \$12,500 for your offence of possessing 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, and that you shall pay it within 3 months from today, in default of which you will serve 6 months imprisonment.

[47] I order that the turtle meat and shell which were found in your possession in respect of this offence is forfeited to the Crown forthwith.

**NUKU'ALOFA: 19 May 2021.**



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

Niu J

**J U D G E**