

Management Act, namely, you jointly possessed 784 sea cucumbers during the closed season for sea cucumber at Sopu on 10 March 2021.

- [2] At about midday that day, an operational team of fisheries officers carried out an operation on the far end of the beach at Sopu and found you both by a tent there and a motor car beside it. Inside the car was a cooler of sea cucumbers and you, Suliasi, told the officers that those sea cucumbers were yours, and you told me in Court that there were 185 sea cucumbers in that cooler.
- [3] The officers also found 3 coolers and 2 sacks of sea cucumbers and you, Tevita, told them they were yours. There were 599 sea cucumbers in those coolers and sacks.
- [4] The closed season for sea cucumbers is from 1st October to 31 March, and you fished and possessed these sea cucumbers on 10 March 2021. You both admitted that you had done wrong and you cooperated with the officers and you have both pleaded guilty when you were charged before me.

No previous conviction

- [5] You both do not have any previous conviction.

Reports – Suliasi Afu

- [6] Probation officer, 'Ilaisaane Fifita, says that you, Suliasi, are 46 years old, married and have 7 children, the eldest being 18 years and the youngest is 3.years. You told her that you earn your living for you and your family from fishing (fangota) and that you live at Hofoa and that you are a preacher and the choir master of the Church of Tonga at Hofoa. She says that you attended Tailulu College but did not finish it because your father died and you had to work to support your mother and 10 siblings (who were all younger than you).
- [7] You told the Officer that you have been fishing (fangota) for nga'ito for your family's meals long before the law restricted

fishing for it and that you admit that you did fish (fangota) these nga'ito with which you were charged and for which you are now to be sentenced. You told her that you had fished them for the purpose of food making and not for sale to the Chinese. You said that you just picked these nga'ito up, while the tide was out, for the food making in celebration of the Queen Salote College Day, and that you knew that it was still the closed season for nga'ito when you fished them.

- [8] You told her that you are very sorry for what you have done and that you want to point out that you only had 185 sea cucumbers but you have been charged with 784 sea cucumbers instead.

Tevita Loni

- [9] Probation officer, Patelisio Pale, says in respect of you, Tevita, that you are 46 years old as well, that you are married and that you have 5 children, age 11 to 2, that you live at Fangaloto and that you are also a fisherman, operating a fish fence at Sopu.
- [10] You told the officer that you left school in form 3 at 'Eua High School and that you worked in construction works of one Leni Tupe at 'Eua and that you have now come to Tongatapu to operate a fish fence of Leni Tupe here at Sopu.
- [11] You told him that you are very sorry and that you apologise to the Fisheries Department for having breached the law by fishing the nga'ito during the closed season. You told him that you went to the beach to check the fish fence for any fish, and that Suliasi was there and that Suliasi called you over and told you to join him collect (by picking up) nga'ito sea cucumbers during the low tide for sale to the Chinese so that you would get some money. You told him that you are very sorry that you did what Suliasi had told you to do.
- [12] The officer says that you told him that you had only fished 100 odd nga'ito and that you were surprised when the officers have said that you in fact had 750 or so nga'ito.

Crown submissions

- [13] Crown Counsel, Mr. Fifita, points out that this offence is serious because of the substantial amount of the maximum fine of \$250,000, and because of the large quantity of 784 sea cucumbers found on you two. Furthermore, you two fished them yourselves and that you both knew that it was still the closed season for fishing them.
- [14] On the other hand, he says that you both have no previous conviction, that you have both pleaded guilty to the offence you have committed and that you have both cooperated with the fishery officers.
- [15] He refers to 3 cases which were for possessing of sea cucumbers during the closed season:
- (a) ***R v Zhou*** (CR109/2013) where the accused absconded and the Court said that there would have been a substantial fine as was in ***Weng v R*** where the accused there was fined \$8,000.
 - (b) ***R v Laulotu & Kitekei'aho*** (CR153-154/2020) where Kitekei'aho was fined \$1,000 and Laulotu was fined \$900.
 - (c) ***R v Finau & Others*** (CR82 – 85/2021). All 4 accused were jointly charged with possessing 849 sea cucumbers during the closed season. Finau had a previous conviction for fishing sea cucumber during closed season. All accused pleaded guilty and cooperated with the police. Finau was fined \$500 to be paid within 1 month or 6 weeks imprisonment in default. The others were all fined \$400 each to be paid within 1 month or 4 weeks imprisonment in default.
- [16] Mr. Fifita submits that the starting point for the consideration of your sentence is a fine of \$1,500 each, and that \$500 be deducted on account of your having no previous conviction, your cooperation with the police and your guilty pleas, resulting in a

fine of \$1,000 to be paid by each of you within 1 month or 4 weeks imprisonment in default.

Your submissions

- [17] When you appeared and made your submissions in Court on 23 July 2021, I asked you what you thought of the Crown's submission that you each pay \$1,000 in 1 month, and you, Suliasi, said that it was too much and that you would be able to pay only \$800 in 1 month, and you, Tevita said that your employer would pay it for you and that if he didn't, you would ask your family to pay it. Mr. Fifita said that the market price of the sea cucumber was about US\$200 per kg, so that the total sea cucumbers you two had would be about US\$12,000 or T\$24,000. You, Tevita then said that what you two had was only nga'ito and that they were just collected off the sea bed when the tide was out, and that you did not dive to get them. I was therefore unsure what it was that you two had and I adjourned the hearing so that a fishery officer who knew would attend.
- [18] When the hearing resumed on 30 July 2021, Poasi Ngaluafe, 54 years of age, fishery officer, attended. He had had 20 years of experience and he knew the sea cucumber which you two had and for which you were charged. He said that the size of the sea cucumber would indicate whether they were collected when the tide was out or were dived for in the deep areas. He said that he found that some of the sea cucumber you had had been dived for, and that there were many deep areas nearby where the big sea cucumbers were found. He said that the sea cucumber you had was the nga'ito and that there were 3 varieties of it – the black back, the brown back and the whitish back. He said that they are all known as the golden sandfish.
- [19] I asked him and he said that the way it is normally cooked is that it is boiled until it is cooked. It is then scraped to get rid of the sand on its skin. It is then chopped into small pieces and then cooked in coconut cream. He said that 3 or 4 sea cucumbers would

be plenty for a family, and for a delicacy at a feast, 10 would be enough.

[20] You, Suliasi, then submitted that you and Tevita be each fined according to the number of sea cucumber you each had, because you said it would not be fair for you to pay the same fine as Tevita when you had had only 185 sea cucumbers. You, Tevita, then asked that your fine be only as you could pay and you asked for the mercy of the Court.

Consideration – differing fines?

[21] I must first consider what Suliasi has asked for, namely, that you be each fined according to the number of sea cucumbers you each had. I am afraid that I cannot do that. I consider that what you two did was a joint operation. Tevita said words to that effect to the probation officer. This is what the probation officer says:

“This person (Tevita) said that as he was leaving the shore to go and check the fish fence, the co-accused called to him to join him and collect nga’ito (sea cucumber) so that they would get some money because there are many people collecting nga’ito although it was still prohibited but it was being collected by the people and sold secretly to the Chinese.”

[22] So, you, Suliasi, was already collecting the nga’ito before Tevita joined you, then you two must have collected nga’ito together jointly and that you collected a total of 4 coolers and 2 sacks full of nga’ito. I cannot see how Tevita would have collected 3 coolers and 2 sacks of nga’ito on his own and Suliasi only collected 1 cooler of nga’ito, when Suliasi had already started collecting before Tevita joined him. No explanation was given by either of you why there were differing amounts said to have been collected by each of you.

[23] But more importantly, you have each pleaded guilty to having, jointly between the two of you, 784 sea cucumbers as charged in your indictment. It reads as follows:

“Suliasi Afu of Hofoa and Tevita Loni of Fangaloto, on or about 10 March 2021, at Sopus, you did possess sea cucumber during the closed season, when you had in your possession 784 sea cucumbers during the closed season from 30 September 2020 to 31 March 2021.”

[24] You are not charged with having fished (or collected) sea cucumbers but with possessing them. When the officers arrived, all the sea cucumbers were in your joint possession and control. You both have pleaded guilty to having joint possession of 784 sea cucumbers. I must therefore sentence you both for possessing all 784 sea cucumbers.

Commercial purpose

[25] I must also consider that you possessed these 784 sea cucumbers for commercial purpose, namely, sale for profit. You, Suliasi, told me that you fished the sea cucumbers for food making for the Queen Salote College Day, but Poasi Ngaluafe, the fishery officer has informed me and I believe and accept his evidence, that the most you would require for such purpose would be 10 sea cucumbers. You had 784 sea cucumbers instead, and that clearly indicates a commercial purpose. That purpose was conveyed by Tevita to the Probation Officer – to sell the sea cucumbers to the Chinese for money.

[26] Fishing sea cucumber or possessing sea cucumber for sale or commercial purpose is the most serious of the offences of possessing sea cucumber, and it must attract a fine commensurate with such purpose.

Purpose of the law

[27] The Fisheries Management Act and the Fisheries Management (Conservation) Regulations, under which you have been charged and have been convicted, and under which you are now sentenced, have been enacted by the King and the Legislative Assembly, to protect the fishery resources of the Kingdom, in

order that those resources are conserved so that they are not depleted, so that they continue to grow and multiply and grow so that the Kingdom has enough to export and to leave enough to grow and multiply and to continue endlessly. They have therefore enacted that if anyone breaches those laws, like you have done, that person may be fined up to a maximum of \$250,000.

[28] It is that serious because the marine resources of the Kingdom are its only natural resources.

The fine

[29] I must also consider that the Legislature has enacted that these offences be punishable only by way of a fine. It does not provide the penalty for punishment if the fine ordered is not paid, and I consider that the reason is because S.26 (1) of the Criminal Offences Act has already provided that the Court may order that if a fine ordered is not paid, the accused may be imprisoned for up to 3 months.

[30] I therefore consider that the Legislature has intended that if the offender does not or cannot pay the fine ordered, then he/she must be imprisoned for up to 3 months. So that, in my view, this law has provided that persons who are unable to pay the fine ordered are to serve a prison sentence of up to 3 months instead. I consider that the Legislature has intended that that is the penalty for breach of these conservation regulations, because of the importance of the marine resources to the economy and wellbeing of the people of the Kingdom.

[31] Crown counsel has referred me to the 3 cases I have stated earlier. In the first two cases, the number of sea cucumbers involved were not mentioned, and in the one that did, the reasons for the amount of the fines imposed were not stated. I therefore only have the case of **R v Finau** [2008] Tonga LR 106 where the accused was charged with operating a fish processing establishment without a licence and with attempting to export

9000 sea cucumbers without a fish export licence. He was fined \$1,000 on each charge, a total of \$2,000, to be paid in 28 days.

[32] I also consider that because you two had 784 sea cucumbers, that is a substantial number of sea cucumbers, and I do not think that you had fished such a large number of them merely on a hope that some Chinese might want to buy them. It is more likely and I consider that you already arranged the buyer to buy them from you, before you went and fished for them. That is just common sense in commercial transactions just like what you were doing.

[33] Having therefore considered the commercial and market value of the sea cucumber of \$24,000 for the sea cucumbers which you had, I consider that a fine of \$1,000 as submitted by the Crown is not commensurate with the offence you have committed. I consider that a fine of at least 10% of the market value would be commensurate with your offence, that is, a fine of \$2,400 for each of you.

Sentence

[34] Accordingly, I sentence you Suliasi Afu and Tevita Loni to each pay a fine of \$2,400 within 2 months from today in default of which you will serve 3 months imprisonment.

[35] I order that the 784 sea cucumbers are forfeited to the Crown forthwith in accordance with S.83 (1) of the Fisheries Management Act.



Niu J

J U D G E

NUKU'ALOFA: 20 August 2021.