

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

CR 281 of 2020

REX

-v-

Vola TUAIMEI'UTA

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**RULING and VERDICT**

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BEFORE: THE HONOURABLE COOPER J

Counsel: ✓ Mr. T. 'Aho for the Prosecution  
Mr. D. Corbett for the defendant.

Date of ruling: 20 August 2021

1. The trial proceeded on 10<sup>th</sup> August. Crown indicated that paragraphs 1, 5, 9, 10 & 11 were agreed and would form the basis for an agreed facts document. The most pertinent being these :

“On or about 14 January 2020, Customs Officers who were working at S.F Oceania found firearms inside the Accused's crate. The firearms were 2 x .12 shotguns and 1 x .22 magnum rifle. The Police asked the Accused whether he has an import licence for the firearms and the Accused said no but he provided an import licence of one Sione Siokivaha Taifonoi fua. The licence was to import 1 x .12 calibre shotgun.

The firearms were later handed over from the Customs Officers to the Police.

The firearms were examined by the Police Armourer and he found them to be real and in good working conditions. He also confirmed that the Accused did not have a firearm licence.”

**The live evidence**

2. 'Eliki Tomu gave evidence. He has worked in police armoury for 17 years and part of his duties is to process import licence applications.

3. He confirmed that the two .12 shotguns and the single .22 Magnum shot gun the prosecution produced in court<sup>1</sup>, and the subject of the indictment, were those that were imported without a licence, they were all firearms for the purpose of the legislation and each in good working order. In fact there was no challenge by the defence to this part of the case.
4. He went on to confirm that an import licence was applied for. That was in January 2020. The process was that all the documents for submission with the application had to be collected together. The applicant then had to complete the firearms training.
5. This was all done by 23<sup>rd</sup> January 2020 when the training was completed. He thought that the application for importation was made after 15<sup>th</sup> January 2020 when he had received the guns.

#### **Cross examined**

- He could not confirm whether or not the application itself had been received in December 2019.
- Nor whether the defendant had attended his offices with Sane Moala a woman police officer, a colleague this witness did know.

#### **Re-examined**

- The witness noted that the applications themselves are not recorded as being received until all the requirements for processing the application have been completed.
  - When the application is received they would record the applicant's contact details so as to contact them for the training.
  - An application could not be granted until the training is completed. The only time a date is recorded in relation to the application is when the requirements for the grant are completed.
6. 23<sup>rd</sup> January 2020 was when the training was completed.

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<sup>1</sup> Ref 319 (a) 2020 1 x .22 magnum rifle serial 01283356; 319 (b) 2020 112 gauge shotgun serial P17-T10587; 319 (c) 2020 1 x 12 gauge shotgun serial I1Y 217218.

7. By agreement the police firearms report was tendered as exhibit 1. Which noted that not only did Mr. Tuamei'uta have no licence for the guns, he had no licence for the ammunition.
8. I note that there is no suggestion that Mr. Tuamei'uta was in possession any ammunition for either gun.

**Sione Punaivaha**

9. He gave his evidence by video link from Vava'u.
10. He has been with the police force for 10 years and in charge of the dog unit. He explained how on the day in question and acting on information he went to the warehouse for SF Oceania with police dogs Zander and Gemma, Labradors trained in New Zealand.
11. The container that was found to have the guns in question was identified and it was confirmed they were later recovered from it, on returning from duties elsewhere at Tonga post, later that day, 14<sup>th</sup> January 2020. When they did so return the defendant was spoken to and confirmed he had no importation licence.
12. Officer Taufu is the OIC. The facts were reported to him.
13. The customs officer present Ms Fatai Taukapo handed over the guns to officer Finau at 1351 hrs that day. Exhibit 2 is the Transfer Note/Cate Note that reflects this.

**Cross-examination**

- Officer Punaivaha could not confirm whether the defendant had been at the warehouse much before they spoke to him on their return from Tonga Post.
- Customs officer Paseka was also present with him and there was another man with Mr. Tuamei'uta whose identity he did not know. A further two or three people were also present.
- There was no mention of a Customs Declaration he was aware of.

## **Tonga Paseka**

14. He has worked as a Customs Officer since February 2013. He had inspected the consignment in question.
15. The broker acts for the importer. The process is that the broker interviews with the importer; it being their chance to declare any restricted items. The importer will go through the pro forma "Importer Authorisation and Declaration Form" and tick the relevant boxes if there is anything to declare.
16. After the interview the forms are signed off and then the consignment is opened under the supervision, in this case, of Customs Officer Paseka.
17. Exhibit 3 was then produced by agreement. Page 1; the Detention notice; any restricted goods are detained and taken to the main office.
18. Page 2 is the investigation section; the details of the items transferred must match the restricted goods seized. In this case they were taken to main office which and were then handed to Fatai Taukapo.
19. Page 3 is the Transfer/Cart Note, as such it is outside this witness' knowledge.
20. Pages 4 and 5, the Bill of Lading and "Importer Authorisation and Declaration Form" had been handed to Customs Officer Paseka.
21. Exhibit 3 page 4 ruling on admissibility of Bill of Lading
22. I invited arguments from the Crown as to the potential route for ruling admissible the contents of this document, but none were forthcoming.
23. I note that the contents of the Bill of Lading was not created by any witness in this case nor signed by any witness. It was created outside the jurisdiction and there was no evidence as to who input the information so as to populate that document; or where that information came from; or any process as to how or where that information was stored, or how its accuracy could be verified. As such I find it to be hearsay and I discount the contents of that document.
24. From handing guns to the main office they would then only be released when the import licence was granted.

25. Customs Officer Paseka. Did not know one way or another if Mr. Tuaimai'uta had an import licence.
26. The Transfer/Cart Note had been received before the consignment was opened.
27. The Detention Notice was signed while Customs Officer Paseka was with Mr. Tuaimai'uta.

#### **Cross Examination**

- The "Importer Authorisation and Declaration Form" was received, completed, before the consignment was opened.
- The detention notice afterwards.
- The importer was spoken to at the main office

#### **Ms Fatai Taukapo**

28. She has been a Customs Officer for 3 years. She received the documents from Officer Paseka.
29. She signed over for the hand over of the guns from herself to Constable Finau; Exhibit 3 page 3.
30. Even if there is an import licence then would have contacted police so that the police could register the restricted goods.

#### **Cross examination**

None.

Case for the prosecution closed.

31. Count 1 was an allegation that the defendant had imported "prohibited" goods contrary to section 95 Customs and Excise Management Act
32. To understand which items are "prohibited and which "restricted" one need look at the Customs and Excise Management Order, by virtue of section 45 of the Act which provides:

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

33. It is in pursuance to that section that the Order was made, which provides that :

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

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

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

34. It therefore follows that guns and ammunition are not “prohibited” items.

35. Thus a count that pleads that they were prohibited; thus alleging that as the basis for an offence contrary to section 95 of the Act, is wrong in law.

36. I note that *R v Ikamanu* AC 7 of 2020, in no way changes that position, dealing, as it does, with a different issue.

37. Therefore count 1 was dismissed.

38. The defence then submitted a no case to answer argument on count 2.

39. They cited *R v Anau* [2008] TO Law Rp 49; [2008] Tonga LR 248 (12 September 2008) as the leading authority for the test as to how to approach half time submission.

40. With the greatest respect the correct test is *R. v. Galbraith*, 73 Cr.App.R. 124, CA

“(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty—the judge will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other

matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury” (per Lord Lane CJ at p. 127).

41. Dealing with the first limb; there plainly was evidence that the guns were imported without a licence, that being in the agreed facts, no application could succeed there.
42. As for the second limb; simply put , there was nothing in the Crown’s core evidence that meant the evidence of the witnesses, as against the admission in the agreed facts, meant that, overall, the prosecution evidence was tenuous, vague, inconsistent or inherently weak.
43. Accordingly, no application could succeed under that limb and so the submission as a whole was rejected.

#### **Defence case**

##### **Vola Tuamei’uta**

44. He is now 59 years old. He explained how he started applying for his licence to import firearms in about August 2019 after he had received communication from the United States of America that the shipment was to be sent to him.
45. He approached Officer Tomu, the armourer, and then submitted the required documentation from the Ministry for Agriculture, the town officer and then went on to arrange and complete his training that same year, 2019.
46. That training covered both the operation and safe keeping of firearms and took place at Longolongo.
47. He was then told by Officer Tomu he needed to wait to receive his licence.
48. He rejected that it was 23rd January 2020 that he completed his training.
49. Albeit undated, he produced his arms examination paper, exhibit 4.
50. His evidence was that he completed it in 2019.

51. Of 14<sup>th</sup> January 20120, he recalled going to the docks and arriving about 1000 hrs. He informed the authorities the shipment contained firearms. He filled out the “Importer Authorisation and Declaration Form” and signed it.

#### **Cross examination**

- When he started his licence application the consignment had not been sent, nor packed.
- He was informed by Officer Tomu that he was allowed to own two different sorts of firearms. His contact in the United States, Lipina, told him there were three firearms in the consignment.
- He started making his licence application some time August/October 2019.
- He went to see Officer Tomu a few times, some times he was not at his office.
- He was told by the officer to write for his licence. It took Mr. Tuamei’uta over a week to collect together all the relevant paper work.
- He saw Officer Tomu twice. Firstly to find out what was needed for the application. Then, a second time, to submit it but that was actually handed to a clerk in the Ministry.
- He chased up Officer Tomu repeatedly.
- As for the exam he had to take, he sat that in October 2019.
- The firearms were not all for him. One was for Mr. Taifonoifua and another for Tipeti Tuipolutu.
- Mr. Taifonoifua had his licence and brought it on 14<sup>th</sup> January 2021.
- He denied that he had ever stated that the guns were only for him and Mr. Taifonoifua. His licence was taken was taken to the office at small industries.
- The police were shown three licences, one for Mr. Taifonoifua and two other people’s.

- He tried to get all his paper work for his licence application. The police said they no longer had it and the Ministry of Agriculture said they could no longer retrieve his paper work as the person who had processed it had emigrated.

#### **Re-examination**

- The clerk in the Ministry was called Ms Kato Ta'ufo'ou.
- The three licences presented were for Mr. Taifonoifua, someone with the first name Stainer and Tuipolutu.

#### **Kato Fainga'anuku**

52. She had been a clerical officer in the Ministry for Police and gave evidence of how Mr. Tuamei'uta's was received by her in October 2019 and she passed it on to Officer Tomu.
53. She thereafter called Mr. Tuamei'uta to arrange for him to come for his training.
54. She was aware of Officer Siane Moala assisting Mr. Tuamei'uta with his application.
55. As far as she recalled the training took place some time last week of October to first week of November.
56. She was referring to an importation licence.

#### **Cross examined**

57. No cross examination.

#### **Siane Moala**

58. She was a police officer and had served in the force for 6 years. She had assisted Mr. Tuamei'uta with his import licence. He had telephoned her, she then spoke to Officer Tomu and it was she who had typed his letter of application for him.
59. When the application was submitted, as far as she knew, it went to Kato, who then passed it to Officer Tomu.

60. After that Mr. Tuamei'uta awaited his training and the exam. He attended for his training on three occasions.
61. First occasion Tomu not present, second occasion he was present but it could not go ahead. He finally completed it on the third occasion.
62. After that and the exam the application went to the Minister for Police.
63. She repeatedly followed up his application after that, but it was never granted.

### **Cross examination**

- She confirmed that she worked in the human resources division. She did not work with Kato.
64. Defence case closed.
  65. The defendant is charged with an offence under section 95 Customs and Excise Management Act.
  66. Elements of the offence the prosecution have to prove beyond a reasonable doubt :
    - i. The defendant
    - ii. Unlawfully imported
    - iii. Restricted item
  67. The prosecution adduced evidence of the defendant applying for the importation licence on 15<sup>th</sup> January 2020, so Officer Tomu, the Armorer “thought”.
  68. No copy of any of the relevant paperwork was not produced albeit that this witness processed the application.
  69. He detailed a system where applications for import licences are not dated upon receipt; indeed only appear to be dated when they are granted after the relevant training and the exam has been taken and passed.
  70. In any event, on the day that the goods arrived in the Kingdom Mr. Tuamei'uta was in touch with the broker and he declared the guns before the consignment was opened and before the police had seized it.

71. The defence evidence was of Mr. Tuamei'uta making an application for his licence in October and his discharging all aspects of the process for his part; the letter, the reference from the Town Officer, passport photo, training and exam by, at the latest, the end of the first week of November 2019; even where he had come to his test three times before he could sit it.
72. This evidence came from himself and most notably from Ms Kato Ta'ufo'ou, a clerk in the Ministry for Police and Officer Moala.
73. So balancing what was asserted by the Crown as the date of the application, in the absence of any documentation and against a back drop of an administrative process that does not record when applications are received as against what Mr. Tuamei'uta asserted and what his reliable witnesses, corroborating one another and well placed to comment; I come to the conclusion that Mr. Tuamei'uta made his application as he said and in very good time and that it was not duly processed within the administration of The Ministry; something Mr. Tuamei'uta had no control over and had seemingly done all he could to ensure no issue arose.
74. He had tried to recover all the documentation to produce to the court, but it was no longer available, for reasons entirely out of his control.
75. Conversely Officer Tomu was not asked in evidence in chief, or at all, why he did not produce any of the relevant documentation. This being part of the Crown's own case it would be incumbent on them to explain.
76. When the defence case is that given the Mr. Tuamei'uta had quite frankly let all the authorities know what the contents of the consignment was and had signed it all over to the Tonga Police, he had acted in a lawful manner.
77. The Customs and Excise Management Act under section 95 concerns itself with the unlawful importation of restricted goods to be the offence in question.
78. By virtue of section 45 those items that are restricted are listed in Schedule 1 of The Customs and Excise Management Act Order 2007; setting out, list two; Restricted Goods, item 1 "Firearms and ammunitions except with a licence issued in accordance with the law."

79. What this would really seem to amount to is “Firearms and ammunition” is restricted; because it is the lack of licence that is what makes the importation unlawful.

80. The Customs and Excise Management Act does not provide for any rules for the provision of an import licence. But, item 5 of Schedule 1 of The Customs and Excise Management Act Order 2007, list two; Restricted goods notes: “Goods, the importation of which is restricted by any other law in force in the Kingdom except in accordance with such law.”

81. The Statutory provisions concerning Firearms and the need for an importation licence are to be found in The Arms and Ammunitions Act, which predated The Customs and Excise Management Act.

82. Section 15 of which imposes the duty to have an import licence for such items :

“No person shall import any arm or ammunition or parts of arms and ammunition into the Kingdom from a place without the Kingdom unless he holds a licence in that behalf:

Provided that when any arm or ammunition is imported into the Kingdom without an import licence or interim licence under this section having been obtained authorising the importation thereof, such importation shall not be deemed to contravene the provisions of this section while such arm or ammunition on importation is left in the possession of the Tonga Police Force.”

83. It is therefore the proviso in Section 15 that Mr. Tuamei’uta can fairly say he avails himself of.

84. He did everything in his power to get a licence in a timely way, he declared the exact contents of the goods before the consignment was opened and the goods passed into the custody of the police as soon as they arrived in the Kingdom and were found.

85. I therefore find that the proviso in section 15 of The Arms and Ammunitions Act applies and Mr. Tuamei’uta shall be deemed not to have committed an offence under this section; and by virtue of Schedule 1 The Customs and Excise Management Act Order 2007; Restricted items, point 5, nor has he committed an offence under S.95 The Customs and Excise Management Act.

86. I therefore acquit him of the only remaining count and record not guilty verdicts against both counts he faced.

**NUKU'ALOFA**  
**20 August 2021**

