

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

CR 156 & 157 of 2020

REX

-v-

Tufui TOVO  
Sosefo FAKA'OSI

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**RULING AND JUDGMENT**

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BEFORE : THE HONOURABLE COOPER J

Counsel : ✓ Mr. 'Aho for the Prosecution  
Mr Tu'utafaiva for the defendants

Date of Ruling : 6<sup>th</sup> August 2021

**The indictment**

1. The indictment was amended at the start of the trial; application by the Crown that Mr Tovo's name be removed from count 1 and 3. That was granted without objection.
2. I shall add now, that the Crown offered no evidence on Count 3 at the close of their case, at the conclusion of Lin Xing Ying's evidence, the complainant on that count, there being no evidence that it was these defendants involved. Accordingly a verdict of not guilty was recorded against Mr. Faka'osi.

**The trial**

**Count 1.**

3. Mr Hua oversees a shop in Pili for relatives of his who are abroad. He received a telephone call from the man who was running the cashiers' checkout at that shop on

18<sup>th</sup> February 2020. That man spoke little English or Tongan. He called Mr. Hua to tell him that police were at the shop.

4. Mr. Hua went there and found police officers there, this was some time around 2000/2100 hrs that day. He spoke to an officer and was told that the man at the checkout had sold cigarettes to a minor.
5. Mr. Hua was suspicious of the police and, though not immediately as he arrived, but shortly thereafter, the conversations that evening were recorded on the mobile phone of the cashier.
6. Mr. Hua and his colleague were told to come to the Nuku'alofa Central Police Station.
7. They went there in the car of Mr. Hua and a police officer was present in that vehicle and his colleague followed in the police car.
8. The first audio recording was made when they stopped the car on Salote Road near Cowley's bakery.
9. There were three audio recordings adduced through this witness. Mr. Hua identifying that they were made by his colleague, but after he had reported this matter to the police, the next day, he had ensured these recordings were made available to the police investigating this allegation and they were then seized the following day.
10. The audio recordings were exhibited.
11. Certainly it was never argued by the defence that these recordings did not amount to what the prosecution had described as a "shake down".
12. Mr. Hua identified which parts he spoke and the voice of the person identified by this witness as Mr. Faka'osi, then Officer Faka'osi, were identified as the person Mr. Hua was talking with in Tongan; these also available to the court translated into English.
13. In the first recording Mr. Hua was being told :

"Two thousand imposed, pay two thousand and 6 months imprisonment, both. It is up to you to think ~~but~~ it, if it is okay, okay, you go to prison and the investigation runs. The offence is very serious. So annoying. It is up to you to think, it is you two to think, if not, let's go to the police station...you will go to prison, you will be charged and released....You, in prison. It is

up to you to think, if not, let's go to the police station. The choice is yours. It is up to you two, if you want to go, if you want to sleep in prison, let's go straight to the police station. That one will be charged and released, you, you go to prison, the investigators will come tomorrow and complete the investigation and they will request for you to be remanded in custody to next week and this week.”

14. From the first Mr Hua can be heard describing the threat of the two thousand dollar fine as “a bribe” that the officer was trying to obtain from him.

15. The second recording Mr. Hua identified as continuous with the first. In it the officer is heard to say this :

“It is when I said 8 so that both your cases are dropped, your case is dropped, his case is dropped, both cases.”

16. The third recording, made some three or so minutes after, taking place behind the shop at Pili captured this exchange :

ACD	(vehicle engine turned on) Let's go. Let's go so I can count, this is very small. This is close to lying and cheating and going to prison.
Chinese	Maan, how am I cheating, I haven't cheated once here in Tonga, it is true, I cannot cheat, I have not cheated once.
ACD	Look how you two are good at bullshit.
Chinese	Good at what? What bullshit?
ACD	Look at this, you gave me \$2s and \$5s.
Chinese	I already told you ....the end of today, all of today, yesterday, man you don't get it.
ACD	This is the turn.
Chinese	Here?
ACD	Mmmh. Stop there, turn in front here.
Chinese	Yes.
1:03 – 1:15	Speaking in Chinese
Chinese	The change money is \$2 and \$5s, they all add up to \$300
ACD	Hoiaue. Man this is too small, this is only one hundred.
Chinese	What you mean one hundred?
ACD	Let me see, one hundred, two.

Chinese	Look at all of it, add all of it, I already told you, I already got all of it.
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17. The officers then left.
18. Mr. Hua said it was the next day that on the app WeChat he saw in the group chat used by a number of Chinese shop owners in Tonga a photo of a police car, an officer inside, one standing outside the vehicle who he identified was the officer who had been speaking to him, it being admitted this was Officer Faka'osi, though the defence made clear from the outset that it was denied that it was Mr. Faka'osi who can be heard in the audio recordings.
19. In fact, from the evidence that followed it must have been the later than the 19<sup>th</sup> that he saw that chat in question; but nothing turns on this.

#### **Cross Examination.**

- Owner of shop at that time was not in Tonga. He reported conversation to police the next day.
- Reported the next day because he is not owner of the shop, he needed to talk to owner first.
- He gave copy of the recordings to the police.
- Did report to police first opportunity, but at time did not have audio with him. The day reported to police, audio on phone but held by shop keeper.
- Called shop keeper, who came to police station and gave audio to the police.
- Exhibit 4, standing figure the officer that spoke to him. He did not take the image in exhibit 4.
- Police did ask for a document to confirm the identity of the man at the till.
- He did show copy passport photo page from his phone at that time.
- The officer then insisted that they show that man's driver's licence, and they forced them to come to the police station.

- He admitted he had given some money, \$40, to that police officer as he had said he was hungry.
- He denied that he was taken to taken to police station through lack identity documents relating cashier or his bribing an officer.
- They just asked them to go to police station to make statement. He said he called Magistrate Langi right after he arrived back at the shop, before officer demanded they go to police station. It was the officer standing outside the vehicle in exhibit 4 the one who demanded he went to the police station.
- When he telephoned Peti Langi he then passed the phone to the police officer. The officer then said Peti Langi would arrest me and put me in a police station.
- He insisted the police came with them and stopped at Cowley bakery shop and that is where the first recording was made.
- He had no idea why they stopped outside Cowley, same officer in his vehicle he had been on the way to police station central with, as made the demands.

**Count 2.**

20. Cheng Yong. Affirmed 1409 hrs
21. He ran a shop in Havelu.
22. February 20<sup>th</sup> 2020 night time there was an incident. It took place after the sale of cigarettes to a person, about 5 minutes later the police arrived.
23. Two officers involved, one came in the other stayed outside the shop.
24. Police asked him if he knew the person who had bought cigarettes was 17 not yet 18 years old ? He said he didn't, but that person looked over 20 years old to him.
25. Police demand he close shop and go with them to police station. He asked why ? They insisted the person was under age.
26. He drove his own car with one police officer sitting beside him.

27. The other drove, following behind. They did not get to police station instead stopping close to Western Union, near the old power office, near The Royal Tombs.
28. He was asked if he knew what the penalty was for selling to minors ? He replied he thought it was \$200 fine.
29. Police officer him to get \$200, he did not have that on him, instead just over \$100 which he handed to the officer.
30. That officer left his car, went to speak to his colleague in the car behind, saying he was going to check with his boss if he would accept \$100 instead of \$200.
31. The officer at the back, he did not come over. Officer in his car went over to the police car behind.
32. All he remembers was that they allowed him to go. The other officer re-joined his colleague, they left, so did he. He was never taken to the police station.
33. On returning to his shop he checked the CCTV cameras. He saw the officer and took an image on his phone from the monitor he was viewing the recording on.
34. He had also taken a photograph on his phone. Exhibit 4 was taken facing through the entrance door to the shop and exhibits 5 and 6 were from the CCTV. He uploaded them to WeChat. That was done as a warning to other shop keepers.
35. It had been the officer in the images in those latter exhibits who had been talking to him.

#### **Cross Examination.**

- Police did not ask for his ID. He could not remember if he called another Chinese person to help. He was in his own car with the officer going into town.
- Police officer demanded he close the shop and sat with me in his own car.
- Police officer stopped me and asks if he knew penalty for selling to minors. He said wanted officer to show him ID confirm the person was really under 18. This said when he was almost at the police station. The officer said penalty

\$200 and Mr. Young said only had about \$100, then officer got out the car and said he would ask his boss in the car behind.

### **Manoa Sili**

36. He is Chief Inspector Tongan police. Officer in charge of the Community Division of Tongan police. He is Liaison officer between Tongan police and Asian community. Defendants under his command whilst police officers and had been for over 12 months and at the time in question.
37. He identified from Exhibit 4 photo Mr. Faka'osi; and exhibit 5 Mr. Tovo.
38. He explained that Infringement notices regarding selling cigarettes to minors is part of responsibilities obligated to his division through the provision of The Management of Tobacco Act and Waste Management Act. Specific officers are trained and then deployed to that role. The defendants had not been trained in that role.
39. If there was a suspected infringement then a ticket summons would be handed out and if proved the fine paid at the Magistrates' Court.

### **Cross examination**

- Part duties to these officer's duties were to visit community police in the villages. Community police are volunteers from the villages.
- Even without training the officers can have a role in the enforcement of tobacco infringement notices; they have a duty to collect that information from local police.
- The image in Exhibit 4 showed a car used by their division, as used by officers who attend the villages.
- There was a deployment to the Japanese Ambassador's Residence that the defendants were part of it.

Police can request identity documents as part of an investigation into tobacco infringement.

### **Re-examination**

- Officer were meant to be at a specific post 20<sup>th</sup> February around Japanese Embassy.

**Crown's case closed.**

**Defence Case**

40. Mr. Tovo. Sworn 1112. 2020 working in Police force.
41. He had been required to leave the force in relation to this allegation. Before that had served for 8 years. In February 2020 in Community Division. He checked the Village Police but if noticed offences in progress they would investigate.
42. 20<sup>th</sup> February 2020 he was un duty having started before 1800 hrs. He was posted at Japanese Ambassador's residence. Officer in charge that operation was CIP Tongi. He was one of many officers at the location.
43. He had needed a toilet break and got permission from CIP Tongi. This was about 1930 hrs and he had been allowed to travel with Faka'osi to Faka'osi's residence nearby in Ma'ufanga to use the bathroom there. Officer Faka'osi drove.
44. As he had entered the vehicle officer Fifita had asked if they could retrieve that officer's mobile phone from his home in Havelu, he did not know where that was but Faka'osi did.
45. They went to Faka'osi's home, he used the bathroom, then to the address in Havelu and got the mobile phone. When they passed a shop in Havelu they stopped so he, Mr. Tovo could buy a lighter and gum. He went in and his colleague remained in the car. When he came out he saw Officer Faka'osi arresting a child for purchasing tobacco.
46. Officer Faka'osi called into the shop if it was the cashier who had sold this child tobacco, the Chinese man said it was.
47. Identity documents were required of the Chinese shop keeper to process the TRF form for the infringement. He thought another Chinese man arrived at the scene too.
48. The cashier was required to come with the officers and they went in the police car. The other Chinese man followed in his vehicle.

49. He stated that the photo in exhibit 4 was taken as they were about to leave for the police station.
50. They had stopped at the Royal Tombs after a phone call alerted the officers they were needed back at post, so they dropped the shop keeper off around the Royal Tombs. When they got back to post their colleagues were waiting for them to drive them back to the police station.

**Cross Examination.**

- On 20<sup>th</sup> February he was on operational duties at 'Anana; Japanese Ambassador's Residence. Both he and Officer Faka'osi were on that detail to provide security, though posted separately; they were assigned to a senior officer, CIP Tongi. It was The King of Tonga who was the guest of Honour and so their detail was to protect Him.
- He maintained it was CIP Tongi who said to go for a bathroom break he should go with Officer Faka'osi.
- He denied he had been given instructions to sue the bathroom and directly come back.
- When he told us to leave for bathroom it was then officer Fifita called out pick his phone from Havelu and Tongi told us to pick it up.
- Picked up phone. Bought lighter and gum, as he left, after buying items, and Officer Faka'osi already there with this kid.
- It was Officer Faka'osi who asked shop keeper if he sold tobacco to the boy. He asked shop keeper if he had identification.
- But, Mr. Tovo's evidence was that it was a third officer, Officer Fivilu who filled out the TRF form.
- His evidence was that a statement from them was also required and they were to collect information for that purpose.

- He denied he told Mr. Yong he would be penalised. Likewise he denied either officer had travelled in Mr. Yong's car, stating they had all travelled in the police vehicle.
- He denied telling Mr. Yong to pull over to the side of the road, close to the area of the Royal Tombs. He stated it was a lie that he had asked for \$ 100. He had not accepted the money on Officer Faka'osi's instructions, or at all.
- He insisted that both officers had carried out their duty that evening.
- The boy who was arrested had his name and date of birth recorded. He did not recall those details now. It was written on a piece of paper, put in their car and then, seemingly, was lost.

**Mr. Faka'osi**

51. He is 39 years old and lives at Ma'ufanga.
52. Currently he works as delivery for Cowley bakery. He left the police 2020 after 9 years in the job. He had been part of the Community Police Division.
53. He explained that meant working in the community to collect information of all types and that was where the Ministry mainly gets its information.
54. 18<sup>th</sup> February working, 1630 – 0130 hrs. He visited the village police. He was working with Officer Tovo that night. They had attended the village police at Popua. Approximately 1830hrs they went to villages of Ma'ufanga, Makamaka. Neli is to visit village police units there.
55. Came across unlawful purchase of tobacco at Chinese shop Pili. He had asked the cashier if it was him who sold tobacco to minor ?
56. Chinese man had answered yes. Officer Tovo made enquiry of Chinese person if he had identification in order to confirm his details; but they lacked clear means to communicate with the shop keeper. He could not speak Tongan or English well.
57. As they were trying to speak to him it must have been then that a phone call was made to the second Chinese man, Mr. Hua. They waited for his arrival. When he did get there he put money into pocket of Officer Tovo who shouted out when that happened.

58. Officer Tovo cautioned the second Chinese shop keeper and charged him with the offence bribing a police officer. Then it became apparent there was no identification for the cashier.
59. As for the minor who had been buying cigarettes, Officer Tovo wrote down the name of that person. He did not recall his name now. The shop was ordered to be shut and they took them to the police station to complete the formal process.
60. The TRF form for charging shop keeper needed to be completed Also complete charging process for bribing police officer. Officer Tovo to spoke on the phone with another senior police officer. After that call he cautioned the two Chinese men and left.
61. 20<sup>th</sup> February 2020 he commenced duties at 1630 hrs.
62. He recounted the same events as Mr. Tovo; being at Japanese Ambassador's residence, Mr. Tovo needing the bathroom and his taking him to his house, then the trip to pick up his colleagues phone and returning via a shop where Mr. Tovo went inside to make a quick purchase.
63. He had noticed the minor standing beside shop holding cigarette box. Asked him where he had bought the cigarettes from. On being told it was from that shop he called out to the cashier who confirmed this. He was standing by the entrance with the youth.
64. He stated that exhibit 4 showed getting into vehicle to go to police station. He had not gone into the shop, it was officer Tovo who had recorded the youth's details.
65. Then the second Chinese man arrived. They left the shop with the Chinese man in the police car. They had to return to their operation and so gave both men a warning and returned.

**Cross examination.**

- He denied it was him speaking in any of the recordings.
- He maintained that both of Officers had been told to take Tovo to use his bathroom at his home.
- Mr. Hua was arrested for bribery but after speaking to the Magistrate was given a warning.

- On being asked why it was the youth was believed when he had given his details but not the Chinese men, he stated that he had not asked those people their details, it was his colleague and he could not assist further.
- Charge Sione with bribe. I did not arrest Sione but heard it. After speaking to magistrate gave a warning.

### **Submissions**

66. The defence regarding count 1 is that it is not this defendant's voice on the recordings. The phone was not produced and so the time and date can not be proved. Further, the transcript does not help, nor has the shop keeper who made the recordings been called to give evidence.
67. Why would this defence commit the offence when a Magistrate had already been involved, that defied logic.
68. There is confusion in the Crown's case as to who uploaded the image, exhibit 4.
69. Mr. Faka'osi strongly denies these allegations.
70. Regarding count 2, the demand for money was not made at Havelu and the explanation for the car stopping near the Royal Tombs was the need for the defendants to return to their post.
71. It comes down to which side should be believed.
72. Crown submitted that it was the first defendant's voice in the recording and this was the evidence of Mr. Hua.
73. The defendants admit being at the shops in question in both counts, on the relevant dates.
74. Regarding both counts, the modus operandi is the same, the claim there had been an infringement of tobacco laws with a sale to a minor and the complainant taken to the police station in his car with an officer present, the other following in a the police car.
75. This latter point is of particular note as this detail as alleged by Mr. Hua. would not have been known to Mr. Young at the time that he made his complaint.

76. At the end of the submissions the Court of its own volition raised an issue.
77. It was this : The elements of the offence under s.164 (2) (a) (1) and (b) Tonga Police Act required that :
- i. The defendant was a member of the Tonga Police;
  - ii. He demanded money;
  - iii. As an inducement to refrain from doing an act in the execution of the person's duty as a member of the Tonga Police.
78. The court mooted that the words "duty" as well as "function" in section 164 (2) (b), must surely mean *lawful* duty; and or *lawful* function.
79. The Court raised that point that if, in fact, the assertions of tobacco infringement against the shop keepers was a ruse to put them at a disadvantage to force them to part with money so as to have the non-existent offences expunged, then these acts would be, as it were, criminal enterprises the defendants had embarked upon, as such they would not have been acting in the execution of their lawful duty or function, but outside it.
80. Upon raising this, Mr. 'Aho for the Crown has referred the Court to R v Tomasi AC 7 2019, in support of his argument that an unlawful act would not necessarily render the subsequent demand for a bribe as taking place outside the execution of the officer's duty.

### **Verdict**

81. In relation to count 1, only Mr. Faka'osi is charged with that offence.
82. The evidence comes from Mr. Hua and the audio recordings.
83. Mr. Faka'osi denied that it was his voice in the recordings. But he accepts that there was the giving of money to Mr. Tovo on the occasion they were at the shop.
84. It defies all reason that there could have been another incident with different police officers on that day with a dispute between Mr. Hua, his cashier and these two other officers in exactly the same way and with identical set of facts and events as in the recording.

85. I therefore find that Mr. Faka'osi has simply lied about this, that the recording is of these events complained of in count 1.
86. I find that Mr. Hua has told the truth about this incident and it is corroborated by the recording.
87. Why else would Mr. Hua have kept such a recording and given it to police had the events not been as he has always stated ? It would make no sense at all. There could be nothing in it for him. In fact, quite the contrary since it is prime facie evidence that he did give the police a bribe and could have left him open to prosecution.
88. It is quite clear that Mr. Faka'osi was just trying to provide any possible explanation so as to try and explain away the prosecution evidence.
89. It is also beyond all realms of sense to suggest, as Mr. Faka'osi does, that all the paper work and charges for bribing an officer, for buying tobacco when under age, for the tobacco infringement offence is now unavailable for the court to see, so as to corroborate his account.
90. I can not accept that a Magistrate would give the advice to the officer to simply give a warning to anyone who had bribed a police officer and let him go on his way.
91. Count both defendants face that allegation.
92. It is significant that both complainants set out a scheme where the shop keeper was told to shut shop and one police officer drove with him and the other followed in a police car and then the requests for money to stop the alleged offences from being formally charged against them were made.
93. It would not be possible, so it seems on the evidence before me, for Mr. Young to know that this is exactly what Mr. Hua, had reported had also happened to him, two days earlier.
94. The evidence that Mr. Tovo was told he could leave his post to use the bathroom but with Mr. Faka'osi driving him is too far-fetched for me to believe. Not least as they formed part of a team of officers who were meant to be assisting and protecting The King Himself that evening.

95. I consider the case of *R v Tomasi*, *ibid*, and the guidance on how to receive such evidence on this point, though in relation to section 165 of the same Act, but focusing on the same question, paragraph 12, at point (ii) noted "...the purpose or intention of the person who offers [the bribe was] that the officer will not fulfil his duty..."
96. Taking that as the ratio of *R v Tomasi*, it appears to me that what follows is that the offence under S.164 is committed when the officer demands a bribe in order to avail the other party of a means to avoid his being duly processed eg charged and or prosecuted, for an suspected offence.
97. Here there was not really a suspected offence.
98. The assertions by the officers that there had been tobacco infringements by the shop keepers were dishonest and a ruse to extort money from them.
99. As such the officers on both occasions had entered into criminal enterprises to extort by pretending there had been infringements of the tobacco laws.
100. That there no evidence of the retention of documents, by the officers, arising from the arrest of the supposed minors said to have bought the tobacco illegally, that those, supposed minors, had never been asked for identification, that they had been allowed to go on their way apparently after being arrested for an offence on both occasions and that it was only the shop keepers who were taken by the police, all points to a scheme to con the shop keepers and extort them.
101. Putting it differently, if there were never really any offences for infringement of the tobacco rules or laws and the officers made up the allegations, then they were not acting in their (lawful) duty ab initio.
102. This was the court's concern at the conclusion of the submissions from the parties and I conclude that it is born out by the case of *R v Tomasi* for the reasons set out above.
103. My attention is drawn to paragraph 13 of that judgement and that "...[the demanding of the bribe] is made with the intention that the police officer will thereby be persuaded to commit a breach of his duty...any performance or non-performance of duty will be something that will occur after the offending is complete."
104. In this case there was no performance of their duty from the outset.

105. On the facts I find that in both instances the defendants had the plan in mind to extort before they got to the shops in question.
106. I conclude they were intent on duping the shop keepers and taking their money before they arrived.
107. The demand was not made "...with the intention ...to commit a breach of his duty."
108. They had abandoned acting in the execution of their duties in favour of their criminal enterprises from the outset and the demands were part of those criminal schemes; not arising in pursuance of lawful enquiries and/or arrests.
109. During submissions the prosecution invited me to allow an application to add counts contrary to section 52 Criminal Offences Act, Extortion by a Government Servant.
110. The prosecution had never put their case on that basis and I consider it would be wrong, in those circumstances, to allow that amendment. The evidence in the case had been concluded and the defendants were entitled to know their fate on the case the Crown had run from first to last.
111. In my view it would not be fair this late change. The prosecution had never put their case in that way, or the defence allowed to consider any points that may arise from the different section as the evidence unfolded, potentially adapting their cross examination accordingly.
112. What I do say is this: I dismiss the charges before me and return verdicts of not guilty in respect of all counts faced by both defendants.

**NUKU'ALOFA**  
**6 August 2021**

