

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 157-160 of 2013

*Scan & file*

*06/11/13*

*Roxley*

**R E X**

**V**

- 1. VALELIANO MANU**
- 2. CHINCHIU LIU aka KEVIN LIU**
- 3. SHIQING LIN**
- 4. XIU MING LIN**

**BEFORE THE HON. ACTING JUSTICE CATO**

Mr Sisifa for the Crown

Mr Pouono for the accused Manu & Liu

Mr Corbett for Shiquing Lin

Chinchiu Liu unrepresented

**R U L I N G**

[1] This was an application by the Crown to admit witness statements under the business records provision contained within section 89 (n) of the Evidence Act. That section provides;

- a. Where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall on production, be admissible as evidence of the fact if-
  - i. The document is, or forms part of a record relating to any trade or business or finance or money operation and

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compiled in the course of that trade or business or finance or money operation from information supplied (whether directly or indirectly) by persons, who have or may reasonably be supposed to have personal knowledge of the matters dealt with in the information they supply; and

- ii. The person who supplied the information recorded in the statement in question is dead, is beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied.

[2] During the course of the trial, it became apparent that in relation to this prosecution, which involved the first of the two importing counts of pseudoephedrine under the provisions of section 5 (b) of the Illicit Drugs Control Act, the Crown were not intending to call New Zealand customs officers who had made written statements tendered at the committal to give evidence concerning the first of the two importations.

[4] In fact, this was an attempted importation because evidence had been given by Detective Sergeant Beale of the New Zealand police, who was part of a joint New Zealand- Tonga operation, that this consignment from China (allegedly intended to be consigned via New Zealand to Tonga for the accused Manu in Nukualofa) had been intercepted by New Zealand customs. Customs had been active in removing the controlled substance pseudoephedrine contained within Contac NT pills which had been concealed in a steam water boiler. Later, the Contac NT had been replaced with a similar looking placebo. The Contac NT pills had been scientifically analysed by a New Zealand scientist with

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the ESR in Auckland who had given evidence that the Contac NT contained pseudoephedrine.

- [5] It became clear during the course of the trial, that Mr Pouono, who acted for Mr Manu and Mr Xiu Ming Lin, was pursuing the issue of chain of proof. Mr Corbett also joined in the opposition to this application. The evidence relating to the interception of the first package had been processed into a witness statement by customs officer Johnson Wu. That statement detailed the arrival and interception of the first package, gave details of the consignor and the consignee (in this case Manu) and a description of the contents being a steam water boiler. The weight of the granules removed was given and other evidence all of which was important and central to the prosecution. Further, the statement of Martin Elsmore contained evidence of the delivery of the Contac NT from Customs to the ESR for analysis, its return and the insertion of placebo material. Both statements were from witnesses who I considered either should have been called at trial or concessions obtained, in advance of trial, to dispense with their being called, their statements being tendered as proof of the truth of the statements' contents.
- [4] Mr Sisifa indicated to me that he sought a ruling as to whether the two witness statements were admissible under the business records exception to the hearsay rule. I have considered the business records provision. I do not consider these documents can be said to be part of a record which suggests to me to be something more spontaneously and regularly created by a qualifying entity. There does not appear to be any definition of business in the Act, and I do not regard

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operations by Customs or Police as qualifying for consideration as a business.

[5] I note the New Zealand Evidence Act, 2006 describes business in these terms;

- a. Means any business, profession, trade, manufacture, occupation, or calling of any kind ; and
- b. Includes the activities of any department of State, local authority, public body, body corporate, organisation, or society

[6] I would add that, in any event, had the provision technically covered a witness statement, I would have exercised my discretion not to allow the evidence to be admitted because to do so would have denied the accused the opportunity to cross-examine. That would in my view have been unfair. It is the appearance of justice and indeed procedural fair play that is also important here. I consider it would be wrong for all the reasons I have given for me to admit such evidence by way of witness statement. Accordingly I do not accede to Mr Sisifa's application.



**DATED: NOVEMBER 2013 JUSTICE**