IN THE KIRIBATI COURT OF APPEAL] **CRIMINAL JURISDICTION]** **HELD AT BETIO]** **REPUBLIC OF KIRIBATI]**	**Criminal Appeal No. 5 of 2017**

BETWEEN	**THE REPUBLIC**	**APPELLANT**
AND	**JOAO AFONSO**	**RESPONDENT**

Before: Blanchard JA
Handley JA
Hansen JA

Counsel: *Pauline Beiatau* for appellant
Taoing Taoaba & Aomoro Amten for respondent

Date of Hearing: 10 August 2017
Date of Judgment: 16 August 2017

JUDGMENT OF THE COURT

[1] This is an appeal by the Republic from the decision of the Chief Justice to acquit the respondent on Counts 2 and 3 of the Amended Charge dated 29 May 2016. This followed his ruling on 6 June 2016 that the accused had no case to answer on those counts. The order of the Chief Justice that those counts be "dismissed" amounted to an acquittal. The respondent objected to the competency of the appeal but s.19A(a) of the *Court of Appeal Act* enables the Attorney-General to appeal, by leave, against a judgment of the High Court acquitting a person. The appeal is clearly competent, but leave is required.

[2] The notice of appeal was filed on 26 August 2016 outside the 30 day period prescribed by s.25(1A) of the *Court of Appeal Act* but that time can be extended "at any time" by the Court. The "appeal" was brought in the name of the Republic but Ms Taoaba did not take the formal objection and the Court will treat the notice of appeal in the name of the Republic as competent. The extension of time is also required, but was not opposed. It should be granted. Time should be extended until 26 August 2016.

[3] Counts 2 and 3 were as follows:

"Count 1

Possession of Drugs contrary to section 39(1)(a) of the Dangerous Drugs Ordinance, Cap 23.

Joao Afonso on the 22 February, 2016 on his yacht namely SV Union Pacific at Kiritimati Island, contravened section 8 by being found in possession of drug namely Marijuana, which is an Indian Hemp substance.

Count 2

Concealing goods under customs control contrary to section 107, schedule 8, item no: 2 of the Customs Act, 2/2005.

Joao Afonso during the periods of the 24 January, 2016 up to the 22 February, 2016, at Kiritimati Island, concealed goods namely marijuana, which is an Indian Hemp substance, and Polynesian French Franc cash, total amount of 1,887,000 equivalent to A$24,089.32, goods under Customs control".

[4] The accused arrived at Kiritimati Island on the yacht *Union Pacific* on 24 January 2016 for the purpose of repairing storm damage before continuing on his voyage to Honolulu

[5] On 22 February 5 police officers boarded the yacht to search for drugs and other prohibited items. During the search officers discovered a small quantity of marijuana and a substantial sum in Polynesian French currency. The police were acting on information received from the TCU in Tarawa, but they did not have a warrant authorising a search.

[6] The trial commenced on 6 June 2016 and the prosecution called three of the police officers who conducted the search. An immigration officer, and a customs officer who had not been involved in the search were also called to give other evidence. The police officers gave their evidence without objection from counsel for the accused, but their cross-examination established that they did not have a warrant authorising the boarding and search of the yacht. Their cross-examination proceeded on the assumption that the relevant powers of entry and search were those conferred by the Customs Ordinance.

[7] When the prosecution closed its case, counsel for the accused submitted that there was no case to answer on Counts 2 and 3 because the entry and search were unlawful and the evidence was obtained illegally. The argument proceeded on the assumption that the only powers available to the police were those conferred by the *Customs Ordinance* which required a warrant, and a writ of assistance. The attention of the Chief Justice was not drawn to the powers of the police under the *Police Powers and Duties Act 2008* which was the basis of the appeal.

[8] The Chief Justice said:

"The entry and search in this case were unauthorised and so the charges arising thereof cannot be allowed to stand".

[9] It may have been too late for the defence to take the point on a no case submission after the evidence had been received without objection but since, in our view, the entry on and search of the yacht were authorised by the 2008 Act there is no need for this Court to rule on whether the point could be taken on a no case submission.

[10] Section 45 of the 2008 Act relevantly provides:

"(1) This section applies if a police officer suspects, on reasonable grounds that –

(a) There is something in a vehicle that –

(i) .....

(ii) May be an unlawful dangerous drug;

.....

(2) The police officer, without warrant, may –

.....

(c) Search the vehicle and anything in the vehicle, for a thing mentioned in subsection (1)(a),

.....

(5) The police officer may seize all or part of a thing –

(a) that may provide evidence of the commission of an offence;

.....

(6) Power under this section to search a vehicle includes power to enter the vehicle, stay in the vehicle ..... to remove something seized under subsection (5) from the vehicle".

[11] Section 8 defines a vehicle as including a vessel.

[12] It is clear therefore that the boarding and search of the yacht by the police officers were authorised by the 2008 Act. They were not cross examined to establish that the information received by police officer Mackenzie from the TCU in Tarawa did not satisfy the statutory requirement for police officers in the position of Mackenzie to have reasonable grounds for suspecting that "an unlawful dangerous drug" could be on board the yacht.

[13] The 2008 Act does not contain a definition of an "unlawful dangerous drug" and it does not make possession of such drugs unlawful. The basis for the unlawful quality of the drug must be found in other legislation, in this case the *Dangerous Drug Ordinance 1977*. This contains a definition of "dangerous drug" as "any of the substances which may be ..... subject to the provisions of this Ordinance". It was not suggested that marijuana was not such a substance.

[14] The appeal must therefore be allowed and Counts 2 and 3 remitted to the Chief Justice to complete the trial. Whether the further trial would serve any useful purpose is not a matter for this Court and the contrary was not suggested.

[15] In our judgment therefore the following orders must be made:

1. Leave to appeal granted.

2. Appeal allowed.
3. The verdict and judgment of acquittal on Counts 2 and 3 of the charge set aside.
4. Counts 2 and 3 remitted to the High Court to be further heard and determined according to law.

Blanchard JA

Handley JA

Hansen JA