

*Makoa*

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**REX**

**V**

**SHAO JUN SUN**

**Before:** The Honourable Justice Laurenson  
**Counsel:** Ms A Finau and Ms JJF Lafaiali'i for Crown  
Mr M Kaufusi for Accused  
**Hearing:** 30 November 2009 and 1-3 November 2009.  
**Date of Judgment:** 5 February 2010.

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**JUDGMENT**

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## The charge

[1] The accused in this case has been charged with one count of operating a fish processing establishment (FPE) without a licence contrary to s 33(4)(a) of the Fisheries Management Act (26/2002) (the Act).

[2] Section 33(4)(a) states:

Any person who –

- (a) Operates or allows to be operated any fish processing establishment without a licence granted under this section;
- (b) under a licence issued under this section, operates or allows to be operated any fish processing establishment contrary to the conditions of such licence;
- (c) operates or allows to be operated any fish processing establishment contrary to the safety and quality standards for fish or fish product establishment under this Act;
- (d) exports, allows the export, attempts to export, assists in the export or attempt at export, of any fish or fish product without a licence to operate a fish processing establishment; or
- (e) being the holder of a licence to operate a fish processing establishment, processes, exports, allows the export, attempts to export, assists in the export or attempt at export of any fish or fish products from an unregistered fish processing establishment, or any other place or premises,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$500,000 or imprisonment for a term not exceeding one year or to both such fine and imprisonment and shall be liable to a fine not exceeding \$5,000 for every day of the fine for which is convicted continues.

[3] Section 2 of the Act defines “fish processing establishment” to mean “any land, premises or other place on or in which fish are processed or stored for the purposes of processing for sale outside Tonga or for sale primary [sic] by wholesale in Tonga.”

[4] The particulars contained in the amended incitement limited the extent of the charge as follows:

Shao Jun Sun, on or about 22 January 2005 at Nuku'alofa, you did operate a fish processing establishment without a fish processing establishment without a licence for the purposes of processing for sale primarily by wholesale in Tonga, and such establishment consisted of 2 freezers with sandfish inside, 6 bins of sandfish, 4 drying racks and 5 cooking drums.

## **Amendment of Charge**

[5] In the course of coming to a decision in this case, I became aware of an issue relating to the form of the charge which appeared to be an error. It was not a matter which had been raised by counsel. Stated briefly:

- (a) The statement of offence in the Amended Indictment (correctly refers to s 33(4)(a) of the Act (see para [2]).
- (b) Proof of the offence requires proof that a fish processing establishment was involved (see para [3]).
- (c) This in turn includes proof of the purposes for which fish are processed or stored for sale outside Tonga or for sale primarily by wholesale in Tonga.
- (d) The particulars of offence (see para [4]) refer only to “sale primarily by wholesale in Tonga”.

[6] During the hearing, Counsel referred to both “sale outside Tonga” and “sale primarily in Tonga”. The reason being on the one hand that the accused’s defence was that although he had been involved in the gathering and storage of the fish, he had not done so for either of the two purposes, i.e. “sale outside Tonga” or “primarily by wholesale in Tonga”. On the other hand, the Crown submitted throughout that one or other of the two alternatives had to apply.

[7] This being the case, I concluded that the particulars were in error and did not accord with the way either party had conducted their respective cases.

[8] Given that the offence had been correctly stated in the statement of offence in the Amended Indictment (i.e. only the particulars were lacking) and the issue had not been raised by either counsel, it appeared to me to be an appropriate case for the Court to amend the particulars in the Amended Indictment to cover the omission. I therefore advised counsel by Minute after the hearing that I was proposing to make the amendment, but before doing so, I wanted their submissions as to whether any prejudice might ensue.

[9] Both counsel supplied submissions accordingly and neither submitted that any prejudice would ensue if the amendment was made. Crown counsel helpfully supplied reference to *R v To'ia* [2004] TO SC 52 and *Halsbury* 4<sup>th</sup> Ed Vol 11(2) para 937, which confirmed that the procedure I had adopted appeared to be correct.

[10] Furthermore, both counsel submitted in effect that the amendment should go further by specifically referring to "processing or storing". I therefore formally note that the particulars of the offence as noted in the Amended Indictment are to be amended to read:

"Shao Jun Sun on or about 22 January 2005 at Nuku'alofa you did operate a fish processing establishment for the purposes of processing or storing for sale outside Tonga or primarily by wholesale in Tonga and such establishment consisted of 2 freezers with sandfish inside, 6 bins of sandfish, 4 drying racks and 5 cooking drums."

#### **Nature of offence**

[11] At the outset of this case, I had a brief discussion with counsel as to how they regarded this particular offence. Without reaching any final conclusion, I was inclined to accept counsels' view that this was a case where the legislature had intended to create an offence of strict liability.

[12] The Long Title to the Act states:

An Act to provide for the conservation, management, sustainable utilisation and development of fisheries resources in the Kingdom and matters incidental thereto.

[13] The offence pursuant to s 33(4)(a) is clearly directed to the regulation of a particular activity for the public welfare and as such it would be appropriate to regard the section as creating an offence of strict liability which does not require proof of *mens rea*. Given the severe penalties involved, including imprisonment for a maximum of one year, it also seemed appropriate that this was one of those cases where it should be open to the accused to escape conviction if he could prove a complete absence of fault on the balance of probabilities.

[14] To reach the conclusion that proof of *mens rea* not be required in such cases depends not just on the purpose of the legislation, but more importantly, on the language used. Section

33(4)(a) by itself does not give any specific consideration as to whether proof of *mens rea* is required or not. The inclusion of the words “fish processing establishment” and their definition in s 2 of the Act do, however, specifically introduce a requirement to prove an element of *mens rea* i.e. proof of the purposes for which the fish are processed or stored.

[15] Now that I have had a chance to consider the issue more fully, I have concluded (and I so find) s 33(4)(a) does not create an offence of strict liability. The result is that the Crown must prove that the accused:

- (a) On or about 22 January 2005 at Nuku’alofa.
- (b) Operated or allowed to be operated.
- (c) Any land premises or other place on or in which fish are processed or stored.
- (d) That the purposes of processing or storing the fish were either to process for sale outside Tonga; or, for sale primarily by wholesale in Tonga.
- (e) The operation was done without a licence granted under s 33 of the Act.

### **Factual background**

[16] The FPE in this case is alleged to have been set up to process an animal-like plant known as a Beche-de-mer, or sea cucumber, one species of which is known as sandfish. It can be found on the sea floor. It grows to about 14 inches in length. After being caught, one end is slit open and the interior gut-like material removed. If not eaten immediately, it can be stored by freezing and then processed. The processing involves a number of steps:

1. Boiling
2. Drying, which can be in an oven or outside in the sun on racks.
3. Before cooking, it is soaked causing it to swell again to about a quarter of its original size.
4. It is regarded as a delicacy in China and an item of seafood in Tonga.

[17] The accused, Mr Sun, and a Tongan woman called Ana, approached a local diver, Sitone Latu Kiteau (known as Latu) sometime in 2005. They came to an agreement that Sun would provide a boat for Latu and others to gather sandfish for him. Sun would pay \$2.50 for each fish, as well as the cost of fuel and food.

[18] Latu said that the word got about with the result that some fifty divers i.e. most of those resident at Patangata, which is on the coast to the East of Nuku'alofa, sought to become involved in the venture which lasted for three days. It seems that Sun only dealt with Latu, who then dealt with the other divers on his behalf. There is some confusion about the details of the arrangement but that issue is not important to the main issues relevant to this case.

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[19] What is important is that the venture commenced on 20 January 2005 shortly after Sun's approach to Latu, who had told Sun that he did not have a boat. On 18 January 2005, Sun approached 'Atunaisa Prescott to buy his boat. The asking price was \$23,000 which included the outboard motor. After attending to some repairs, Mr Prescott delivered the boat to Patangata on 20 January 2005, and then received his money.

[20] The same day, Sun, Lata and others, set out to sea in search of sandfish. They were successful. The sandfish were taken to Sun's residence at Houmakelikao and the divers were paid. The fish were placed in a freezer at Sun's residence.

[21] The same reoccurred the following day.

[22] On 22 January 2005 three days later, the arrangement went sadly astray. Mr Sun met the diver's after they came ashore about midday at the road junction at Popua. This was about the time that a fisheries officer, Mr Tevita Taulofo, came upon the scene. He had been directed there by his office because reports had been received that persons were fishing illegally for sandfish.

[23] Once again there are differences in the detail of the evidence but on the following essential matters there is no dispute:

- (a) A police officer, Constable (now Sergeant) Feamani, came to assist Mr Taulofo, who had also sought more help from his office.
- (b) The divers apparently became concerned that they would not be paid. Some of them, together with Sun, boarded his boat and, despite Mr Taulofo's exhortations not to do so, proceeded to drive the boat some distance away to deep water.
- (c) Mr Taulofo effectively commandeered another diver's boat and caught up to Sun's boat. He crossed over to this and then prevailed on Mr Sun and the others to return to the position on the shore whence the boat had departed about an hour before.
- (d) They all then proceeded to Sun's house at Houmakelikao taking with them the sandfish caught on that day. On arrival, they found inside the house 2 freezers containing in total 1650 sandfish. Outside the house they found 2 large metal racks, upon which trays could be placed. The 2 racks together occupied a good part of a large truck tray. Also found were 5 large drums cut in half which could be used for boiling fish.

All these items, plus the fish caught on the day, were taken to the Ministry of Fisheries depot at Sopusu. The fish were counted there. It was found that a further 785 fish had been caught on that day.

[24] It is quite clear that neither the racks nor the drums had been used to process fish. It was equally clear that none of the fish had been processed in any way by boiling or drying.

### **Discussion**

[25] There is no dispute that the accused:

- (a) On or about 22 January 2005 at Houmakelikao in Nuku'alofa
- (b) Did operate (i.e. managed or controlled)
- (c) A house property at Houmakelikao where 1650 sandfish were stored in two freezers.

(d) He did not have a licence to operate a fish processing establishment under s 33 of the Act.

[26] The sole issue to be decided by me is whether the Crown has proved beyond reasonable doubt that the accused had those fish, in that place, for the purposes of either processing them for sale outside Tonga, or for sale primarily by wholesale in Tonga.

[27] The Crown's basic argument is that the quantity of frozen fish found is such that they must have been collected for processing either for sale outside Tonga, or primarily by wholesale in Tonga. The accused on the other hand, gave evidence that this was not the case at all. He had collected the fish for his own consumption and to give away as gifts to some 15 or 16 Chinese friends who had helped him after he had come to Tonga.

[28] The background to this argument is a Cabinet decision dated 5 February 2003 relating to a moratorium on the harvesting and processing of sea cucumbers for export. Recommendation No.1 stated:

1. That Cabinet reaffirms its Cabinet Decision No. 1255 of 9<sup>th</sup> September 1997 which approved:
  - (i) That a moratorium be imposed on harvesting of sea cucumbers for export over the whole of Tonga to allow stocks to recover to sustainably manageable levels. This moratorium should be declared for a ten year period in the first instance effective from the 31<sup>st</sup> December 1997 to be subjected to review by the Ministry after five years.
  - (ii) That all stored Beche-de-mer be cleared by 31<sup>st</sup> December 1997 and no products to be exported beyond that date.
  - (iii) Subsistence harvesting for local consumption to be allowed to continue subject to size limits.

[29] Also to be taken into account is the question of how many fish will be eaten at one time by one person. Mr Latu said that he and his family would eat about 80 fish on a Sunday. The family would include about 25 people i.e. about 3.2 fish each. Mr Taulofo said that one full sized fish was enough for a couple. Mr Feamani said that he could eat about 2 fish in a meal. Mr Sun said that Chinese people can eat one fish in one meal but that Tongan people can eat 7 or 8. On the basis of this evidence, I conclude that 2 or 3 fish would be a generous amount consumed by one person at one time.



[30] The accused said in evidence that he required the fish to give to some 15 or 16 Chinese friends at the time of the Chinese New Year on 8 February 2005. The Crown pointed out that if this was so each friend would receive over 100 of the 1650 fish found in the freezers. If the further 785 fish gathered on the 22<sup>nd</sup> January 2005 were brought into account, the total would increase to over 152 per person.

[31] The additional 785 fish cannot be taken into account as having been stored on the accused's property on 22 January 2005 because they were brought there by the authorities. The question is whether they can be brought into account as evidence of an ongoing operation. In other words, if they had not been intercepted, would they too have been stored and then processed with the fish already at the accused's home.

[32] The accused said in evidence that the arrangement he made with Latu was:

- (a) he would provide the boat;
- (b) when he required sandfish he would provide petrol and food;
- (c) he would be present on the boat when it was being used to gather sandfish;
- (d) Latu would look after the boat and retain the key to the motor. He, Latu, could use the boat to catch other fish without the accused being aboard.
- (e) He would pay the divers \$2.50 per sandfish.

[33] Latu on the other hand, said that the accused had not set any limits on how long the arrangement was to last, or how many sandfish would be accepted. The only condition was that all sandfish collected were to be supplied to the accused.

[34] The accused also said he had not authorised any sandfishing to be done on 22 January 2005. Perhaps more significantly, he agreed that he had not told Latu after the completion of fishing the previous day that sufficient had been gathered for his purposes.

[35] I am satisfied beyond reasonable doubt that the fishing carried out on 22 January 2005 was intended to be part of an ongoing operation. No limit had been placed on the diving arrangements made with Latu.

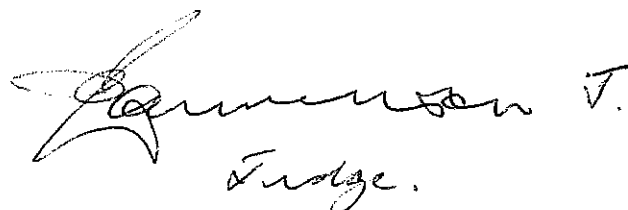
[36] There are other matters which reinforce my conclusion:

- (a) The accused was clearly prepared, and able, to make a significant investment in the operation. The boat alone cost \$23,000. The drying frames as shown in photographs produced in evidence were large and substantial. The cost of the 2435 sandfish at \$2.50 each amounted to \$6,080.00.
- (b) The nature of the plant formed at the accused's house indicates that a sizeable operation was in mind. There were 5 large drums readied for boiling the fish. The drying racks were large and well able to take a large number of fish. Together the 2 racks occupied the best part of a truck tray.
- (c) The accused said that his investment in the boat and other gear was done in the expectation that the moratorium on gathering the sandfish would be removed in the near future. There was no evidence to support this.
- (d) I have already referred to the arrangement made with Latu. This involved entrusting a boat and engine costing \$23,000 to a person who a few days beforehand had been a complete stranger. I cannot find any credibility in the accused's explanation that the arrangement made with Latu was simply to provide sufficient fish for the accused and his friends. Even the amount found on 22 January 2005 i.e. 1650 seems extremely excessive for those purposes. The only credible explanation I can glean from the scale of the arrangement is that it was intended to provide sandfish illegally for either sale outside Tonga or by wholesale within Tonga.

## Verdict

[37] I am satisfied beyond reasonable doubt that the Crown has proved the charge against the accused. I accordingly find the accused guilty.

[38] On 3 December 2009 the accused was remanded on bail to 9am on 21 January 2010 to appear before His Honour the Chief Justice for sentence. I understand that in the meantime, this date has been enlarged to a later date.

  
Judge.