IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

CRIM. NO. S95/92;
S473/92

BETWEEN : THE POLICE

Informant

A N D : SONNY STEHLIN of Vailima, planter

Defendant

Counsel : H.M. Aikman for Prosecution
R.S. Toailoa for Defendant

Hearing : 10 & 11 August 1993

Decision : 16 August 1993

DECISION OF SAPOLU, CJ

The accused faces two charges under the Narcotics Act 1967. The first charge is that at Apia on the 11th day of April 1992, the accused knowingly and without a licence and in contravention of section 7 of the Narcotics Act 1967 had in his possession narcotics, namely, cannabis substances. The second charge is that at Vailima on the 12th day of April 1992, the accused cultivated prohibited plants, namely, cannabis sativa L plants, without a licence granted by the Director General of Health, in contravention of section 6 of the Narcotics Act 1967. In short, the accused is charged with having possession and cultivation of narcotics contrary to the provisions of the Narcotics Act 1967.

The evidence adduced by the prosecution shows that on Saturday night, 11 April 1992, the accused was in front of the Love Boat nightclub, when he was met by a police officer, Constable Esau Uiese who was on his way to take up his duties with the Police night shift at the Apia Police Station. When met by the police officer, the accused was under the influence of alcohol

and was also smoking what appeared to the police officer not to be a cigarette. This aroused the suspicion of the police officer who then asked to see the accused's packet of cigarettes. The accused showed the police officer an empty packet of Rothmans cigarettes. That did not satisfy the police officer's suspicion. So the police officer asked the accused to accompany him to the Police Station. The accused was reluctant to go to the Police Station. Thepolice officer then requested the assistance of another man, and they accompanied the accused to the Police Station. At the Police Station the accused was searched and a packet of Rothmans containing five unused and two used marijuana cigarettes was inside the jacket the accused was wearing. The accused was then kept in police custody that night without an interview. Corporal Simi Crichton testified that an interview was not in order at that time because of the accused's state of drunkenness.

Early in the following morning at about 5.00am, Corporal Neemia Auvaa contacted by phone Chief Inspector Faaopopo Matamu who was in charge of the police duty that day. That was Sunday, 12 April 1992. Chief Inspector Matamu authorised the police to go ahead and search the accused's premises for suspected marijuana without a search warrant. It came out of the evidence of Chief Inspector Matamu, Corporal Auvaa and the leader of the search party, Sergeant Penaia Kaleopa, that the Police took that action for three reasons. Firstly the Police believed that they have the power to search the accused's premises for suspected marijuana. Secondly, they were concerned that the accused's family might become aware that the accused was in Police custody and therefore destroy any evidence of marijuana that might be found at the accused's premises. Corporal Auvaa testified that when the accused was brought into the Police Station on Saturday night, there were some people in front of the Police Station. He was concerned that one of those might know the accused or his family and informed the accused's family about the accused being seen inside the Police Station, and the accused's family would therefore

destroy any traces of marijuana at the accused's premises before the Police arrive. The third reason, was that it was a Sunday, and it would be relatively difficult to obtain a search warrant. The fourth reason was that the Police were suspicious because of the accused being in possession of five marijuana cigarettes, and it is also normal Police practice to search the premises of those persons who are found in possession of marijuana.

So the Police went up on the Sunday in question to Vaoala to search the accused's premises. They found the wife of the accused at home. Sergeant Kaleopa and Corporal Auva'a explained to the accused's wife the purpose of the Police visit. During the search of the accused's premises, the Police found three piles of marijuana leaves, some of which were dried leaves. The Police also found within an enclosure of corrugated roofing irons adjoining the rear of the accused's house 31 marijuana plants ranging from 4 feet, 6 feet, 8 feet to 12 feet according to the evidence that was adduced by Sergeant Kaleopa and Constable Tulaniu Tuiala. All these marijuana plants were uprooted and brought together with the three piles of marijuana leaves to the Apia Police Station. The 31 marijuana plants, the three piles of marijuana leaves and the 7 marijuana cigarettes already found on the accused, were then all photographed on the same Sunday morning. Those photographs were produced in evidence in this case.

On the same Sunday morning, the accused was interviewed by Corporal Crichton and he voluntarily admitted to growing 30 marijuana plants and being in possession of the three piles of marijuana leaves as found by the Police at his premises. He also admitted to being in possession of the 7 marijuana cigarettes found inside his jacket on Saturday night. He says that the reason why he cultivated marijuana was because he suffers from an ulcer and when he feels pain in his stomach, he smokes a marijuana and that alleviates the pain. I will come back later in my decision to this point about the accused's ulcer when I discuss the defence of necessity raised on behalf of the accused.

Now on Monday morning, 13 April 1992, the marijuana plants, piles of marijuana leaves and marijuana cigarettes were taken to the National Hospital where they were weighed by the Chief Pharmacist at the National Hospital. It was found that the piles of leaves weighed 243 grams, the 7 cigarettes weighed 4.5 grams and the 31 plants weighed 10 kilograms. The total weight for all these marijuana substances came to 10.247 kilogramms.

The Chief Pharmacist was called to give evidence as to the weight of these marijuana substances, and he also testified that from the narcotics register he keeps, the accused does not hold a licence to deal in, or cultivate, or possess marijuana or narcotics.

The Police then removed a leaf from each of the 31 marijuana plants and put it in a separate sealed envelope. So there were 31 separate sealed envelopes each containing only one leaf. Thus each envelope relates only to one plant, that is, the plant whose leaf it contains. The same was done with the three piles of marijuana leaves. A separate sample was obtained from each pile and put in a separate sealed envelope so that there were three envelopes each relating separately to the pile of leaves whose sample it contains. Likewise, the same was done with the seven marijuana cigarettes, so that there were seven separate envelopes each containing only one sample from the separate cigarette from which the sample was obtained.

All these envelopes containing marijuana substances were sent to the then Department of Scientific and Industrial Research in New Zealand for laboratory examination and tests. The analyst who scientifically examined and tested these marijuana substances was called from New Zealand to give evidence and she produced a report wherein she states that all of the items sent by the Police for testing contained cannabis resin and was from the plant of genus cannabis. She also testified that she used 3 scientific tests and all three tests were applied to each of the items sent to her and each of those items was shown to contain cannabis resin and ws from a plant of the species cannabis sativa L.

This brings me back to the two changes in this case. Section 6 (1)(a) of the Narcotics Act provides for the offence of cultivation as follows:

"Every person who cultivates a prohibited plant commits an offence "against this Act, and liable on conviction to imprisonment for a "term not exceeding 7 years."

Section 2(1) of the Act then defines a "prohibited plant" to include any plant of the genus cannabis. Section 6(3) of the Act provides two defences to a charge under section 6(1) but none of those defences is available in this case.

Section 7 of the Act provides for the offence of possession as follows:

"No person shall knowingly be in possession of, or attempt to "obtain possession, of any narcotic".

The rest of section 7 then provides for circumstances where a person is permitted to be in possession of a narcotic But none of those circumstances apply in this case. Section 18(2) then provides that any person who has in his possession any narccotic contrary to any provision of the Act is liable to a term of imprisonment not exceeding 7 years.

From the evidence already referred to, there is really no dispute that the accused cultivated the marijuana plants in this case. The Police found 31 marijuana plants growing on the accused's Vaoala property. Although in his cautioned statement, the accused admits to growing 30 marijuana plants, I am satisfied as a matter of fact that the accused was responsible for growing all 31 marijuana plants found by the Police at his premises. A sample from each plant was sent to the Department of Scientific and Industrial Research in New Zealand and each sample tested positive as containing cannabis resin from a plant of the genus cannabis which is a "prohibited plant" in terms of the Act.

As to the charge of possession, the Police found 3 piles of marijuana leaves from the accused's house and 7 marijuana cigarettes from his jacket. In his cautioned statement, the accused admits to being in possession of those items. Samples from those items were tested b, the Department of Scientific and Industrial Research in New Zealand and they contained cannabis resin and were from a plant of the genus cannabis. Cannabis resin is of course a narcotic in terms of the Act.

This leads me on to the defence of necessity raised on behalf of the accused.

Mr Toailoa for the accused submits that the defence of necessity exists at common law. That being so, he further submits that the defence is available by virtue of section 8 of the Crimes Ordinance 1961 to the charges against the accused and on the evidence in this case the defence of necessity should succeed and the accused must therefore be acquitted of the charges. Mr Toailoa also submits that there is no onus on the accused to prove the defence of necessity; it is for the prosecution to disprove the existence of the defence.

Miss Aikman for the prosecution submits that the defence of necessity does not exist in law and she refers, in support of that submission, to London Borough of Southwork v Williams [1971] 2 All ER 175; Smith and Hogan on Criminal Law 4th edition; and the well known case of R v Dudly and Stephen [1884] 14 QBD 273. She also submits that the only defence available to the charge of cultivation under section 6 of the Act are the defences provided in section 6 itself. The defence of necessity not being one of those defences, she therefore submits that it is not a defence to a charge of cultivation.

From my own reasearch, I am satisfied as a matter of law that the defence of necessity does exist and that it is available in appropriate although limited circumstances, to a charge of cultivation or possession under the Narcotics Act. I am therefore in agreement with Mr Toailoa's

submission that the defence of necessity exists and is applicable to the charges in this case. There are two issues here; firstly, the existence of the defence of necessity; secondly, its applicability to the present charges. I will deal with these issues in that order. After that I will then pass on to consider the evidence whether it sustains the defence of necessity in this case.

On the question of whether the defence of necessity does exist, I will start first with the recent English authorities. In R v Canway [1988] 3 All ER 1025 the English Court of Appeal held :

> "we conclude that necessity can only be a defence to a charge of
> "reckless driving where the facts establish 'duress of
> "circumstances', as in R v Willer, i.e. where the defendant was
> "constrained by circumstances to drive as he did to avoid death or
> "serious bodily harm to himself or some other person.
> "As the learned editors point out in Smith and Hogan 'Criminal
> "Law (6th edn, 1988) p225, to admit a defence of 'duress of
> "circumstances' is a logical consequence of existence of the
> "defence of duress as that term is ordinarily understood, i.e.
> "'do this or else'. This approach does no more than recognise
> "that duress is an example of necessity. Whether 'duress of
> "circumstances' is called 'duress' or 'necessity' does not
> "matter."

It appears to me that from the passage cited, the English Court of Appeal has accepted that necessity is a defence to a charge of reckless driving, where the circumstances to establish that defence are present. Granted, the Court seems to recognise that the defence of necessity is available to a charge of reckless driving in limited circumstances, but every defence has its own 'limited sphere of circumstances' where it can only apply. But more importantly, the English Court of Appeal has openly

recognised that there is a defence in law called the defence of necessity.

The next recent English case which deals with the defence of duress is the case of R v Martin [1989] 1 All ER 652. The English Court of Appeal in that case was dealing with an appeal relating to a charge of driving while disqualified. In allowing the appeal, the Court of Appeal said :

> "The principles may be summarised; first, English law does,
> "in extreme circumstances, recognise a defence of necessity.
> "Most commonly this defence arises as duress, that is pressure
> "on the accused's will from the wrongful threats or violence of
> "another. Equally however it can arise from other objective
> "dangers threatening the accused or others. Arising thus it
> "is conveniently called "duress of circumstances'.
> "Second, the defence is available only if, from an objective
> "standpoint, the accused can be said to be acting reasonably
> "and proportionately in order to avoid a threat of death or
> "serious injury. Third, assuming the defence to be open to
> "the accused on his account of the facts, the issue should be
> "left to the jury, who should be directed to determine these
> "two questions; first, was the accused, or may he have been,
> "impelled to act as he did because as a result of what he
> "reasonably believed to be the situation he had good cause to
> "fear that otherwise death or serious physical injury would
> "result; second, if so, would a sober person of reasonable
> "firmness, sharing the characteristics of the accused, have
> "responded to that situation by acting as the accused acted?
> "If the answer to both those questions was Yes, then the jury
> "would acquit; the defence of necessity would have been
> "established."

Upon reading this passage from R v Martin it appears to me that the

English Court of Appeal has gone further than in R v Conway's case and give recognition to a general defence of necessity in English law, so that the defence of necessity is not to be limited to a charge of reckless driving as in R v Conway or the charge of driving while disqualified as in R v Martin.

At this point, I should point out that a general defence of necessity is recognised in Canada as part of Canadian law. That is clear from the decision of the Supreme Court of Canada in Perka v The Queen [1984] 2 S.C. 232. In that case, the accused tried to smuggle on a ship en route from the international waters off the coast of Columbia in South America to the international waters off the coast of Alaska in the United States several tons of marijuana cannabis worth 6 to 7 million dollars. On its route to Alaska, the ship encountered a series of problems with its engine, generators and navigational devices. Those problems were aggravated by high seas and rising wind. For the safety of the ship and the crew, it was decided to seek refuge on the shoreline of Canada. However, in so doing the ship was grounded on a rock and it appeared that it was going to capsize on the rock. So the cargo of marijuana cannabis was offloaded and carried to the shore. It was there that the Canadian Police found the accused and later charged them with importing cannabis into Canada and with possession for the purpose of trafficking. It appears that the accused (the appellants before the Supreme Court of Canada) raised the defence of necessity. At their trial they were acquitted. On the appeal by the Crown to the Court of Appeal, that Court ordered a new trial. On appeal by the accused from the Court of Appeal to the Supreme Court, that Court dismissed the appeal and ordered a new trial.

In the Supreme Court of Canada, Dickson J in delivering the judgment of himself, Ritchie, Chouinard and Lamer JJ, accepted that at common law the defence of necessity is available in Canada. In a

comprehensive and profound discussion of the defence of necessity, Dickson J referred to passages from Aristotle, Hobbes and Kant to justify the existence of the defence of necessity. He then says :

"In the United States a general defence of necessity has been
"recognised in the statutory law of a number of states and
"has found its way into the Model Penal Code of the
"American Law Institute".

Dickson J then referred to varying opinions in England as to the existence of a general defence of necessity in English law. And he referred to Blackstone's "Commentaries on the Law"; Stephen's "A History of the Criminal Law in England"; and Halsbury's Laws of England 4th edn, vol 11, para. 11. He then pointed out that Glanville Williams in an article entitled "The Defence of Necessity", (1953) 6 C.L. P216 was able to assent 'with some assurance' that the defence of necessity is recognised by English law, but the authors of Smith and Hogan, "Criminal Law" (4th edn 1978) deny the existence of a general defence of necessity as part of English law.

Dickson J then goes on to say :

"In Canada the existence and the extent of a general defence
"of necessity was discussed by this Court in <u>Morgentaler v</u>
"<u>The Queen [1976] 1 S.C.R. 616.</u> As to whether or not the defence
"exists at all I had occasion to say at p.678 : 'On the
"'authorities, it is manifestly difficult 'to be categorical and
"'state that there is a law of necessity, paramount over other
"'laws, relieving obedience from the letter of the law. If it does
"'exist, it can go no further than to justify non-compliance in
"'urgent situations of clear and imminent peril when compliance
"'with the law is demonstrably impossible'. Subsequent to
<u>Morgentaler</u>, the Courts appear to have assumed that a defence of

"necessity does exist".

Further on in the judgment, Dickson J goes on to say :

"If the defence of necessity is to form a valid and consistent part of
"our criminal law it must, as has been universally recognised, be
"strictly controlled and scrupulously limited to situations that
"correspond to its underlying rationale. That rationale as I have
"indicated, is the recognition that it is inappropriate to punish
"actions which are normatively 'involuntary'.
"In **Morgentaler** I was of the view that any defence of necessity was
"restricted to instances of non-compliance 'in urgent situations of
"'clear and imminent peril when compliance with the law is
"'demonstrably impossible'. In my opinion, this restriction focus
"directly on the 'involuntariness' of the purportedly necessitous
"behaviour by providing a number of tests for determining whether
"the wrongful act was truly the only realistic reaction open to
"the actor or whether he was in fact making what in fairness
"could be called a choice. If he was making a choice, then the
"wrongful act cannot have been involuntary in the relevant sense".
"The requirement that the situation be urgent and the peril be
"imminent, test whether it was indeed unavoidable for the actor
"to act at all ....
"At a minimum the situation must be so emergent and the peril must
"be so emergent and the peril must be so pressing that normal human
"instincts cry out for action and make a counsel of patience
"unreasonable. The requirement that compliance with the law be
"'demonstrably impossible' takes this assessment one step further.
"Given that the accused had to act, could he nevertheless
"realistically have acted to avoid the peril or prevent the harm,
"without breaking the law? Was there a legal way out? I think

this is what Bracton means when he lists 'necessity' as a defence,

"providing the wrongful act was not 'avoidable'. The question
"to be asked is whether the agent had any real choice : could he
have done otherwise? If there is a reasonable legal alternative
"to disobeying the law, then the decision to disobey becomes a
"voluntary one, impelled by some consideration beyond the dictates
"of 'necessity' and human instincts.

"The importance of this requirement that there be no reasonable
"legal alternative cannot be overstressed.

"Even if the requirements for urgency and 'no legal way out' are
"met, there is clearly a further consideration. There must be
"some way of assuring proportionality. No rational criminal
"justice system, no matter how humane or liberal, could excuse
"the infliction of a greater harm to allow the actor to avert a
"lesser evil. In such circumstances we expect the individual
"to bear the harm and refrain from acting illegally. If he
"cannot control himself we will not excuse him.

"I would therefore add to the preceding requirements a stipulation
"of proportionality expressable, as it was in Morgentaler, by
"the proviso that the harm inflicted must be less than the harm
"sought to be avoided".

Dickson J then goes on to consider the question of whether, if the accused was committing a crime at the time the necessitous circumstances arise, should he be denied the defence of necessity as a matter of law. It will be recalled from the facts of this case, that when the accused landed their cargo of marijuana cannabis on the shore of Canada, they had been carrying that cargo in a ship which encountered a series of mechanical problems.

Together with deteriorating seas and wind, and faced with the possibility that the ship was going to capsize, the accused were forced to offload their cargo and carry it onto the shore of Canada. But the destination of the ship was not Canada but Alaska in the United States.

In reply to the question just posed, Dickson J goes on to say :
"In my view the accused's fault in bringing about the situation
"later invoked to excuse his conduct 'can' be relevant to the
"availability of the defence of necessity, but not in the
"sweeping way suggested by some of the commentators and in some
"of the statutory formulations. Insofar as the accused's 'fault'
"reflects on the moral quality of the action taken to meet the
"emergency, it is irrelevant to the issue of the availability of
"the dfence on the same basis as the illegality or immorality of
"actions preceding the emergency are irrelevant. If this fault
"is capable of attracting criminal or civil liability in its own
"right, the culprit should be appropriately sanctioned. I see
"no basis, however, for 'transferring' such liability to the
"actions taken in response to the emergency, especially where
"to do so would result in attaching criminal consequences on the
"basis of negligence.
"In my view the better approach to ..e relationship of fault to
"the availability of necessity as a defence is based once again
"on the question of whether the actions sought to be excused were
"truly 'involuntary'. If the necessitous situation was clearly
"forseeable to a reasonable observer, if the actor contemplated
"that his actions would likely to give rise to an emergency
"requiring the breaking of the law, then I doubt whether what
"confronted the accused was in the relevant sense an emergency.
"His response was in that sense not 'involuntary'. 'Contributory

"fault' of this nature, is a relevant consideration to the
"availability of the defence.

"If the accused's 'fault' consists of actions whose clear
"consequences were in the situation that actually ensued, then
"he was 'really' confronted with an emergency which compelled
"him to commit the unlawful act he now seeks to have excused.
"In such situations the defence is unavailable. Mere negligence,
"however, or the simple fact that he was engaged in illegal or
"immoral conduct when the emergency arose will not disentitle an
"individual to rely on the defence of necessity".

Dickson J then summarised his views on whether a defence of necessity will succeed or not as follows:

"For the defence to succeed the accused's actions must be, in the
"relevant sense, an 'involuntary' response to an imminent and
"overwhelming peril. The defence cannot succeed if the response
"was disproportional to the peril or if it was not 'involuntary'
"in the sense that the emergency was not 'real' or not imminent or
"that there was a reasonable alternative response that was not
"illegal".

I have quoted extensively from Perka's case because of the significance of the question I have to decide in this case whether for the purpose of Western Samoan law, and for the purpose of this case, there is a defence of necessity available. Secondly Perka's case throws comprehensive light on the limits and restrictions to be imposed on the defence of necessity if it is to be accepted.

Turning now to the English authorities cited by Miss Aikman, Smith and Hogan, 'Criminal Law' (4th edn) has already been mentioned in Perka's case. The case of R v Dudley and Stephen, even though it came to be regarded as settling English law that 'necessity' is not a defence to a charge of murder,

the death sentence for murder in that case was commuted to 6 months' imprisonment. As for the case of London Borough of Southwork v Williams, the judgments of Lord Denning MR and Lord Edmund Davies do not deny outright that 'necessity' may not excuse the commission of an offence in every case. Rather, their Lordships do appear to recognise that in very limited circumstances the 'plea of necessity' may afford an excuse for the commission of an offence. It was in Buckoke v Greater London COuncil [1971] 2 All ER 254 that Lord Denning MR seems to have been constrained to say that there is no defence of necessity in English law. This was how Lord Denning put the matter:

> "During the argument I raised the question : Might not the driver "of a fire engine be able to raise the defence of necessity? I put "this illustration. "A driver of a fire engine with ladders "approaches the traffic lights. He sees 200 yards down the road a "blazing house with a man at an upstairs window in extreme peril. "The road is clear in all directions. At that moment the lights "turn red. Is the driver to wait for 60 seconds, or more, for "the lights to turn green? If the driver waits for that time, the "man's life will be lost. I suggested to both counsel that the "driver might be excused in crossing the lights to save the man. "He might have the defence of necessity. Both counsel denied it. "They would not allow him any defence in law. The circumstances "went to mitigation they said, and did not take away his guilt. "If counsel are correct -- and I accept that they are -- neverthe- "less such a man should not be prosecuted. He should be congratu- "lated."

It appears to me from this passage of Lord Denning when he raised with counsel the defence of necessity, that he was conscious of the good sense of having 'necessity' as a defence in certain circumstances but the denial

by counsel of the existence of such a defence perhaps constrained him to accept that necessity does not exist as a defence. However, Lord Denning makes it clear that in a situation of 'necessity', an accused should not be prosecuted. Thus it appears that in a 'necessity' situation, an accused, according to Lord Denning, should not be prosecuted even if there is no defence called the defence of necessity. By saying that in a 'necessity' situation, an accused should not be prosecuted, that in my view goes to show that 'necessity' is an exonerating factor.

After considering all these authorities, I have come to the view that a defence of necessity exists in law and is available under Western Samoan law. As to the limitations and restrictions to be applied to the defence of necessity, I prefer the limitations and restrictions set out by Dickson J in Perka's case to the limitations stated by the English Court of Appeal in R v Martin. I think that the statement in R v Martin that the accused must be faced with the threat of death or serious bodily injury in order for the defence of necessity to apply may be too restrictive.

Having accepted that the defence of necessity exists in law, the next question is whether it applies to the charges in this case. Section 9 of the Crimes Ordinance 1961 provides :

> "All rules and principles of the common law which render any "circumstances a justification or excuse for any act or omission, "or a defence to any charge, shall remain in force and apply in "respect of a charge of any offence, whether under this Ordinance "or under any other enactment, except so far as they are altered "or are inconsistent with this Ordinance or any other enactment".

'Necessity' can be described as a common law excuse, justification or defence :see both the judgments delivered by Dickson J and Wilson J in Perka's case. So the defence of necessity applies to an offence charged under any enactment unless it is altered by that enactment or is inconsistent with it.

Upon reading sections 6 and 7 of the Narcotics Act, I am not satisfied that the provisions of those two sections oust all the common law defences preserved under section 9 of the Crimes Ordinance. It would in my view, require more explicit words in sections 6 and 7 of the Narcotics Act to exclude the application of section 9 of the Crimes Ordinance to them. It should also be pointed out that 'absence of mens rea' is a very longstanding common law defence. There is no express provision in section 6 or section 7 that 'absence of mens rea' is a defence to a charge under those sections. However, in the well known case of R v Strawbridge [1970] NZLR 909 the New Zealand Court of Appeal held that the offence of cultivation of a prohibited plant under section 5 of the New Zealand Narcotics Act 1965 requires proof of mens rea. That means that 'absence of mens rea' which is a common law defence is a defence to a charge of cultivation of a prohibited plant in New Zealand even though, as I have stated, there is no express provision under section 5 of the New Zealand Narcotics Act saying that 'absence of mens rea' is a defence under that section. But section 5 of the New Zealand Act is very similar to section 6 of our Narcotics Act which provides for the o[illegible]nce of a cultivation of a prohibited plant. In the case of Police v Rowles [1974] 2 NZLR 756 the Supreme Court (now the High Court) of New Zealand, dealt with a charge of possession of narcotics under section 6 of the New Zealand Narcotics Act. Mahon J in that case held that proof of mens rea is required for an offence of possession of narcotics under section 6 of the Act. That means the common law defence of 'absence of mens rea' is available under the New Zealand Act to a charge of possession of narcotics even though section 6 does not expressly provide that 'absence of mens rea' is a defence under that section. Section 6 of the New Zealand is similar to section 7 of our Narcotics Act which provides for the offence of possession of narcotics. I do realise of course that there are differences between the provisions cited of the New Zealand Act and the corresponding provisions of our Act. But those differences, in

my view, are immaterial for our present purpose.

For these reasons I do not think that Sections 6 and 7 of our Act oust the application of section 9 of the Crimes Ordinance. That will only happen when the Narcotics Act alters any common law excuse, justification, or defence; or if such an excuse, justification, or defence is inconsistent with the provisions of the Narcotics Act. I do not find such an alteration or inconsistency in respect of the defence of necessity. So the defence of necessity applies to the charges in this case.

Before dealing with the evidence in relation to the defence of necessity, I will deal now with Mr Toailoa's submission that there is no onus on the accused to prove the defence of necessity; it is for the prosecution to disprove this defence. I think the answer to this submission is also provided by Dickson J in Perka's case where he says :

> "Although necessity is spoken of as a defence, in the sense that it "is raised by the accused, the Crown always bears the burden of "proving a voluntary act. The prosecution must prove every "element of the crime charged. One such element is the "voluntariness of the act. Normally, voluntariness can be "presumed, but if the accused places before the Court through "his own witnesses or through cross-examination of Crown "witnesses, evidence sufficient to raise an issue that the "situation created by external forces was so emergent that "failure to act could endanger life or health and upon any "reasonable view of the facts, compliance with the law was "impossible, then the Crown must be prepared to meet that "issue. There is no onus of proof on the accused."

So there is no onus on the accused to prove the defence of necessity. Even though the voluntariness of an act is normally presumed, when there is evidence to raise the issue whether the act complained of was

voluntary or not, the prosecution must be prepared to meet that issue.

I must add, however, that if the Court is satisfied that the defence of necessity is available on the facts and therefore the act complained of was 'involuntary' then the defence of necessity succeeds and the accused should be acquitted. Likewise if the Court is in doubt whether the defence of necessity is available on the facts, and therefore it is doubtful whether the act complained of was 'voluntary' or 'involuntary', then the accused must also be acquitted because the prosecution has not proved the charge beyond reasonable doubt.

This brings me to the evidence relating to the defence of necessity. The accused has for a number of years been suffering from a duodenal ulcer, also known as the peptic ulcer of the duodenum. In his cautioned statement, the accused says he has had this duodenal ulcer for 16 years and he could find no treatment which could cure his disease. The medicine like Eno and Hardy's powder that he took did not work, he still felt pain in his stomach. He found out that it was only by smoking marijuana that he was relieved of his stomach pain, and that was the reason why he cultivated and smoked marijuana. The wife of the accused also gave evidence and she testified that the accused has been suffering from an ulcer for many years. She says that they had been to the National Hospital several times for treatment of the accused's ulcer but the treatment given did not work. She also says that the treatment prescribed by the National Hospital was liquid medicine and tablets which did not work. She further says the medicine was expensive. However, it also came out from her evidence that up to the time the accused was apprehended by the Police, he was taking tablets. This is also confirmed by the fact that after the accused had had a sandwich at the Police Station, and whilst he was being interviewed by Corporal Crichton, he asked for his tablets and

the Police went up to the accused's place at Vaoala to obtain his tablets.

The accused's wife also testified that the National Hospital advised the accused to refrain from smoking and drinking because of his ulcer. However, it is also clear from her evidence that the accused used to smoke cigarettes before he changed over to marijuana and he still drinks. In fact when Constable Uiese first confronted the accused in front of the Love Boat night club, the accused was drunk. Corpora Crichton also gave evidence that the accused could not be interviewed on the night that he was brought into the Police Station because the accused was drunk. So it is clear that the accused must have been drinking alcohol. But that is what the National Hospital had advised the accused not to do, that is, drinking.

The evidence by the accused's wife also shows that the accused had been smoking cigarettes. Whether that continued to be so after the accused was advised to refrain from smoking is not clear from the evidence. Her evidence also shows that when the accused stopped smoking cigarettes he changed over to smoking marijuana.

Evidence was also called from three women who deal in traditional folk medicine and whom the accused had seen about pains to his stomach. One of the women was seen by the accused up to 1991. The combined effect of this evidence was that the accused complained about pain in his stomach. Two of them discovered that the accused was suffering from "toala" related to pain to the upper part of the stomach just below the chest. The treatments all these women gave the accused did not work. They did not prescribe marijuana as a cure for the accused's pain.

Finally, there was the evidence of the doctor whom the accused saw about the 22nd of April 1992. That doctor says that marijuana has hallucinogenic and sedative properties. It contains a certain ingredient which produces a sense of well being, relaxation and emotional inhibition.

Applying the principles of law relating to the defence of necessity to this evidence, I do not think that the defence of necessity can succeed in this case. One of the essential elements of the defence is that there must have been no other reasonable alternative response that was not illegal that the accused could have taken to relieve his stomach pain other than the smoking of marijuana. To put it in other words, the accused must have had no real choice but to smoke marijuana to relieve him of his stomach pain. He could not have done otherwise. However, the accused had a reasonable alternative, he also had a choice, and he could have acted otherwise. That comes out of the fact that he was given advice by the National Hospital to refrain from drinking because of his ulcer. He still drinks and was found drunk on the night he was brought into the Police Station. If the accused had stopped drinking as advised but he still felt stomach pain then perhaps it may be said he had no other reasonable alternative or choice. On that alone I am satisfied that the defence of necessity can not succeed in this case.

It is also to be noted that the accused was also advised to refrain from smoking because of his ulcer, but it is clear that there was no stop in his smoking. After he gave up smoking cigarettes, he immediately started smoking marijuana. There was really, according to the evidence, no time allowed by the accused for the advice given by the National Hospital to refrain from smoking to work. The same may be said about the advice to refrain from drinking.

I also do not believe the evidence by the accused's wife that since about 1985 the medicine prescribed by the National Hospital did not work, so the accused resorted to smoking marijuana. Her evidence shows that the accused was taking tablets and infact at the time the accused was interviewed by Corporal Crichton, the accused was still taking tablets. Why should the accused still be taking tablets in 1992 if infact in 1985

the accused and his wife had found out that the medicine (which included tablets) prescribed by the National Hospital did not work.

There is also the evidence of the three women who treated the accused with traditional folk medicine that they did not prescribe marijuana as a cure for the accused's stomach pain.

I have therefore came to the view that the defence of necessity cannot succeed in this case.

Accordingly I find that each of the two charges has been proved beyond reasonable doubt.

TFM Sapolu
CHIEF JUSTICE