

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

CR 109 of 2013

R E X

V

JIA BIN ZHOU

BEFORE THE HON. JUSTICE CATO

OBSERVATIONS

- [1] On the 26th November, 2013 Mr Zhou pleaded guilty to one count of operating a fish processing establishment without a licence contrary to section 33(4) (a) of the Fisheries Management Act 2002. He also pleaded guilty to two counts of possession of undersized bech-de-mer or sea cucumber as it is more commonly called contrary to regulation 26(3) of the Fisheries Management (Conservation) regulations 2008. The second and third charges in this case are not as serious; in the first only one bech-de-mer was undersized (less than 13 cms) and in the second 9 white teatfish under 16 cm in length.
- [2] The head sentence, had I proceeded to sentence, would have been the count of operating a fish processing establishment without a licence. The maximum sentence for this offence is a fine not exceeding 1 year or a \$500,000 fine or both, and an additional \$5000 fine for every day the offence continues. Plainly, Parliament as it rightly should, because the protection of Tongan fish stocks and fisheries is of great

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importance for this island Kingdom, intended the exploitation of fisheries by unlicensed operators to be a matter meriting very serious penalty. As far as the other charges are concerned, the maximum penalty is a fine of \$250.00.

- [3] The facts of this offending in my view place this in the serious category of offending. In April 2013, the Fisheries department received information about a fish processing establishment that was processing sea cucumbers without a licence. Through a joint operation by the police and fisheries officers, an investigation was conducted into the information received. A search warrant was executed at the accused's residence in Anana where a fish processing establishment was discovered with a total of 5,828 cucumbers. Although the accused initially denied responsibility claiming that the house belonged to one other, he subsequently when represented by experienced counsel pleaded guilty to the offences. I add that at the premises were located a great deal of equipment associated with diving, torches, regulators, wet suits, BCDs, scuba tanks and hoods, and drums. There were compressor hoses, cooking drums, some of the sea cucumber were cooked and others uncooked.
- [4] This was plainly a significant illegal processing outlet. How long it had been is not before me. A bail application was made by an earlier counsel for Mr Zhou to return to China. This was declined as the charges were regarded as too serious. I note that further application was made by Mr Zhou on the 15th November 2013 for bail to enable him to travel to China. This was not proceeded with, however, because he pleaded guilty and the matter of sentence was to proceed. Mr Zhou mentioned in his affidavit in the second bail application that he had a business in China, and a wife

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and two young children there. He said he was involved in a company here and he had a substantial sum of money in a nominated account in Tonga. He said it was his desire to be with his family and he had no intention of absconding. At the stage that affidavit was filed he had not pleaded guilty. He said his passport was with the Supreme Court. However, on the 26th November, 2013 having maintained a not-guilty stance since his first appearance in or about April 2013, he changed his plea on all counts. Shortly after, despite his deposing in his affidavit, that he had no intention of absconding, he did so.

- [5] The matter was adjourned for sentencing submissions to the 10th January, 2014 at 2pm. On that date, there was no appearance of Mr Zhou. He had, apparently, not been in contact with his counsel. I ordered a warrant for his arrest. Subsequent inquiries reveal he left the country shortly after pleading guilty to the charges. Further inquiries reveal that his passport was deposited with the Magistrates Court on the 27th June, 2013 and signed for by a clerk. There are, however, no signatures for the release of the passport. I am informed that he uplifted that passport because a passport for the same number was used by him to leave Tonga about the time he pleaded guilty. If so, it was handed back without authority. There is no satisfactory response from the Magistrate's Court or from any clerk as to why or when the passport was released. Plainly, it was released without authority.
- [6] There is no information of a transfer of the passport to the Supreme Court with the file. I am also advised that, as is the normal practice, an order restraining Mr Zhou from leaving the jurisdiction was processed by the Magistrate's Court. Despite this, it appears he was permitted to travel out of the jurisdiction in breach of

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bail conditions, a restraining order which border control seems to have overlooked, and effectively avoiding the consequences of his admitted offending. This is a matter which gives rise to considerable concern on the part of this Court and recommendation is made for urgent steps to ensure that this does not happen again – this requires strict protocols be observed for the security of passports and their release, the service of restraining orders on border control, and vigilance by border control of potential breaches of restraining orders.

- [7] This Court must have confidence that the conditions it imposes associated with bail are respected or else many more people will have to be remanded in custody pending the outcome of their cases particularly where they have strong ties with other countries, and the charges as here are serious. I have already expressed my concerns about the variation of bail to enable a person to travel out of the country on serious charges. This case has reinforced the concerns I expressed in that case.
- [8] Mr Pouono is still his counsel of record. This Court must impose penalties that serve to uphold that legislation which is intended to protect the resource. I am told by Mr Sisifa for the Crown that unlicensed processing of sea cucumber is becoming more prevalent in Tonga. It is not surprising that this is so. Sea cucumber is prized as a delicacy in Asia and fetches high prices. It is, however, well known that sea cucumber are ecologically important to the health of the environment of Tonga waters performing a distillation process. For this reason, it is important that it, like other fisheries resources are closely regulated and that the resource is not left to the consequences of predatory exploitation.

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[9] I am fortified in this view by the Judgment of the Chief Justice on a recent appeal Wu Zhu Weng v The Police. AM 11 of 2013, 28th August, 10th September 2013. There, having considered a question of the appropriate sentence on charges of possession of prohibited fishing gear contrary to section 18(c) of the Fisheries Management Act 2002, and possession of sea cucumber during the closed season contrary to Regulation 26(4) of the Fisheries Management (Conservation) regulations 2008, and section 102 of the Fisheries Management Act Scott CJ imposed fines of \$8000.00 on each of the two counts. It is to be noted that the maximum penalty on the first charge was \$100,000 and on the second \$250,000; a great deal less than for the penalties imposed for unlicensed processing in this case where a sentence of imprisonment and a fine of up to \$500,000 is provided. Scott CJ however was confined to a maximum of \$20,000 on each count because the appellant had pleaded guilty in the lower court and the maximum available to a magistrate on sentence on each of the counts was \$10,000. There is no such limitation in this Court. There I note the appellant was described as a professional sea cucumber gatherer married with three children.

[10] The only comparable authority in point that was placed before me was the judgment of Ford CJ in R v Shao Jun Sun Cr 17/2006 involving one count of operating a fish processing establishment without a licence contrary to section 33 (4) (a) of the Fisheries Management Act (26/2002). There, Ford CJ imposed a sentence of 6 months imprisonment and in addition he was fined \$10,000 to be paid within 30 days in default a further four months imprisonment. In that case, 2,435 sea cucumbers were found at the residence. On appeal, the Court of Appeal considered the Judge should have considered the question of a suspended sentence and

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varies that part of the sentence so as to fully suspend the sentence of imprisonment. Because of his previous good character, his sentence of imprisonment was suspended for three years of good behaviour. The case, however, was complicated by the fact that it was not until 5 years after the offending that the matter had come for trial, and sometime after that before Ford CJ, who had not been the trial Judge, came to sentence the appellant.

[11] In this case, much more than double the number of sea cucumber was obtained. In this case, there was a guilty plea but it is plain that objectively the case was more serious than R v Shao Jun Sun. Also that was a case decided some years ago in 2006. Since then I am told by Mr Sisifa that breaches of the Fisheries Act have become more prevalent with this greatly prized and valued resource. I consider that a sentence of imprisonment would have been appropriate to mark the obvious predatory nature of this offending had the offender been here to be sentenced.

[12] I consider, however, like Ford CJ, that offending like this also requires a substantial fine, as well. This approach has been recently endorsed by the present Chief Justice as I have said in relation to lesser offending. Given that the amount of sea cucumber located was more than double the amount in Shao Sun, and also that several years have passed since that that case was decided justifying an upwards adjustment of the level of fine, the prevalence it seems of this offending and the need to protect the fisheries resource against predatory behaviour, I would have additionally been minded to impose a substantial fine in excess of that imposed by Ford CJ.

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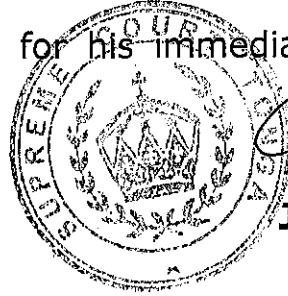
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[13] I do not impose any sentence on the offender in his absence, however. Should at some time in the future the offender return to Tonga, these observations may serve as a record of circumstances that existed, at the time he absconded.

[14] Meanwhile a warrant exists for his immediate arrest should he return to Tonga.

ATED: 23 JANUARY 2014



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J U D G E