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IN THE COURT OF APPEAL
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 12 of 2021
(CR 90 of 2020)

'EPUEFI LAIMANI
-v-
REX

Application for leave to appeal against conviction and sentence

RULING

BEFORE:	LORD CHIEF JUSTICE WHITTEN QC
To:	Mrs A. Tavo-Mailangi for the Appellant/Applicant
	Mr J. Lutui DPP for the Respondent
Verdict:	6 April 2021
Sentence:	3 May 2021
Notice of Appeal:	18 May 2021
Application for leave:	30 June 2021
Ruling:	15 July 2021

Application

1. This is an application for leave to appeal against the applicant's conviction and sentence.

Background

2. On 6 April 2021, following a trial which took place over 10 and 11 March 2021, Judge Cooper found the applicant guilty of possession 5.15 g of methamphetamine (count 1), 3.59 g of cannabis (count 2), offering a bribe to a member of Tonga police in the sum of $50 (count 3) and a further count of offering a bribe to a member of Tonga police in the sum of $3,000 (count 4).

3. On 3 May 2021, the judge sentenced the Applicant to 5 ½ years' imprisonment with the last 6 months suspended on conditions.

4. On 18 May 2021, a Notice of Appeal against conviction and sentence was filed.

5. On 30 June 2021, counsel for the appellant filed an ex parte application for leave to appeal pursuant to ss 16 (b) and (c) of the *Court of Appeal Act*. The stated grounds of the application are that there are reasonable grounds for the appeal against conviction and sentence on the grounds stated in the Notice of Appeal. In his affidavit in support, the applicant deposes, relevantly, to an 'honest belief'

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that the grounds of appeal stated in his Notice of Appeal are 'valid grounds of appeal '.

Approach

6. The Court of Appeal Rules are silent as to the requirement/s for a grant of leave to appeal where required. Therefore, rule 2 incorporates the rules of procedure for the time being in England relating to appeals to the Court of Appeal shall apply.

7. Rule 52.6 of the current UK Civil Procedure Rules provides that in respect of first appeals to the Court of Appeal, permission to appeal will only be given where the court considers that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard.

8. A 'reasonable' prospect is one which may be regarded as rational or according to reason. Reasonable prospects of success mean a 'real chance' of that, rather than whether it is more likely than not: *Taufa v Rex* [2005] TOCA 1. In *Tuitavake v Rex* [2005] TOCA 13, in the context of the same test bail pending appeal, it was observed that the prospects of the success of the appeal may be discounted as a factor to be assessed by the Court "unless those prospects are obvious"[1]: *Lavulavu v R* [2021] TOSC 111; AC 17 of 2021 (9 July 2021).

9. Pursuant to O 10 r 1(3) of the Tongan Rules, I have proceeded to determine the matter without a hearing.

Appeal against conviction

10. In essence, the trial judge accepted the evidence of the police witnesses called, that:

    (a) on 10 October 2018, the lead officer, Officer Fifita, was travelling in an unmarked police car, with other plain clothed officers, along Vuna Road, when he saw the applicant, whom the officer knew from previous drugs operations, sitting in his vehicle;

    (b) the appellant ducked down out of sight in a suspicious manner;

    (c) when the officer approached and spoke to him, the applicant tried to hand a $50 note to the officer who refused it;

    (d) the applicant's hands then started to tremble;

    (e) the applicant then reached into a compartment of his vehicle and pulled out a number of $100 and $50 notes and offered them to the officer, and the officer refused them;

    (f) the appellant then took a small tin from his trouser pocket and threw it onto the floor of the vehicle;

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[1] Citing *R v Giordano* (1982) 31 SASR 241 at 243.

(g) he was then removed from the car;

(h) the tin was inspected and was found to contain a number of small packets of what was later tested to be methamphetamines and cannabis;

(i) the applicant denied any knowledge of the drugs;

(j) en route to the police station, the appellant asked Officer Fifita and another, Officer Pohiva, to stop at an ATM so that he could give them $3,000 each, which they refused;

(k) the methamphetamines originally weighed a total of 5.15 grams and the cannabis weighted 3.59 grams;

(l) the drugs were not placed in the exhibit storage until 19 October 2018, during which time, they were stored under lock and key;

(m) otherwise, there was satisfactory continuity in the chain of custody before the drugs were ultimately tested.

11. The applicant elected to neither give nor call evidence at trial.

12. The seven grounds of appeal against conviction may be characterised as alleged errors of law and fact by the trial judge in being satisfied beyond reasonable doubt of the appellant's guilt in the face of challenges on behalf of the appellant in relation to the integrity of the custody of the drugs and an asserted lack of supporting evidence for the bribery offences.

Ground 1: The judge gave very little regard to the undisputed difference in the weight of the substances seized and tested.

13. At paragraph 19 of the reasons for verdict, the trial judge referred to the weights of the drugs when they were first weighed (as per the indictment). At paragraph 23, he referred to evidence of the methamphetamines being weighed on 19 October 2018 at 4.7 grams "*which included the bags they were in*". At paragraph 30(c), he recorded the parties agreement that the weight of the methamphetamine was 5.15 grams on 10 October 2018 and 4.7 grams on 8 November 2018. That last date appears to be a typographical error because the parties' list of agreed facts refers to the methamphetamines weighing 4.7 g "*when it was weighed before taken to ESR*". That accords with exhibit 5, a form entitled "Exhibits For Laboratory Examination" completed by the officer charged with taking the methamphetamines to New Zealand for analysis. That form was dated 21 June 2019.

14. All other identifying indicium such as the operation name, the exhibit number and the dates they were originally collected remained consistent through the evidence of the other police officers at trial.

15. At paragraph 48 and following, the judge described the methamphetamines as "*being the same drug that was seized from the car of the defendant as was tested*". He then gave a number of reasons.

16. At paragraph 56, he observed: "*That there is a slight discrepancy in weight between the two weightings does not change my view especially given the continued reference to 'Uafa Amelika Operation' that accompanied those drugs from start to finish*".

17. Based on those references alone, this ground has no merit. The judge clearly had regard to the differences in weight of the methamphetamines. In doing so, he formed the view that the discrepancy was not sufficient to create any reasonable doubt about whether the methamphetamines ultimately tested were those found in the applicant's possession.

18. Further, however, at paragraph 4.3 of her closing submissions below, counsel for the applicant advanced a number of reasons for the submission that the Prosecution had failed to prove beyond reasonable doubt that the items seized from the applicant's vehicle were those tested and tendered in evidence as exhibits 6 and 7. Relevantly, it was submitted that in respect of the methamphetamine, "*the difference in weight before and after it was moved to the exhibit room puts further doubt on how the items seized on 10 October 2018 were secured before it was moved to the exhibit room on 19 October 2018*". In that regard, counsel also noted the uncontradicted evidence of Officer Fifita that those exhibits were safely locked away in the investigation office exhibit room during that period with the only keys held by Officer Leveni. Counsel then submitted that that evidence was "challenged" and that Officer Leveni was not called. Despite that, it is clear from the judge's reasons that he accepted the evidence of Fifita without reservation. The repeated references throughout the closing submissions for the appellant to various aspects of the prosecution evidence below being "challenged" could hardly have been a basis for establishing any reasonable doubt in the mind of the trial judge, especially when those references were regularly followed by the fact that each of those witnesses denied the various challenges. Moreover, the submissions did not contain any attempt to establish that any of the evidence of those witnesses had been damaged during cross examination when 'challenged'.

19. The difference in weight (0.45 g) represented less than 10% of the original measure. It does not appear that the reasons for the difference were ever explored during the trial. However, consistent with counsel's reference to decisions concerning the "strict standard of proof necessary to establish the chain of evidence beyond reasonable doubt",[2] experience of cases involving similar comparatively minor discrepancies in weight suggests a number of common and benign explanations such as the sensitivity of the scales on the different occasions, or whether the drugs are weighed in the bags in which they were seized or not, as discussed in *R v Satini* [2020] TOSC 84, referred to below. See also *Rex v Palei* [2019] TOSC 36; *R v Posoni* [2020] TOSC 71; *R v Fatongiatau* [2020] TOSC 96.

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[2] Paragraphs 4.4 and 4.5 of the submissions below.

Ground 2: *The drugs were not properly stored after seizure on 10 October 2018 and only taken to the exhibit register room on 19 October 2018.*

20. This ground has been considered above and, for the same reasons, does not have reasonable prospects of success.

Ground 3: *The judge disregarded the different CRB numbers shown in Exhibit 2, column 11, in relation to the movement of the substances seized on 10 October 2018 when they were taken to the exhibit room on 19 October 2018.*

21. By reference to the applicant's written closing submissions below, and unlike the last grounds, apart from referring to the asserted difference in CRB numbers (paragraphs 3.3.1(iv) and 3.5.1), the submission forming this ground was not put below as part of the reasons in paragraph 4.3 thereof for submission that the Prosecution had failed to prove its case.

22. In any event, examination of the excerpt from the Exhibit Register Diary (exhibit 2) and the excerpt from the Drugs Movement Diary (exhibit 3) reveals a common reference to 'CRB 1046' relating to the 'ice' and 'CRB 1047' relating to the cannabis.

Ground 4: *The judge suggested to the Prosecution that it apply to amend the indictment by removing Officer Pohiva's name from count 4 which would 'assist the defence case'.*

23. At paragraph 34 of the reasons, the trial judge stated: *"... At the conclusion of the evidence, it was noticed that Count 4 was bad for duplicity as it referred to offering to bribe to separate police officers. The Prosecution applied to amend by removing Officer Pohiva's name. Again, no objection was taken and leave was granted."*

24. No issue is taken by the applicant with the accuracy of that account. As such, no error has been identified in this ground.

25. Clause 89 of the Constitution empowers the court to direct the form of indictments. No criticism is made of the judge identifying that count 4, as originally drafted, was bad for duplicity. The applicant does not assert any prejudice as a result fo the amendment. Nor could he. For by deleting one of the two officers from that count, a circumstance of aggravation (two officers instead of only one) was abandoned by the Prosecution which could only be seen to have been to the defendant's advantage.

Ground 5: *There was no evidence to support count 4 such as the money found in the car considered by the judge to justify count 3.*

26. Again, no error of law, in terms of principle or approach, or of material fact, has been identified in this ground.

27. As the judge identified at paragraph 76 of the reasons, there is no rule of law which *required* any supporting evidence. The applicant here does not contend otherwise. Again, the applicant's submissions below (paragraph 4.8) only went as far as identifying that the officer's evidence was challenged; but nothing more. The judge accepted the evidence of Fifita that the applicant offered, on a second occasion, to bribe him.

Ground 6: *The judge failed to exercise care in considering the lack of supporting evidence for that of the lead officer in respect of count 4, which prior to the amendment to the indictment, was in fact in respect of two police officers.*

28. This ground has been considered immediately above and, for the same reasons, does not have reasonable prospects of success.

Ground 7: *To the defence argument that Officer Pohiva should have been called by the Prosecution, the judge responded that the defence could have required him as a witness but did not, when the onus of proof was on the Crown.*

29. The Crown elected, by seeking and being granted leave to amend the indictment on count 4, to proceed on the second bribery charge only in respect of Officer Fifita. The Crown then discharged its onus of proof by calling Officer Fifita, whose evidence the judge accepted as "honest and cogent" (paragraph 79) so as to leave him in no doubt on the two bribery allegations.

Conclusion

30. For those reasons, the applicant has failed to identify any error of law or fact, nor reasonable prospects of success on the grounds considered above.

31. Accordingly, leave to appeal against conviction is refused.

Appeal against sentence

32. The judge sentenced the applicant as follows:

    (a) on count 1, he set a starting point of 3 ½ years imprisonment but increased that by a further year "*to reflect that [the applicant] was plainly involved in supplying amphetamines that day*";

    (b) 1 ½ years imprisonment on count 2 to be served concurrently with count 1;

    (c) 1 year imprisonment on count 3 to be served consecutively with the head sentence on count 1; and

    (d) 1 year imprisonment to be served concurrently with the other sentences.

33. The net result was a sentence of 5 ½ years' imprisonment with the last 6 months suspended on conditions.

34. The stated grounds of appeal are that the sentence:

(a) is excessive and harsh having regard to the circumstances of the offence and appellant; and

(b) the sentencing judge failed to take into account all the mitigating factors submitted by the probation report.

35. The court file does not contain any written submissions on sentence on behalf of the appellant.

36. The grounds of appeal are defective in that they fail to specify "the circumstances of the offence and appellant" which are said to render the sentences "excessive and harsh" nor do they specify "the mitigating factors submitted by the Probation Report".

37. The only factors referred to the probation report, which could have been considered material in mitigation, were that:

(a) the appellant had completed his sentence in proceeding CR 59/19, of 2 years and 9 months imprisonment with the final 6 months suspended for 12 months on conditions including completion of an alcohol and drugs abuse course;

(b) from that, the report writer opined that the rehabilitation course had helped the applicant rehabilitate from his substance abuse problem;

(c) the applicant had the support of his family and his community;

(d) the applicant had also obtained gainful employment with praise from his employer; and

(e) in his current situation, the applicant posed a minimal risk of reoffending, "*as long as he avoids negative peers*".

38. At paragraph 31 of the sentencing remarks, the judge stated: "*I have also considered all the mitigation in the presentence report and accompanying references*".

39. To that point then, the two grounds of appeal against sentence do not have reasonable prospects of success.

40. However, there are aspects of the sentencing which warrant review by this Court and which may be seen to fall within the overly generalised grounds as filed.

41. Firstly, the Crown recommended an appropriate starting point on the head count (5.15 g of methamphetamine) of 3 years imprisonment. At paragraph 32 of the sentencing remarks, the judge set a starting point of 3 ½ years imprisonment. Having regard to the relevant comparable sentences referred to of *Uasike*, *Moala* and *Mateni*, that was at the upper end of the range. However, at paragraph 26, his Honour considered that "*the evidence paints the clearest picture of someone who was dealing drugs…*" and, at [32], he responded by adding another year to the starting point "*to reflect that [the appellant] was plainly involved in supplying amphetamines that day*". The appellant was not charged with supplying.

42. Secondly, even though in *Mateni*, there were also evidence that the possession was for the purpose of supply, the resulting starting point of 4 ½ years imposed by the sentencing judge here for 5.15 grams of methamphetamine exceeded that set in *Mateni* of 4 years for 8.08 grams.

43. Thirdly, and again by way of comparative analysis, in proceeding CR 59/19 (which was referred to in the Crown's submissions and the pre-sentence report), the applicant was sentenced for possession of a total of 10.38 g of methamphetamines (the largest count being for just over 7 grams) to 2 years and 9 months imprisonment with the final 6 months suspended for 12 months on conditions.

44. Fourthly, there is no indication in the sentencing remarks here that the judge was ever apprised of the temporal relationship between the offending the subject of CR 59/19 and the instant, or the difference in procedural handling of the two.

45. A review of the earlier file reveals that:

    (a) that offending occurred on 1 August 2018;

    (b) the applicant was convicted on 12 June 2019 following trial (before Paulsen LCJ);

    (c) he was sentenced on 31 July 2019 (by Niu J, upon Paulsen LCJ's retirement from office);

    (d) the sentence was backdated to 10 October 2018, the date of remand in custody; and

    (e) he was released on 28 June 2020.

46. The instant offending occurred on 10 October 2018, that is, a little over two months after the offending in CR 59/19. Yet, for reasons unexplained, delays in the prosecution of the proceeding below resulted in the applicant:

    (a) being committed by the Magistrates Court on 16 April 2020;

    (b) first appearing before the Supreme Court on 14 May 2020, at which time the matter was adjourned and he was remanded in custody; and

    (c) being arraigned (before Cato J) on 21 May 2020.

47. The matter was then transferred (following Cato J's retirement) to me on 28 October 2020. On 17 November 2020, I granted the applicant bail due to the extent of the delays in prosecuting the proceeding to that date and the further delays likely to be encountered in bringing the matter to trial due to the retirement of Cato J. On 29 January 2021, the matter was transferred to Cooper J and the trial commenced on 10 March 2021.

48. But for the unexplained prosecution delays, given the close proximity of the offending for the two proceedings, sentencing could well have been dealt with together or at least much closer together. As it happened, the two matters have

been dealt with almost two years apart, with the sentence in this matter being imposed almost a year after the applicant completed his prison sentence for CR 59/19. In the result, if the sentence is left to stand, it is arguable that the applicant has been ordered to a greater aggregate of imprisonment than he would have had the two matters been heard together. In that circ, consideration of the totality principle arises.

49. One related but countervailing factor, again unknown to the sentencing judge, was that the instant offending must have occurred while the applicant was on bail for CR 59/19.

Conclusion

50. Overall, I am satisfied that there are reasonable prospects of success on the appeal against sentence.

Result

51. The application for leave to appeal against conviction is refused.

52. The application for leave to appeal against sentence is granted.

53. The appellant is to file an Amended Notice of Appeal against his sentence, which reflects and gives effect to the matters referred to in paragraphs 41 to 49 hereof, within 14 days of the date hereof.

NUKU'ALOFA
15 July 2021

M. H. Whitten QC LCJ
PRESIDENT