

IN THE COURT OF APPEAL OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

ATTORNEY GENERAL'S OFFICE	
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AC 6 of 2021

(CR 126 of 2020)

BETWEEN PANGI PULOKA
Appellant

AND REX
Respondent

Court: Whitten P
Hansen J
Randerson J
White J

Counsel: ✓ Ms A Tavo-Mailangi for Appellant
J Lutui and I Finau for Respondent

Hearing: 21 September 2021

Judgment: 1 October 2021

JUDGMENT OF THE COURT

Introduction

[1] The appellant, Mr Puloka, was convicted after trial before Langi J of possession of illicit drugs namely methamphetamine and cannabis at Kafoa on 19 April 2019, contrary to s 4(a)(iii) of the Illicit Drugs Control Act. Mr Puloka was charged jointly with Mr Fakaosi Katoa, who was also convicted of the same offences. Both were later sentenced to terms of imprisonment. Three other persons were also tried alongside Mr Puloka and Mr Katoa on drugs charges arising from the same occasion. They were also convicted.

[2] Mr Puloka now appeals against his conviction essentially on the grounds that there was insufficient evidence upon which the trial Judge could have found him guilty beyond reasonable doubt. There is no appeal against sentence.

The evidence at trial

[3] Much of the evidence called for the prosecution at trial was undisputed. On 19 April 2019, at approximately 11.00pm, the Police received information that drug dealing was occurring at Mr Puloka's residence at Kafoa. On inquiry, the Police established there were many vehicles parked at the residence. The decision was made to search the premises without warrant under ss 122 and 123 of the Tonga Police Act. Although the validity of the search was challenged at trial, there is no issue in that respect on appeal.

[4] When the Police arrived at the address accompanied by members of the Tactical Response Group, they went into what was described as a compound to secure the area. At the back of the compound a trailer (also described elsewhere as a caravan) was located in which Mr Puloka lived. There was also another trailer occupied by a fourth accused and his girlfriend. Next to the two trailers was a shed with a pool table where the Police found some of the accused and other men playing pool and sitting around the area.

[5] Officer 'Akau'ola went into Mr Puloka's trailer and found him inside holding a test tube. Mr Puloka was taken outside and gathered with all others present and made to sit or lie down. Inside Mr Puloka's trailer, the Police found an external hard-drive on top of a table. The hard-drive was opened and found to contain 12 packets containing 0.2 gms of methamphetamine and two packs containing 1.48gms of cannabis. The Police also located varying quantities of methamphetamine and cannabis in the possession of or associated with the three other accused .

Defence evidence

[6] Mr Puloka elected to give evidence and called two witnesses on his behalf. Mr Puloka's evidence was that he was playing pool with his friends at his home on the day in question. Because there had been a Police raid at his property in 2018 resulting in the arrest of six people for possession of illicit drugs, he had told his friends after this incident that no one was allowed to bring any more illicit drugs to his home. After playing pool, with Mr Kae Tau'aika, Mr Puloka said he went back inside his caravan to lie down. Mr Katoa arrived soon after and was in a hurry to play pool against Mr Tau'aika. Mr Puloka said that Mr Katoa rushed into his caravan and put his things on top of the table inside the caravan before going outside to play pool. The Police arrived about five minutes later and Mr Puloka was present while the Police conducted a search of his caravan in which the external hard-drive was located. This was opened and found to contain the methamphetamine and cannabis. When asked by the Police who this belonged to, Mr Puloka said it belonged to Mr Katoa. In cross-examination, Mr Puloka accepted he and his family lived in the compound. His family lived in the main house

while he stayed in the caravan. He accepted that his friends were allowed to visit and enter the caravan whenever they liked but denied he allowed them to use the premises for drug dealing.

[7] Mr Puloka's first witness was Mr Tau'aika, who said he saw Mr Katoa going into Mr Puloka's caravan and putting his stuff, including the external hard-drive, on top of the table. A second witness, Mr Soakimi said he was standing next to Mr Puloka's caravan and recalled seeing Mr Katoa holding keys and a black box which he put together on the table.

Reasons for verdict

[8] Langi J delivered a careful and comprehensive verdict. There is no dispute about her description of the onus of proof, the elements the Crown was required to prove nor the correct approach to the assessment of circumstantial evidence in a criminal case. The focus of Mr Puloka's defence at trial and his argument on appeal relates to the issue of possession. Did Mr Puloka have physical custody and control of an illicit drug without lawful excuse and did he know that it was an illicit drug?

[9] The Judge referred to authorities on the meaning of possession concluding that it must be proved that the accused had knowledge of the presence of the drug and some control over it. In addition to physical control, it must be shown that the accused has, or ought to have imputed to him or her, the intention to possess, or knowledge that he does possess, what is in fact a prohibited or illicit substance. The Judge found that it was not necessary for the prosecution to prove that the accused had actual knowledge that he had the drugs in question.¹

[10] Langi J noted the need for care in considering circumstantial evidence and the need to reach the conclusion that it is of sufficient reliability or strength. She also noted the importance of avoiding mere speculation. She was in no doubt that Mr Puloka had knowledge that the external hard-drive contained illicit drugs and that he had some control over it. She relied on the following features:

- (a) There was an inconsistency in Mr Puloka's evidence and that of Kae Tau'aika. Mr Puloka claimed never to have set eyes on the external hard-drive before the Police drew it to his attention. Mr Tau'aika's evidence however was that Mr Katoa brought the external hard-drive to the property every day. The Judge considered that if this were the case then Mr Puloka must have seen it previously.
- (b) She preferred the evidence of Mr Tau'aika because he had no reason to lie. In contrast, Mr Puloka had every reason to distance himself from the hard-drive.
- (c) The Judge referred to the fact that Mr Katoa walked straight into the caravan and in the presence of Mr Puloka, put the external hard-drive on top of the table. In her view, this suggested Mr Katoa was no stranger to the caravan and that

¹ *R v Motuliki* [2002] TOSC 22; CR92/01 (24 May 2002); *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, 392 (HL) at 393 per Lord Wilberforce; *R v Boyesen* [1982] 2 All ER 161, 163 (HL); *R v Lewis* (1988) Cr App R 270 (CA) and *R v Cox* [1990] 2 NZLR 275.

there was an understanding between himself and Mr Puloka such that in the circumstances Mr Puloka must have known what was in the hard- drive.

- (d) On his own admission, Mr Puloka had stated that there had already been a history of drugs being seized from his residence.
- (e) Mr Puloka's statement that he warned his friends not to bring illicit drugs to the house was inconsistent with the quantities the Police actually found on the night.²

Appellant's submissions

[11] Ms Tavo-Mailangi's submissions on appeal focused on the absence of evidence to prove beyond reasonable doubt the elements of possession and knowledge as described by the Judge. She submitted that the Judge had based her decision on very weak circumstantial evidence and had strayed into the area of guessing and mere speculation.

[12] Counsel submitted that Mr Puloka had no opportunity to learn or discover what was inside the external hard-drive which is a device normally plugged into a machine; Mr Puloka had gone into his trailer to lie down; he did not know that the external hard-drive in his room could contain illicit drugs and matters had all taken place within a short time span.

[13] Counsel further submitted that the familiarity of Kae Tau'aika with Mr Katoa's external hard-drive did not mean Mr Puloka had the same familiarity.

Crown submissions

[14] Mr Lutui submitted on behalf of the Crown that the trial Judge had correctly stated the relevant legal principles and that the evidence considered as a whole, although circumstantial, was sufficiently strong to justify the Judge's conclusion. The Judge had the advantage of hearing the entire evidence and seeing and hearing the witnesses.

Discussion

[15] We are not persuaded that the Judge was wrong to conclude that the case against Mr Puloka, based as it was on circumstantial evidence, was proved beyond reasonable doubt. Despite Mr Puloka's evidence that he had told his friends not to bring drugs to the property, the quantities of methamphetamine and cannabis located on the night in question show that his directions (if given) were ignored by his friends. Mr Puloka must have known that. Secondly, the Judge was entitled to conclude on the evidence she accepted from Mr Tau'aika that Mr Katoa brought the external hard-drive to the property every day. Again, Mr Puloka must have known that. Thirdly, the Judge was well entitled to conclude that there was a familiarity between Mr Puloka and Mr Katoa such that he felt very comfortable entering Mr Puloka's

² Cannabis was found inside the fourth accused's quarters; methamphetamine was found in a can alleged to have dropped from the third accused; an extensive amount of methamphetamine was found between two vehicles parked inside the compound; drugs were found on another accused who had already pleaded guilty; methamphetamine and cannabis was found inside the external hard-drive.

caravan at any time and leaving his possessions there. Fourthly, it was not explained why Mr Katoa felt it was necessary to bring an external hard-drive to Mr Poluka’s property on a regular basis and why it was necessary for him to leave it inside Mr Puloka’s caravan. Although the Judge did not refer to this, it seems to us to be significant that Mr Katoa felt it necessary to carry such an object around with him and leave it in Mr Puloka’s caravan. No attempt was made to explain why an object intended to drive some form of electronic device was carried around in this way and routinely left in Mr Puloka’s caravan. No legitimate reason for this unusual behaviour was proffered. Finally, there is another matter the Judge did not refer to in her reasons for verdict. When the Police went to the property Mr Puloka was not lying down in his caravan as he stated in evidence but was holding a test tube. We were told this evidence was unchallenged. It suggests to us that it was open for the Judge to infer that Mr Puloka was participating in drug use himself at the time of the offending. This is another apparent inconsistency in his evidence which the Judge would have been entitled to take into account.

Result

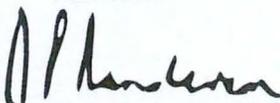
[16] Overall, we consider there was a sufficient basis in the evidence for the Judge to be satisfied beyond reasonable doubt of all the essential elements of the crimes with which Mr Puloka was charged. Accordingly, the appeal against conviction is dismissed.



Whitten P



Hansen J



Randerson J



White J

