

Introduction

[1] The appellants appeal against conviction on charges of possession of methamphetamine following their conviction after trial by Cooper J. In addition, the first appellant, Mr Moala, appeals against his sentence of five and a half years imprisonment with the last six months suspended on conditions for two years.

[2] The essential and largely undisputed facts may be briefly stated. Acting on information received on the morning of 3 September 2019, the police went to premises owned by the first appellant Mr Moala at Ngele'ia. There, they located the second appellant Mr Alatini near a piggery on Mr Moala's property. Mr Alatini was employed as a security guard by Mr Moala at the piggery. Officers searched Mr Alatini and found in the back pocket of his trousers a small bag containing two small packets of what appeared to be methamphetamine and another packet containing a substance suspected to be methamphetamine lying on the ground nearby. On analysis, it was found that the substances were methamphetamine and weighed 0.063gms and 0.0234gms respectively. Two others were arrested but we are no longer concerned with them.

[3] Shortly afterwards, Mr Moala arrived at the residence driving a motor vehicle. He was accompanied by a Mr Vaipulu. The police then commenced a warrantless search of the premises, beginning at some fau trees near the piggery on land the Judge accepted was common ground adjacent to Mr Moala's property. During the search, the police found three test tubes near the base of a tree and another three test tubes inside a fau tree. They also found a bundle, wrapped in leaves on top of a fau tree which was found to contain a plastic bag with 10 packets of a substance suspected to be methamphetamine. Upon analysis, the substance was found to be methamphetamine weighing 19.49gms. The appellants and other individuals were arrested and charged. Each declined to make any statement.

[4] The indictment charged four offences:

- (a) Counts 1 and 2 charged Mr Alatini with two counts of possession of methamphetamine for the two small quantities of methamphetamine found on his person or nearby;

- (b) Count 3 charged one Ms Taione with possession of methamphetamine but she was acquitted at trial;
- (c) Count 4 charged Mr Alatini, Mr Moala and Ms Taione with possession of the larger quantity of methamphetamine found in the fau trees. On this count, both Mr Alatini and Ms Taione were acquitted.

[5] In summary, Mr Alatini appeals against his convictions on counts 1 and 2 while Mr Moala appeals against his conviction and sentence on count 4.

[6] A number of grounds of appeal have been advanced but the principal issues relate to the lawfulness of the warrantless search (raised by both appellants) and the Judge's finding that the prosecution had proved beyond reasonable doubt that Mr Moala had possession and control of the substances located.

The Judge's ruling

[7] Cooper J summarised the Crown evidence in considerable detail. At the close of the Crown case all four accused submitted there was no case to answer. The Judge concluded¹ that the Crown had not demonstrated that Mr Alatini and Ms Taione had control over the drugs in the fau tree area, the subject of count 4. The Judge said they had not stopped particularly close by to the area of the fau trees so as to demonstrate a control over the drugs and there were no observations to show that they were selling or handing over drugs on another's behalf or at all. However, in respect of Mr Moala, the Judge found there was "a very different story".² Elaborating on this conclusion, the Judge said:

[92] It was his land the piggery. It was an on-going concern where he would be expected to take a real interest in who what happening on his property and adjacent.

[93] The piggery was opposite his house so that it would be clear to anyone there that people were coming and going; people not concerned with the piggery, so who had no reason to be there at all; save that overwhelming inference that there was this supplying of drugs going on in the trees, very close to the piggery.

¹ At [86].

² At [91].

[94] It is perfectly possible and reasonable in these circumstances, based on the evidence at this stage to reject all the realistic possibilities consistent with innocence.

[8] Neither Mr Alatini nor Ms Taione gave evidence. Mr Moala said in evidence that he arrived at his address to find the officers carrying out a search. He confirmed that the fau tree area was common ground available for anyone to pick coconuts or collect firewood. He denied that the drugs found amongst the fau trees were his.

[9] Addressing the lawfulness of the search of the premises, the Judge stated that none was required for the area on which the fau trees were found since it was common ground available to anyone. There could therefore be no unlawful search in relation to Mr Moala and count 4. However, the Judge went on to address as an alternative the application of s 24 of the Illicit Drugs Act which states:

24. (1) A police officer may exercise any of the powers in section 23 without a warrant, if the grounds for obtaining a warrant under that section exist and the officer suspects on reasonable grounds, that:

- (a) it is necessary to do so in order to prevent the concealment, loss or destruction of anything connected with an offence under this Act; and
- (b) the circumstances are of such seriousness and urgency as to require the immediate exercise of the power without the authority of a warrant.

(2) A police officer may, for the purposes of this section, stop any vehicle or craft where the officer suspects on reasonable grounds that anything connected with an offence under this Act is upon or in the vehicle or craft.

(3) A police officer shall report to a magistrate any action, which he has taken under this section.

[10] We pause here to note that Ms Kafoa based her submission on the slightly more onerous s 123 of the Tongan Police Act which relevantly provides:

123 Search of places, vehicles, vessels and aircraft without warrant

(1) This section applies if a police officer is satisfied, on reasonable grounds, that:

- (a) a serious offence has been committed, is being committed or is about to be committed in any place, premises, vehicle, vessel or aircraft; and

- (b) it would be impracticable, unreasonable or not in the interests of justice if the officer was required to apply for a warrant in order to conduct a search in relation to the offence.

[11] Mr Aho accepted that nothing turns in this case on the distinction between these two sections, submitting that the Judge below was entitled to find the search was lawful on the basis of either provision.

[12] Cooper J noted evidence that the informant had provided reliable information leading to at least 20 seizures of illegal drugs. That information, the Judge found, had been received shortly before 10am that day. The officers immediately assembled a team, briefed them and deployed. The Judge considered the fact that the drugs were hidden in the bush and the packages were disguised with leaves, demonstrating that, without swift action, all the evidence could have been completely untraceable. He concluded that:³

It is quite clear, in all the circumstances, that this was an emergency; any delay would lead to the drugs, the users and potential identifying ringleader of this enterprise in understanding its scale all to be lost.

[13] In those circumstances, the Judge was quite certain that the right step was immediate action and for the police to act as they did.

[14] In convicting Mr Alatini, the Judge expressed his reasoning as follows:

[164] Mr 'Alatini was found with the drugs in his rear trouser pocket and a packet under him where he lay on the floor. Having an item in your trouser pocket creates an overwhelming inference the person in question knew about it and was in control of it.

[165] In relation to the packet found underneath him, he was asked about this by the Officer and he replied "It is salt". Plainly given that he was already in possession of Methamphetamine in his pocket, then there becomes an overwhelming inference that another packet, that was found underneath him that he claims to know the nature of the contents of was also in his possession; knew about and had control of. That it was underneath him rather than in his pocket I infer from that he had tried to discard it to mitigate his involvement.

³ At [130].

[166] I therefore find him in possession of all here bags, said to be 0.063g, so guilty of count 1 and count 2 0.234g.”

[15] As to Mr Moala and count 4, the Judge said:

[169] Mr Moala on count 4. The area of the Fau tree is right next to the piggery that Mr Moala owns and runs. It is his business and at that time was an on-going concern.

[170] The guard stationed at the piggery was Mr ‘Alatini. We have already established that he is a user of Methamphetamine. Mr Moala was driving to the location, in his car, that very day another Methamphetamine user, Mr Vaipulu.

[171] It defies all reason that a business man, whose business is a few feet from his front door, would not know of all the comings and goings that a drug dealing outfit must be creating.

[172] The numerous test tubes found, show that users were consuming at the location, that would mean the comings and goings would be those of drug addled users with their associated intoxication; making them all the more obvious.

[173] That this was happening at his door step, that he kept a cohort of users around him that it was going on from right next to his business and that business was guarded by a Methamphetamine user create the strongest possible inference that Mr Moala knew what was going on.

[174] That it was adjacent to his land, and in front of his home and no more than 80 m away, that he is the man with a business and money and property as well as bringing users to the scene and employing a meths user as security create a strong inference from which I deduce that it was a scheme that was run by him and so demonstrates his control and therefore possession.

[1175] To ensure that continuation of his drug supply business he drove people to his home and kept them around him in his grounds too no doubt to guarantee an income for himself by drug dealing.

[176] I therefore find him guilty of count 4.

Was the search of the fau tree area unlawful?

[16] The respondent did not argue that no search warrant was needed because the fau tree area was on common ground, not owned by Mr Moala. We do not address this issue and make no finding about it. On the assumption that a search warrant was required for that area unless

s 123 of the Tonga Police Act was available, it is not in dispute that the Crown was required to show that:

- (a) A police officer was satisfied, on reasonable grounds, that a serious offence had been or was being committed in the place or premises searched; and
- (b) It would be impracticable, unreasonable or not in the interests of justice if the officer was required to apply for a search warrant.

[17] The evidence on this issue came from Officers Leveni and Vi. Officer Leveni stated that he received information from an informant in relation to the residence of Mr Moala at Ngel'ia to the effect that the sale of illicit drugs was taking place and that they were alleged to have been hidden at a fau tree at the residence. He had received information on five or six occasions from the same informant with successful outcomes. After speaking personally to the informant, the officer returned to the police station and informed the leading officer in the case Inspector Vi and the officer in charge, Officer Taufu. He was instructed to proceed quickly. Having received the information about 10 in the morning he arrived at the target address about 10.30am. He participated in the search of the fau tree area and described the test tubes and discovery of the substances later confirmed to be methamphetamine. He measured the distance from the piggery to the fau tree at 12 or 13 metres. In cross-examination he confirmed that the search was undertaken on a weekday when it could be presumed a Magistrate was available during working hours to obtain a warrant if necessary. With reference to the relevant provisions of the Tonga Police Act, Officer Leveni said a superior officer had considered and relied on the relevant sections rather than himself.

[18] In re-examination, the officer added that the informant had told him the drugs belonged to Mr Moala.

[19] Officer Vi gave evidence that at about 9.00am on 3 September 2019, he received information regarded as reliable about current selling of illicit drugs at Mr Moala's property at Ngel'ia. While he was in the process of confirming this information, Officer Leveni told him he had received the same information. Officer Vi was aware of previous cases supporting the informant's reliability and concluded that a deal or sale was currently in operation. Officer Vi then decided that a briefing should take place and advised the officer in charge, Officer Taufu

about the information received. It was agreed that the operation would be executed and a briefing then took place. Officer Vi went to the property along with others. He was present when Mr Moala arrived in a motor vehicle accompanied by Mr Vaipulu. One Asaeli Teulilo also arrived at the property while the police were there. Searches were carried out on every individual who came after the arrival of the police. Illicit items were found in the possession of Mr Vaipulu, Mr Teulilo and one Kiko Uata. In cross-examination, Officer Vi said that information from the informant in question had been successful in over 20 operations.

[20] Counsel for the appellants submitted that the prosecution had not demonstrated that a warrantless search was permitted in terms of s 123 of the Tonga Police Act. Several points were made including the absence of evidence that any inquiry was made about the availability of a search warrant; Mr Alatini was not mentioned in the informant information; Officer Taufua as the officer in charge had not given evidence; and the fact that drugs were found could not justify a search that was otherwise unlawful. It was also submitted that it was necessary to adduce some additional evidence of the reliability of the informant and that some further inquiry such as undertaking surveillance of the site should have occurred before proceeding with the search.

[21] On this issue, we accept the respondent's submissions that the decision to undertake a warrantless search of the piggery and the fau tree area was amply supported by the prosecution evidence. The combined evidence of Officers Leveni and Vi provided specific detail that Mr Moala was involved in the sale of illicit drugs at his property and was specific in the detail given about the location of illicit drugs in the fau tree area. The information supplied was that the sale of drugs was occurring on that day. The reliability of the informant's information was clear and confirmed to have been separately supplied to both Officers Leveni and Vi. That information was then shared with the officer in charge and a decision made by him and Inspector Vi to proceed with a search. We do not accept the submission that any additional evidence to confirm the reliability of the information was required.

[22] We accept that there was no evidence of consideration being given to obtaining a warrant but we agree with the Judge that urgent steps were required to proceed immediately in order to avoid the drugs being disposed of. In all the circumstances, we are satisfied that the Judge was correct to rule that the Police were satisfied on reasonable grounds that a serious offence was being committed at Mr Moala's premises and/or at the adjoining fau tree land and

that it would be impracticable, unreasonable or not in the interests of justice for the police to have applied for a warrant. The suggestion that surveillance should first have been taken was not put in cross-examination and it would have been likely to alert the offenders if it had been undertaken. Finally, it was not in the circumstances necessary for Officer Taufa to give evidence himself as counsel submitted.

Did the Crown prove the necessary elements of possession and control?

[23] Ms Kafoa submitted that the Crown had not proved beyond reasonable doubt that Mr Moala had knowledge of and possession and control of the drugs found on the fau tree property. Under this heading, counsel raised the following points:

- (a) There was no evidence of an ongoing concern at the premises as found by the Judge;
- (b) There was no evidence that Mr Alatini and Mr Vaipulu were drug users;
- (c) Mr Moala was not in the vicinity of the fau trees and there was no evidence he controlled who went there;
- (d) The conviction of Mr Moala on count 4 was inconsistent with the acquittal of the others on that count.

[24] Dealing with the first of these points, we accept the respondent's submission that, viewed overall, the evidence established that the piggery on Mr Moala's property and the immediately adjacent fau trees area were being used for the consumption and supply of illicit drugs. This was clearly indicated by the location of utensils scattered around at both sites, the methamphetamine found on Mr Alatini's person and nearby him and the location of a substantial quantity of methamphetamine in the fau tree area. The question was whether Mr Moala had knowledge, possession and control over what was occurring.

[25] Addressing the second point, the location of drugs on Mr Alatini's person and nearby plainly demonstrated that he was a drug user. Similarly, there was evidence from Officer Vi that he found methamphetamine in the possession of Mr Vaipulu when he arrived with Mr Moala at the scene. This point therefore has no substance.

[26] As to the third point, Mr Moala owned the property on which the piggery was located which was only a very short distance away from the common ground area where the larger quantity of methamphetamine was located. The evidence was that the distance from the piggery and associated hut to the fau tree was 12 to 13 metres. It is not in dispute that Mr Alatini was employed by Mr Moala to guard the piggery. As well the Judge found that Mr Moala could not have been unaware of people coming and going from the property who were not associated with any legitimate activities at the piggery or otherwise on Mr Moala's property. The common area with the fau trees was close enough to be readily visible by Mr Moala and he was in a position to observe comings and goings from that property and the piggery area. It was evident that Mr Moala was bringing potential customers such as Mr Vaipulu to the property and, as owner of the piggery and the employer of Mr Alatini, he was in a position to control activities in the piggery area and associated activities on the common area.

[27] The final point relating to inconsistency by the acquittal of Mr Alatini and Ms Taione is capable of ready explanation. The Judge was satisfied there was insufficient evidence to link Mr Alatini and Ms Taione to the drugs found in the fau tree. The different conclusion the Judge reached in respect of Mr Moala was clearly explained by the Judge in the passages we have already cited. We reject the submission that the discharge of other defendants with whom Mr Moala was jointly charged means, as a matter of law, that he must also be discharged.

[28] We record that the appellants abandoned grounds of appeal based on alleged discrepancies in the weights of the drugs located and alleged unfairness in the conduct of the trial.

Mr Moala's sentence appeal

[29] In sentencing Mr Moala, Cooper J stated:

On the evidence before me I infer he was running this operation to supply methamphetamine. He was even driving users to the address, as was the case when arrested. He had Mr Alatini acting for him, who no doubt was guarding the piggery as well as acting as a look-out; probably more, but that I discount for purposes of sentence.

[30] The Judge reviewed relevant authorities and noted that the need for firmer action had been seen and marked in recent years. He concluded that a starting point of four and a half

years was appropriate and increased that by one year to five and a half years to reflect the fact that Mr Moala established a place to deal the drugs; had at least one person, Mr Aladini working for him; drove users himself to the location and made a commercial enterprise from his criminality. The Judge noted that Mr Moala had no previous convictions but observed this may have been because he had not been caught before. The last six months of the sentence was suspended for two years on condition that he complete a drug rehabilitation course and committed no offences punishable by imprisonment.

[31] Mr Moala through counsel argues that the sentence was manifestly excessive because it was inconsistent with comparable cases and because the Judge ought not to have increased the sentence for supplying drugs when this was not charged. Reference was made amongst other cases to *R v Ngaue*,⁴ in which Cato J sentenced the accused to three and a half years imprisonment with the final nine months suspended on conditions. 14.5gms of methamphetamine and 43.89gms of cannabis was involved.

[32] Mr Aho accepted that the Judge had erred in not allowing a discount for the absence of previous convictions. We agree and observe that it was speculative and inappropriate for the Judge to suggest this was because he had not previously been caught. On the other hand, where there is evidence to show that the defendant has been engaged in activities supporting the conclusion that the possession of illicit drugs was for the purpose of supply, this may justify an uplift in the sentence as an aggravating factor on a charge of possession simpliciter. This was clearly the case here.

[33] In the end, counsel were agreed that a sentence of 4 and a half years was appropriate with a partial suspension. The only difference between them was over the length of the suspension. Ms Kafoa suggested 6 to 12 months while the respondent proposed 6 months. In our view, the last 12 months of the sentence should be suspended for 2 years.

Result

[34] The appeals against conviction are dismissed.

⁴ *R v Ngaue* (unreported, Supreme Court CR 06/2018).

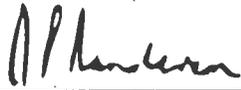
[35] Mr Moala's appeal against sentence is allowed. His sentence is quashed and, in substitution, he is sentenced to four years and 6 months imprisonment with the last twelve months of the sentence suspended for two years on the same conditions as the Judge imposed for the suspension he ordered.



Whitten P



Blanchard J



Randerson J

