

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

AM 5 of 2020

BETWEEN:

POLICE

Appellant

-and-

FILI TA'AI

Respondent

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN

Counsel: Mr T. 'Aho for the Appellant
Mr S. Tu'utafaiva for the Respondent

Date of hearing: 23 April 2020


1. After considering the affidavits filed on behalf of the Appellant, the parties' written submissions and hearing from counsel for the parties today, it was agreed that the single issue for determination on this appeal was whether the police prosecutor below, Acting Sergeant Alauni Puafisi, sought to call evidence from Senior Constable Carsten Leveni after the Senior Magistrate ruled that the scientific analyst certificate the prosecution initially sought to rely upon pursuant to s.36(2) of the *Illicit Drugs Control Act* was inadmissible because of the Prosecution's failure to serve the prescribed notice that the prosecution did not propose to call the analyst as a witness.
2. At the conclusion of the hearing, I delivered an ex tempore decision in which I dismissed the appeal. Neither party requested written reasons. However, for the record, I briefly record a summary of my reasons for that decision.
3. At paragraph 15 of his amended affidavit sworn 17 March 2019, Acting Sergeant Puafisi deposed that he told the learned Magistrate that he had Senior Constable Leveni waiting outside to give evidence on his report. The affidavit does not contain any reference to what if anything was said by the Magistrate in response or whether in fact Acting Sergeant Puafisi then went on to seek to call Senior Constable Leveni, if so, whether any objection was raised by Mr Tu'utafaiva, and if so, how the Magistrate dealt with any such objection.

23 APR 2020


4. At paragraph 17, Acting Sergeant Puafisi deposed that because the report was ruled inadmissible, "*I had no other evidence to prove that the substance in question was cannabis and the case was subsequently dismissed*". That is patently inconsistent with, and arguably contradicts, paragraph 15. Clearly, he had other evidence available in the form of Senior Constable Leveni. Given Senior Constable Leveni himself deposed to having been subpoenaed and was waiting outside the courtroom, the logical next step for Acting Sergeant Puafisi upon the certificate being ruled inadmissible, was to call Senior Constable Leveni to give evidence.
5. There is no reference in the Magistrate's rulings on the admissibility of the analyst's certificate or on the no case submission which followed to any indication or request by Acting Sergeant Puafisi to call evidence from Senior Constable Leveni.
6. Similarly, there is no such reference in the clerk's notes, a copy of which was obtained and transcribed ahead of the hearing today.
7. In his outline of submissions, Mr Tu'utafaiva (without intending to give evidence) expressly denied that the prosecutor told the Magistrate that Senior Constable Leveni was waiting outside. He otherwise, relevantly, pointed to the difficulties arising from paragraph 17 of Acting Sergeant Puafisi's affidavit as discussed above.
8. Accordingly, I was not satisfied on the balance of probabilities¹ that Acting Sergeant Puafisi indicated to the Magistrate that Senior Constable Leveni was waiting outside or that he sought to call Senior Constable Leveni to give evidence.
9. It was that failure, and not any error on the part of the Senior Magistrate, which led to the charges being dismissed.

NUKU'ALOFA
23 April 2020




M.H. Whitten QC
LORD CHIEF JUSTICE

¹ The standard of proof both counsel agreed was applicable to an appeal of this kind.