

Scan and file. Mr Lutini  
DPP  
Crown Law

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

AM 26 of 2020  
(Mag CR 329, 339, 348, 350 of 2019)

BETWEEN:

POLICE

Appellant

-and-

[1] TEVITA SAVIETI

[2] 'ATUNAIISA TUPOUATA

Respondents

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## REASONS FOR JUDGMENT

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BEFORE: LORD CHIEF JUSTICE WHITTEN  
Appearances: Mr T. 'Aho of the office of the DPP for the Appellant  
The Respondents in person  
Date of hearing: 23 October 2020  
Date of judgment: 23 October 2020  
Date of reasons: 2 November 2020

### Introduction

1. In the proceedings below, the Respondents were each charged with one count of possession of illicit drugs contrary to s.4(a) of the *Illicit Drugs Control Act* ("the Act") and one count of engaging in dealings with other persons for the possession of illicit drugs contrary to s.4(b) of the Act.
2. The charges were referred to Principal Magistrate Mafi for preliminary enquiry in accordance with s 32 of the *Magistrates Court Act*.
3. On 10 August 2020, the learned Magistrate found that there was insufficient evidence to commit the Respondents on the possession charges and that there was no evidence to commit them on the engaging with others charge. Accordingly both Respondents were discharged.
4. In this proceeding, the Police appeal both decisions.

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5. During the hearing of the appeal, the Appellant filed written submissions together with other documents in an appeal booklet and Mr 'Aho made further oral submissions at the hearing. Neither of the respondents filed any submissions in accordance with previous directions although they did indicate that when they received those directions, they consulted a lawyer about their contents. After they were given an opportunity to consider the Appellant's submissions (in Tongan) during the hearing, each of the Respondents were extended an invitation to make any submissions to the court, which they declined.
6. At the conclusion of the hearing, I decided that the learned Magistrate's decision in relation to the first charge was correct but that his analysis in dismissing the second charge was incorrect at law. Orders were therefore made granting the appeal in part, affirming the Magistrate's decision in relation to the possession charge and setting aside his decision to dismiss the engaging in dealing with others charge. The Respondents were then committed to stand trial in this court on that charge at a later date. Consequential orders were also made.
7. I indicated at the close of the hearing that I would provide more fulsome reasons in writing. These are those reasons.

### **Background**

8. The summary of facts which formed part of the brief of evidence before the learned Magistrate provides the following background of alleged facts.
9. On 10 May 2019, the Drugs Task Force Enforcement Division received information regarding drugs being imported from abroad by one, Sione Fuimaono, through one of the shipments to SF Enterprises at Ma'ufanga. A joint operation team was dispatched together with units from the Tactical Response Group and Customs to undertake investigation and surveillance.
10. One of the consignments was a plastic cylinder addressed to one, Seluini 'Iloa. It was examined and found to contain five parcels of alleged illicit drugs hidden

in washing powder dustbins or buckets. Photos were taken before the alleged drugs were removed for further examination.

11. By 13 May 2019, it appeared that Fuimaono had returned overseas but had contacted 'Iloa about ways in which the two buckets, formerly containing the packages, could be collected by one, Fililangi Ta'ai. Fuimaono offered to pay 'Iloa \$3,000 to have the two buckets delivered to a designated pickup location. Later that day, Ta'ai and one, Şulu Fineanganofu, went to a Digicel office where Ta'ai gave Fineanganofu \$3,000 to be deposited into 'Iloa's account.
12. Later that day, 'Iloa dropped off the two buckets at an old quarry at Mataki'eua for collection by Ta'ai. The law enforcement agents monitored the site on the lookout for whomever was going to collect the buckets.
13. At approximately 9:21 PM, a blue rental vehicle arrived at the site carrying the two Respondents and another male related to Tupou'ata. That other got out of the car before it turned into the area where the buckets were located. There, the Respondents were observed collecting the two buckets and placing them in the car. Police apprehended the related person but the Respondents drove off.
14. By that stage, Ta'ai had left the country but was later apprehended by police on his return at the airport. He was subsequently arrested together with the two Respondents in this proceeding. They voluntarily admitted that Ta'ai had instructed them to pick up the two buckets and bring them to him. Records of interview were conducted.
15. The Appellant also prepared an appeal booklet which contained its submissions, the Magistrates ruling, the Summary of Facts and also an affidavit of Acting Sgt Siosateki Vanikolo sworn on 30 May 2019 which was filed in support of an ex parte application to extend the detention of the \$3,000 referred to above as being recoverable cash associated with the operation. The affidavit was not before the Magistrate on the preliminary enquiry. However, Mr 'Aho explained it as providing further background and context only. The Acting Sergeant was one of the operatives who was surveilling the site at the time the Respondents are alleged to have retrieved the two buckets and driven off with them.

16. The Acting Sergeant deposed that later in the evening in question, one of the Respondents, Savieti, contacted police and volunteered that he was one of the persons in the car and that he wanted to talk to them. Shortly after 3 AM the next morning, a member of the task force collected Savieti from an agreed location and brought him to the police headquarters at Longolongo for questioning. After he was cautioned, Savieti is alleged to have told police that he and the other respondent hereto were employed by Ta'ai to retrieve the buckets from the location in Matakieua and that the drugs that were meant to be in the buckets were destined for Ta'ai.
17. The police then commenced a search for Tupouata. On 21 May 2019, he also contacted the task force and volunteered that he was the other person in the car that night and that he too wanted to speak with the authorities. About 11 AM, he was also picked up from an agreed location and brought to police headquarters for questioning. After being cautioned, Tupouata allegedly told police that he was also employed by Ta'ai and that the drugs that were meant to be in the buckets were destined for Ta'ai.
18. The Acting Sergeant also deposed that the drugs seized, which weighed just over 2.1 kg, had a street value in Tonga of just over TOP\$2 million.

#### **The Principal Magistrate's decision**

19. The learned Magistrate made his decisions in the proceedings below based on certain of the papers for the preliminary enquiry which were provided together with those for the charges against Ta'ai. The Respondents were unrepresented on the preliminary enquiry as they were on this appeal. However, Mr Tu'utafaiva appeared for Ta'ai. As I understand it, Mr Tu'utafaiva effectively made an no case submission in respect of the charges against his client. The Respondents did not make any submissions in that regard. The learned Magistrate recorded here that he had earlier found that there was no case against Ta'ai in respect of the charges then laid against him.
20. The Magistrate set out the relevant provisions of s.32 of the Magistrates Court Act, namely:

### 32 Committal hearings

(1) If a person is accused of having committed an offence which is triable only in the Supreme Court (except by operation of section 35) a Magistrate shall hold a preliminary inquiry in the Magistrate's Court without the calling of witnesses.

(2) The Magistrate shall notify the prosecutor and the accused of the date on which the preliminary inquiry shall be held and shall require the attendance of the accused -

(a) by issuing a summons; or

(b) if it appears to the Magistrate, from evidence on oath, that the person is likely to abscond - by issuing a warrant.

(3) For every preliminary inquiry the prosecutor shall lodge with the Magistrate, at least 5 days before the date thereof, 2 sets of documents each consisting of one copy of a fair summary of the statements of the prosecution witnesses, one copy of the list of exhibits he proposes to produce and one copy of any documentary exhibits he proposes to produce.

(4) At the preliminary inquiry the Magistrate shall -

(a) in open Court, the accused's set of documents consisting of one summary of the statements of the prosecution witnesses, one copy of the list of exhibits, and one copy of the documentary exhibits; and

(b) endorse on the remaining copy that the accused has received his set of documents; and

(c) if he considers that the documents disclose that a sufficient case has been made out to put the accused upon his trial before the Supreme Court, commit the accused to the Supreme Court for trial in custody or on bail as appropriate, and forward the remaining set of documents together with a record of the proceedings in Form 21 in the Schedule hereto to the Registrar of the Supreme Court; or

(d) if he considers that the documents do not disclose that a sufficient case has been made out to put the accused upon his trial before the Supreme Court, shall discharge him.

21. He also made reference to the relevant practice direction on preliminary enquiries and the analogous principles in *R v Galbraith* [1981] 2 All ER 1060; (1981) 73 Cr App Rep 124 (CA) at 127 for dealing with no case submissions:

*"How then should the judge approach a submission of 'no case'?"*

*(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.*

*(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.*

*(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*

*(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty then the judge should allow the matter to be tried by the jury."*

22. The Magistrate then set out the essential elements for the possession charge and noted that they included knowledge and control. He described the essential elements of the engaging with others charge as being that the accused, did engage with others, to possess illicit drugs.
23. In that part of the Magistrate's decision entitled "Law and the Evidence", he stated that the documentary evidence provided by the prosecution in the matter was not complete in accordance with s.32(4) for there was no list of exhibits and no list of documentary exhibits. He recorded that:
- (a) he had directed the Prosecution to provide those documents and that they were finally delivered in chambers on 26 May 2020 which was the hearing in relation to Ta'ai;
  - (b) he had directed Mr 'Aho to also provide the paperwork for the two Respondents and that Mr 'Aho agreed to do so by 9 June 2020;
  - (c) that date passed and no submissions or other papers for the matters were filed.
24. The Magistrate expressed the view that the Prosecution's failure to provide all the documentary evidence required was a "lack of prosecution" and that he believed it was open to him to discontinue the case for that reason alone. That, of course, would not have been a proper exercise of the Magistrate's duty under s.32 of the *Magistrates Court Act*. In the event of seemingly incomplete documents being submitted by the Police for preliminary enquiry, a Magistrate

is still required to consider them in order to determine whether they disclose a sufficient case to place the accused on trial before the Supreme Court.

25. In any event, the learned Magistrate here did not discontinue the case, but went on to record how he reviewed the papers that had been filed with the court. At paragraph 14 of his reasons, the Magistrate said:

*"There are many papers that are in the file but it is unclear what is it in relation to. The only appropriate thing to look at, is the Summary of Facts and the Brief of Evidence. There is also an ESR report which is not disputed."*

26. The ensuing analysis by the Magistrate turned on a simple proposition. He considered that once the police had removed the bags of alleged illicit drugs from the two buckets, neither of the Respondents should have been charged with either of the offences, because he considered that both required physical possession of the alleged drugs. In other words, once the drugs had been removed, neither of the Respondents could ever have committed any offence involving their possession for there were "no illicit drugs to have knowledge or control over".<sup>1</sup>
27. In fact, the learned Magistrate opined that as the police knew that there were no drugs inside the buckets at the time the Respondents were observed collecting them, it appeared that the charges were "malicious".<sup>2</sup>

### **Appellant's submissions**

28. The thrust of the Appellant's written submissions at paragraphs 6 to 10 thereof, was that, in his analysis, the learned Magistrate had "glossed over" that part of the Summary of Facts which recorded the Respondents' alleged voluntary admission that Ta'ai had directed them to pick up the two buckets and bring them to him. The Appellant also pointed to the fact that part of the committal papers before the Magistrate included statements made by each of the Respondents in which they admitted being directed to go to the quarry to pick up the two buckets containing methamphetamines. It was submitted, by

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<sup>1</sup> [16]

<sup>2</sup> [18]

reference to paragraph 14 of his reasons for decision, that the learned Magistrate had failed to consider those statements.

29. Reliance was also placed on the decision in *Police v Talamai* AM 07/2018 at [4] where Cato J held that in relation to preliminary enquiries:

*"... The Magistrate himself should not attempt to evaluate the evidence and, indeed, cannot do so in the absence of the witnesses being called to give their evidence with their reliability assessed after cross examination and considered with all the other evidence adduced..."*

## Discussion

30. During the course of oral submissions, Mr 'Aho conceded, rightly in my view, that the Magistrate's analysis on the possession charge was in fact correct. That is, the requisite element of knowledge and control meant that, in this case, once the alleged illicit drugs have been removed from the buckets, at the very least, the Respondents were incapable of exercising any control over the drugs which were by then in police custody.
31. However, in my opinion, it is in relation to the second charge of engaging in dealings with others for the possession of illicit drugs, that the learned Magistrate erred.
32. On its proper interpretation, s.4(b) places the focus on the dealings between the persons involved and whether the intention or purpose of those dealings was for the possession of illicit drugs. If a successful prosecution on that charge depended on the persons engaged in the dealings also having to end up with the drugs in their possession, then the provision would in fact have no work to do because subsection (a) - possession - would cover the field.
33. To illustrate, imagine six persons conspired together and undertook various roles for the common purpose of obtaining illicit drugs. However, assume that by the time of apprehension, the last person in the chain was the only one who actually had the drugs in their physical possession. On the Magistrate's analysis, the other five, without whom the plan to obtain the drugs could not have been effected, could never be charged with any offence under the Act. In my view, that analysis and interpretation is incorrect.

34. The evident purpose of the charge in subsection (b) is to ensure that all those engaged in dealings with the intention or purpose of obtaining drugs may be prosecuted even though any one or more of them do not actually end up with the drugs in their possession at the time of apprehension.
35. A further illustration of the erroneous interpretation by the Magistrate may be seen in the practical effects of his decision. If allowed to stand, it is likely that all those involved in this operation would evade prosecution because, once the police removed the alleged illicit drugs, none of them could any longer be charged with any offence under s.4 (save possibly for those involved in the importation). If that were correct, then the police and the drug enforcement agencies would never be allowed to intercept illicit drugs being tracked into the country and would therefore be forced to risk losing track of the drugs as they passed from offender to offender with the result that they might then find their way into the community. In this case, and in that event, the weight and value of the alleged drugs involved could well have had catastrophic consequences.
36. The only other alternative would be what Mr 'Aho described as a 'controlled delivery scenario' provided for by the Act where a senior officer can authorise illicit drugs, normally in the hands of undercover officers, continuing to their intended destination into the hands of an offender the police are targeting. But of course even that course is attended with serious risks of law enforcement authorities losing control of the illicit drugs.
37. In my view, such an interpretation and potential outcomes are not something which Parliament could be presumed to have intended when it passed s.4 of the Act.
38. A further basis for allowing this part of the appeal was the Magistrate's apparent failure to have considered certain of the documents placed before him for the preliminary enquiry including alleged admissions by each of the Respondent. During the hearing, Mr 'Aho read from the Tongan versions of those statements in which Mr. Savieti clearly states that he was there to pick up 'ice' that was in the buckets. And, in the statement of Mr. Tupouata, he first said that he was told to go and pick up the buckets but he didn't know what was in them.

However, later in his statement, he described how he opened up the buckets to find washing powder but that 'the packages' were not there.

39. Had the Magistrate been aware of the alleged admissions, he would have appreciated that they were evidence upon which a jury properly instructed could convict on the charges of engaging in dealings with others for the possession of the drugs. That omission on the part of the Magistrate constituted a failure to fulfil the requirements of s.32(4)(c) of the *Magistrates Court Act* which included consideration of whether the documents (i.e. all the documents) submitted by the Police disclosed a sufficient case to refer the Respondents for trial before the Supreme Court. That alone is a sufficient basis for setting aside the Magistrate's decision on the second charges.
40. Even without the alleged admissions, there was in my view, sufficient evidence on the documents the learned Magistrate did in fact consider which should have led him to conclude, on a *Galbraith* analysis, that any Crown case based on inference ought to be left to a jury (or judge on a judge alone trial).

## Result

41. For those reasons, the following orders were made:
  - (a) The appeal is allowed in part.
  - (b) The decision of Principal Magistrate Mafi dated 10 August 2020 in Magistrates Court criminal proceedings 329 and 339 of 2019 that there was insufficient evidence to commit the Respondents on the possession charges and thereby discharged them is affirmed.
  - (c) The decision of Principal Magistrate Mafi dated 10 August 2020 in Magistrates Court criminal proceedings 348 and 350 of 2020 in which he found that there was no evidence to commit the Respondents on the charges of engaging in dealings with others for the possession of illicit drugs, and thereby discharged them, is quashed and set aside.
  - (d) Pursuant to section 80 of the *Magistrates Court Act*, the Respondents are committed to stand trial before the Supreme Court on one count of

engaging in dealings with others for the possession of an illicit drug (namely 2257.12 g of methamphetamine) in contravention of s.4(b)(iii) of the *Illicit Drugs Control Act*.

- (e) The indictment and statement of facts is to be filed and served by 13 November 2020.
- (f) The Respondents will be arraigned on 27 November 2020 at 9 AM in court 1.
- (g) The Respondents are granted bail to appear on that date on condition that they:
  - (i) not commit any offence punishable by imprisonment;
  - (ii) not leave Tongatapu without a court order; and
  - (iii) not contact any Crown witnesses in the case.
- (h) No order as to costs.

NUKU'ALOFA  
2 November 2020



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC  
LORD CHIEF JUSTICE