

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

CR 36 of 2015

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28/7/17

BETWEEN: R E X - Prosecution

AND: NAUSAIMONE KITEKEI'AHO - Defendant

BEFORE THE HON. JUSTICE CATO

Mr Aho and Mr Finau for the Prosecution
Mr Corbett for the Accused

VERDICT

[1] The accused, Nausaimone Kitekei'aho, was indicted on one count of possession of illicit drugs contrary to section 4 (a)(b)(ii) of the Illicit Drugs Control Act 2003, and the second, bribery of a member of the Tongan police contrary to section 165(1) of the Tongan Police Act 2010.

THE EVIDENCE

[2] The first witness was Sergeant Etuate Siale. He obtained a search warrant from Magistrate Mafi on the 24th November, 2014. The warrant commanded police to enter the 'dwelling house, property, town allotment, vehicle at Popua where Nausaimone Kitekei'aho lives" and search for illicit drugs. The

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affidavit accompanying the warrant had been sworn out by the witness and in it he deposed that;

"The Police have found reliable information relating to illegal illicit drugs marijuana plants of the cannabis type which is kept at the town allotment property of Nausaimone Kitekei'aho (m) Popua on which Nausaimone Kitekei'aho and others are living."

- [3] The Officer in charge of the search was Sateki Tu'utafaiva who conducted the search on the 25th November, 2014, at Popua. The property was, in size, a quarter of an acre and had two small dwelling houses on it that were close together. The witness said he found the accused at the property when police entered the allotment in the early morning. The warrant was read to him and he had said it was fine for police to continue with their work. The witness asked to whom the house belonged and the accused had said that his son and family lived there. A search of it followed. No drugs or items of interest were located. Tu'utafaiva then advised the accused that the next search would involve the second house. He asked the accused who the second house belonged to? The accused said that it belonged to his mother. Tu'utafaiva told the accused to bring his mother out of the house so that the police could continue the search. He said that, as other officers commenced to search, the accused had asked him if they could have a moment to talk. At this point, the witness said that he and the accused had walked into the living room and the accused had asked him what if he gave the witness \$2000.00 so as not to conduct the search? Tu'utafaiva asked the accused what he meant and he said the thing is in the room. Tu'utafaiva said that a door to the room was open and there was a black plastic bag under the bed. The accused told Tu'utafaiva that there was marijuana under the bed. He was then told that he would be charged with possession of illicit drugs.

- [4] Tu'utafaiva told officers Fihaki and Vi to bring out the bag and it was photographed. Tu'utafaiva said that the photographs and the drug which occupied about half an onion sack had been lost and the prosecutor, Mr Aho, informed the Court that this had occurred during the refurbishment of the Police station when exhibits were removed to the Longo Longo Police station. He said that Officers Fihaki, Vi and Fahina were in the room when the drug was located. He said that the bag was opened and he saw the material in it was cannabis. He said that he had been in many operations involving marijuana. He said the plastic bag had been taken to the police station as an exhibit.
- [5] Under cross-examination, he admitted that he did not ask the accused whether he lived in the first house searched. He said that was the third time he had conducted a search warrant on the accused and this was the third time that he had found him in that residence. He said he had read the accused the search warrant before the first residence was searched. He said the accused had looked at the search warrant and read it. Then he had said the house was free for them to search.
- [6] He said that the accused had told him that he resided at his de-facto partner's residence about two minutes from the location where the search was to take place. He said that this conversation took place when they were searching the first house. Tu'utafaiva thought that he still lived at the first house even though the accused had said that he did not because he had found him there on previous occasions. He said that, after the search was over, they had effected a search on the premises, where the accused said he lived with his partner and no drugs had been obtained.
- [7] Tu'utafaiva was asked also about the second house and he said that there were male clothes in the room where the drugs were

located. He said that his thoughts were that the accused's son and wife resided in the first house and the accused and his mother lived in the other house. The mother occupied one room. He said that women's clothes were in that room. He said that he believed that the accused lived in the second room because the drug was found there and the accused had said it was his. Tu'utafaiva admitted that he had been told by the accused that he lived elsewhere with his partner when they were about to search the second house.

[8] No drugs were found at the premises where the accused said he lived with his partner. Mr Corbett asked about the record of interview and why bribery was not mentioned in that. Tu'utafaiva did not appear to respond to this question and Mr Corbett did not take this further.

[9] Officer Feki gave evidence of the accused entering into a record of interview on the 25th November, 2014. He said the drugs were present at the record of interview and were weighed and found to be 5 kilograms. He was present when the bag was weighed. He said it was one of the largest seizures he had been involved with during a period of 7 years working in drugs. He said that drying out would account for the difference in weight as recorded initially on seizure and the 3.8 kilograms that was stated in the indictment.

[10] In his record of interview, taken on the 25th November 2014, the accused admitted that marijuana had been located in his mother's house. He admitted the drug was his. He said he just had it to smoke. He said he recognized the drug in the office during interview as his. He denied living with his mother. He said he was not inside his mother's house when police came but outside. He completed his record of interview by saying he would finish it in Court. When the charge of possession of illicit drugs

was put to him he said that everything was true. In his voluntary statement, he said simply that he was content with the work carried out by the police.

[11] Officer Fihaki said that no drugs were found in the first house and as they commenced to search the second house he heard the accused say that house belonged to his mother. He confirmed that before they commenced to search that residence Tu'utafaiva told them to hold while he talked to the accused. He said that the accused and Tu'utafaiva went into the house and talked. He said that he did not know what they were talking about. He said that Tu'utafaiva had called them in and had said that the accused would direct them to something. The accused had said the thing was under the bed. The accused admitted that the drug was his. Officer Tu'itavuki had photographed the open bag in situ. Some of the material was green and some of it was dry. He produced a seizure list which showed that the drug had been seized by the police and taken from the house. It showed the recorded weight and a sample being taken for analysis. The drug was taken to Officer Pale who took a sample and tested it. He said that Tu'utafaiva had only told him, after the search, that the accused had called him and told him where the drug was.

[12] Officer Pale gave evidence that inter alia he worked in photography and conducted preliminary tests for drugs. He identified the plant material as cannabis from a botanical examination and a presumptive chemical test. He had taken a sample from the whole exhibit which had been brought to him.

[13] The accused gave evidence and also called evidence. The accused said that he was aged 52 and resided at Popua. He said that he was separated, had a partner and had children with her. He said that he had walked to his mother's residence at about 8am to get some fish. That was a distance about 200 metres

from where he lived with his partner. He asked his son for fish and the police arrived. Officer Tu'utafaiva got out and read the warrant to him. He said he would search his mother's house. There were two houses about 10 metres apart; one his son was living in and the other belonged to his mother. After they concluded the search of the son's house they continued to his mother's house. He said that he told police that was his mother's house and not his. He said that he had informed Tu'utafaiva of this when he had read the search warrant to him. He said they went to conduct the search and Tu'utafaiva had asked him to request his mother to come out of the house, and she did.

[14] The police had then continued with their work. He denied that he had ever approached Tu'utafaiva to talk. He denied offering Tu'utafaiva a bribe. He said the police told him they had found marijuana. He said he looked inside and saw the marijuana. He said the police told him it was marijuana and that he did not know what it was. The police then searched his house where he lived with his partner and found nothing.

[15] He said that his mother owned the house as a result of his father dying. He was the heir but did not own the house. He said he did not live in either of those two houses, but elsewhere with his partner. He said that he went to the police station and accepted the work done because he was sorry for his mother. He resiled from any admission of owning or knowing what the plants were, saying he only told the police this because his mother was ill. He said a younger brother was living with his mother at the time of the search.

[16] Under cross-examination, he admitted that he had been living at his son's residence with his partner before moving to live nearby in a residence owned by his cousin, a year before the search. He repeatedly denied any admission that the marijuana, was his or

that he had offered Tu'utafaiva a bribe. He said that he was shocked and surprised at what had happened. He said the clothes found in the bedroom where the drug was located were probably his younger brother's. He agreed that he visited his mother from time to time.

[17] The accused's son gave evidence. He said that after the first search they had called his father to come into the mother's house. He was in the house for 2 to 3 minutes. The police came out of the house. He did not hear any conversation. He said that no one lived with his grandmother. His father and other relatives brought her food. His father only came over if he wanted to eat fish.

[18] The accused's partner confirmed that she and the accused had lived together for 8 years and had two children. They had lived with the accused's son and family for a couple of years after 2010 and had moved to their present residence about two years before the search. The police had searched their residence and found nothing. She said the accused did not live with his mother.

FINDINGS

[19] I carefully considered the evidence of the accused and I do not accept that he was telling the truth when he resiled from the admissions he made in his signed record of interview. I accept the evidence of Officer Tu'utafaiva, in preference to the accused or his son, that the accused had approached him for a discussion in private and that they had entered the mother's residence together. Consequently, Tu'tufaiva had halted the search whilst he and the accused had a short conversation in which I accept the accused offered him a bribe prior to the accused pointing out the drug. I accept also that the accused subsequently admitted that the drug located under the bed belonged to him, and was

cannabis. I do not accept his explanation given at trial, for the first time, that he only made the admissions he did because he wanted to assist his mother. I reject any suggestion that he told the police lies concerning his involvement out of a concern for his mother. I consider that, although he probably did not live at his mother's residence, he had access to the house and that is the reason he was able to place the drug under the bed in the spare room.

[20] On the issue of the bribe, I also accept Tu'utafaiva's evidence that the accused, before the search of the mother's residence took place, had asked Tu'utafaiva to talk in private and that they had entered the house before the drug was located. The fact that the search was temporarily halted was supported by officer Fihaki who said that Tu'utafaiva had told him to hold the search while he talked with the accused and they went inside the residence. I think it unlikely Tu'utafaiva would have interrupted the search without reason to do so. I accept the reason he gave that the accused attempted to bribe him not to continue with it. I consider that this was a desperate attempt by the accused to dissuade police from conducting the search because he knew what they would find. When this did not work and knowing that the drug would be inevitably located, I accept that he referred Tu'utafaiva to it.

[21] Much of the challenge by Mr Corbett was directed at the search itself. He submitted that the police went beyond the scope of the warrant when they searched the two houses and that the drug was obtained pursuant to an illegal search and was inadmissible. The central aspect of his challenge was that the accused, at the time of the search, was not living at either of the premises but with his partner, elsewhere. He emphasised that the police were told this before the search commenced of the mother's residence.

[22] Tu'utafaiva had said that on three previous occasions they had effected a search of the first residence and the accused had been living there. The accused and his partner admitted living at the son's residence one to two years before the search. I consider that Tu'utafaiva, honestly believed, despite the accused saying otherwise, that the accused was living at a residence on the allotment when he found him there at or around 8am prior to the 2014 search. Mr Corbett suggested that he should have halted the search at that point, and procured another warrant when the Court opened for business at about 8.30. He submitted that there was present enough police to have controlled the scene until this was done and prevent any incriminating material being removed. I do not think, however, that the police would have had any power to control the scene whilst another warrant was obtained.

[23] I do not consider that this was a case where the police egregiously abused the power of search, or took deliberate short cuts to obtain and execute a search warrant. The warrant had been obtained to satisfy clause 16 of the Constitution which provides that it is unlawful to enter forcibly the houses or premises of another or to search for anything or take anything that is the property of another except according to law. I am satisfied that the accused, was on the premises at the time the police came to execute the warrant, although not inside either of the houses probably, as he said, eating some fish provided by his son, and the police had good reason based on their experience of his living at that residence on earlier occasions when police had searched that he was still living there at the time the police conducted their search on the 25th November, 2014, and that he was living in the second residence. By the time police came to enter the second house, following a request by the accused to speak in private, Tu'utafaiva, I find, had been offered a bribe not

to search further and then had been alerted to where the drug was. At that point, he would have been in dereliction of duty had he not called police in to secure the drug.

[24] Mr Finau for the Crown referred me to the judgement of Ford CJ in *R v Bowe* [2003] Tonga LR 24. In that case, also involving drugs, Ford CJ considered that even if a search was illegal, the evidence in England would be admissible at common law under *Kuruma v The Queen* [1955] AC 97 which allowed evidence to be given and the death sentence consequently upheld, even though the evidence had been obtained under an illegal search. Certainly, as Ford CJ remarked, that was the high water mark illustrating the inclusionary approach which had been adopted by English courts at common law for many years. However, it is doubtful in the modern world where an individual's right to privacy is given greater emphasis and the legitimacy of police action relating to search and seizure is more closely scrutinised, that the inclusionary approach should be slavishly followed in Tonga today. I raised with counsel the approach of the High Court of Australia in *Bunning v Cross* (1978)141 CLR 54 where the Court sanctioned a balanced approach to such issues. The Court in considering whether illegally obtained evidence should be admitted had to balance the public interest in maintaining the integrity of search and seizure procedures and ensuring that those whose task it is to enforce the law act lawfully, against the public interest that those who commit criminal offences should be brought to justice. (See further *Ireland's Case* (1970) 126 CLR 321)The factors adverted to by Stephen and Aickin JJ in *Bunning* were;

- a. no deliberate disregard of the law should be involved;
- b. whether the evidence could have just as easily been lawfully obtained;

- c. the cogency of the evidence and whether the illegality could be said to affect its cogency;
- d. the importance of the evidence in the context of the case;
- e. If vital evidence, was it of perishable or evanescent nature so that if there were any delay in securing it, it would have ceased to exist.
- f. the seriousness of the offending.

[25] This approach has gained favour in New Zealand and similar considerations are to be found under section 30 of the Evidence Act, 2006.

[26] Whatever approach is adopted here, I do not find that the police deliberately acted beyond the scope of the warrant. They acted in the belief that the accused lived at one of the houses on the allotment and the accused's behaviour prior to the search of his mother's residence would have given Tu'utafaiva additional reason to believe that he did live there. In these circumstances, I consider that, even though the scope of the warrant was exceeded because the accused probably lived elsewhere, this was not sufficient reason to reject the admission of cogent and vital evidence, in this case.

[27] In any event, I consider that when the accused asked to speak to Tu'utafaiva in private and then allowed him to enter and carry on a conversation in the house, whilst the search was halted, Tu'utafaiva was not a trespasser but present pursuant to an implied licence to enter the residence, by invitation of the accused, who plainly would have access to and authority to enter upon the premises it being, according to his evidence his

family home which his mother had inherited after his father's death. See on implied licence, R v Ratima (1999) 17 CRNZ 227(CA) On this view, there is no illegality in what the police did in entering the mother's premises pursuant to the accused's invitation to do so, before a search was undertaken and in securing the drug after the accused had pointed it out to Tu'utafaiva.

[28] Mr Corbett made submissions on the bribe. He pointed out that this was not the subject of any discussion in the record of interview, and so could not have been communicated to officer Feki. This may well be the case and is consistent also with the accused not being charged or committed on a charge of bribery to this Court. Neither Tu'utafaiva or Feki were pressed on this issue, by Mr Corbett. It seems likely, however, that Tu'utafaiva did not mention this to Feki or Feki would have been expected to have taken it up with the accused in the interview. Tu'utafaiva, however, must have made mention of it in his brief of evidence tendered at the committal on the possession charge, leading the Crown to include it as an additional count in the indictment. The prosecution was entitled to pursue this very serious allegation and include a count of bribery if the Crown considered it appropriate to do so in the indictment after there had been a lawful committal on the possession charge to this Court, and the evidence tendered on the committal revealed another uncharged offence. Cf R v Lamb [1969]1 All ER 45 on section 2(2)(c)(i) of the Administration of Justice (Miscellaneous Provisions Act) 1933. Mr Corbett did not object to the count of bribery being included in the indictment so I proceed on the basis that it must have been included in the brief of Tu'utafaiva leading to committal on the possession count. Indeed, prior to delivering this judgment, Mr Aho confirmed that this was so. I have considered Mr Corbett's complaint but for the reasons I have given I accept Tu'utafaiva's evidence that a bribe was

offered and I convict the accused of bribery, also. I also add that I have taken into account that there is no supporting evidence of the bribe which was made in private and for that reason I should exercise care before convicting. For reasons which I have given, I am satisfied, however, beyond reasonable doubt that Tu'utafaiva was telling the truth about this.

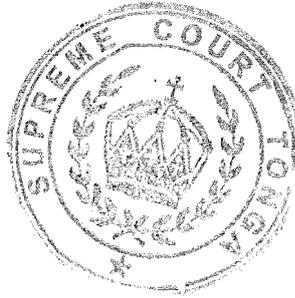
[29] Mr Corbett also complained that, although the evidence indicated that photographs had been taken of the cannabis including being in situ and the cannabis had been seized and weighed, neither photographs nor drugs had been produced in evidence. Nothing, however, was made of this during the evidence. Had it been, the Crown could have adduced evidence to formally explain why they could not be produced. Mr Aho explained why this was so from the bar table in answer to a question posed by the Court as to whether photographs said to have been taken of the marijuana were going to be produced, namely that the evidence had been lost during the refurbishment of the police station, and Mr Corbett did not suggest he was dissatisfied with this explanation or required further proof during the trial. In the absence of this being raised as an issue, I see no reason now why this should preclude me from convicting the accused of possession of an illicit drug. I am satisfied beyond reasonable doubt that the Crown has proven the essential elements of the offending involving the accused being in possession of cannabis, the weight of which in the indictment I accept was 3,800 grams or 134 ounces, which is a large amount of cannabis in Tonga. I am satisfied also beyond any reasonable doubt that the material was taken into custody weighed and sampled and identified by expert evidence as cannabis or marijuana, an illicit drug. I am satisfied that at all material times beyond a reasonable doubt that the accused had custody and control of the drug, that is possession of it, and that he identified it as cannabis and as his after it had

been taken back to the police station and was present when he was being interviewed.

VERDICT

[30] Accordingly, I convict the accused on one count of possession of illicit drugs contrary to section 4 (a) (b) (ii) of the Illicit Drugs Control Act 2003, and the second, bribery of a member of the Tongan police contrary to section 165(1) of the Tongan Police Act 2010.

DATED: 27 JULY 2017



A handwritten signature in black ink, appearing to read "Cato", is written over the printed name.

C. B. Cato

JUDGE