

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

CR 59 of 2019

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BETWEEN: REX

- Prosecution

AND: 'EPUEFI HOLIDAY LAIMANI

- Accused

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr 'I Finau for the Prosecution
The Accused in person

Date of Hearing: 30 - 31 May and 4 June 2019

Date of Ruling: 12 June 2019

VERDICT

The charge and preliminary matters

- [1] On 1 August 2018, the Police executed a search warrant at a Hofoa property where Mr Laimani resides in a one room hut. The Police found, amongst other things, plastic packets containing what appeared to be methamphetamine and cash (some of it hidden) totalling \$5,639.

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[2] Mr Laimani is charged with one count of possession of a Class A drug, namely methamphetamine, without lawful excuse, contrary to section 4(a) of the Illicit Drugs Control Act.

[3] Section 4(a) of the Illicit Drugs Control Act relevantly provides:

Any person who knowingly without lawful excuse, the proof of which shall lie on him-

(a) possesses...an illicit drug

commits an offence....

[4] I have reminded myself at the outset that the onus of proof lies on the prosecution at all times and it is to the standard of proof beyond a reasonable doubt in relation to the charge and every constituent element of the charge.

[5] The elements of the offence that must be proved are the following:

(a) That on 1 August 2018 at Hofoa;

(b) Mr Laimani knowingly possessed;

(c) The Class A drug, methamphetamine.

[6] It will be a defence if an accused is in lawful possession of an illicit drug, but the accused bears the onus of proof in relation to that matter. Whether this requires proof on the balance of probabilities, or merely imposes an evidential burden, is not something I need consider. Mr Laimani makes no claim to lawful possession of the drugs in this case.

[7] On arraignment, Mr Laimani was represented by counsel. He pleaded not guilty to the charge and elected trial by Judge alone. On the day the trial was scheduled to commence (28 May 2019) Mr Laimani advised me that he wished to represent himself and his counsel withdrew. Mr Laimani was given two further days to prepare his defence. Throughout his trial, he impressed as an intelligent and skilled advocate in his own cause.

The witnesses and credibility

- [8] I heard evidence from eight witnesses for the prosecution.
- [9] The first witness was Inspector Taniela Tapueluelu. He gave evidence of having obtained a search warrant from the Magistrate's Court to search the residences of Siosa Fakaosi and Mr Laimani at Hofoa. He led the search from shortly before 6am on 1 August 2018. He read the search warrant to Mr Laimani before the search was conducted. He produced the search warrant.
- [10] The second witness was Officer Patelesio Tu'utavuki. He took and produced photographs of the inside and outside of Mr Laimani's hut.
- [11] The third witness was Officer Tu'amelie Fifita. He was involved in the search of Mr Laimani's hut. He confirmed that the search warrant was read to Mr Laimani by Inspector Tapueluelu before the search began. He said that 10 larger plastic packets and 14 smaller plastic packets of methamphetamine were found inside a black bag that was attached to red shorts hanging in the hut. The shorts belonged to Mr Laimani. Cash was found in a pocket of the shorts and in a wallet that was in a pocket of the shorts. The wallet also contained Mr Laimani's drivers licence and bank card. Cash was found concealed in the wall of the hut and in two modified Ajax containers and one modified brake fluid bottle. There were also a weighing scale and empty plastic packets found.
- [12] The fourth witness was Officer 'Ofa Palefau. She made entries in the Police diary of action. Mr Laimani signed entries relating to the finding of the drugs and cash in the shorts. She produced the diary of action.
- [13] The fifth witness was Officer Emily Otuhouma. She made the search list, detailing the items found and removed during the search. She produced the search list.
- [14] The sixth witness was Officer Carsten Leveni. He also confirmed that Inspector Tapueluelu read the search warrant to Mr Laimani. The items found were returned to the Police station and the methamphetamine was weighed in

its plastic packets. He produced photographs showing the methamphetamine being weighed and the recorded weights. The packets of methamphetamine were kept in safe custody before he and Officer Halatoa Taufu took them to New Zealand on 8 November 2018. The packets were delivered to the Institute of Environmental Science Research Laboratory (ESR) for analysis.

- [15] The seventh witness was Officer Halatoa Taufu. He explained the steps that were taken to remove the methamphetamine from Tonga to New Zealand for analysis. On 8 November 2018, he and Officer Leveni travelled to New Zealand and delivered the methamphetamine to the ESR for analysis. On 28 November 2018, a scientific-analyst certificate was received from the ESR. It confirmed that crystals taken from one of the larger plastic packets and one of the smaller plastic packets had been analysed and found to contain methamphetamine. He produced the scientific-analyst certificate.
- [16] The final prosecution witness was Fatai Samani. He works for the Attorney General's Office. He gave evidence relevant to the service upon Mr Laimani of the scientific-analyst certificate and a written notice pursuant to s. 36(2) of the Illicit Drugs Control Act (advising Mr Laimani that the prosecution did not propose to call the analyst as a witness) at the committal hearing. The documents were included with the committal papers. I note that Mr Laimani's evidence confirms he discussed the documents with his then counsel on, or around, 11 April 2019, when this case first came before this Court.
- [17] Much of Mr Laimani's cross-examination of the Police Officers challenged them on points of detail but this really served no useful purpose. For instance, he did not accept the evidence given by three witnesses that Inspector Tapueluelu had read him the search warrant, yet it was plain, from his own evidence, that the search warrant was indeed read to him, albeit by, he says, another Officer. He challenged Officer Palefau on the issue of whether he signed the diary of action in the hut or at the Police Station but did not deny that he signed it. He challenged Officers Leveni and Taufu on whether they

had travelled to New Zealand, and maintained that they had not done so, despite the production of their passports.

[18] The evidence of the Police Officers was not faultless but I am satisfied that they gave their accounts honestly and to the best of their recollection. In so far as there were errors, I do not regard them as material. By comparison, the evidence of Mr Laimani and his witness was almost entirely contrived. I now turn to their evidence.

[19] Mr Laimani said that on the morning of the search he was awoken by a flashlight shining on his face. It was Officer Kalosi Tapueluelu, and not Inspector Tapueluelu, who had, “read me my rights” and, “held a paper in front of me.” He was clearly referring to the search warrant. Officer Faeamani then sat with him and, “explained in detail the reason they came to the hut.” The Police searched his hut and found drugs in a bag hanging from his red shorts. They also found money in the shorts, in a hole in the wall, in Ajax containers and, in a brake fluid bottle. He showed the Police where cash was kept at the top of the window. That was his cash. He knew nothing about the drugs or the other cash. In explanation for his lack of knowledge, he presented the following account.

[20] On 31 July 2018, he had “cruised” in a rental car with one Ngana and Ngana’s girlfriend. They had stopped at different places to drink alcohol. He vomited and passed out. He does not recall anything until he awoke in his hut as the Police executed the search warrant. He knew nothing about the drugs or about most of the cash found in the hut.

[21] A few days after he was released from custody, he had met Ngana at the store. Ngana told him that on the night they were drinking together his girlfriend had dropped Mr Laimani and Ngana back at the hut. She went to see her cousin, who was having trouble with her boyfriend. Ngana had later gone in Mr Laimani’s car to meet up with his girlfriend. He had worn Mr Laimani’s red shorts because Mr Laimani had vomited on him. Ngana had stolen the drugs,

cash and weighing scale, which was subsequently found in Mr Laimani's hut by the Police, from the boyfriend of his girlfriend's cousin. He had then returned to the hut. Sometime later, his girlfriend also returned to the hut. They had sex in the hut, whilst Mr Laimani was passed out. Ngana and his girlfriend left in the girlfriend's car to get more alcohol, leaving behind Mr Laimani's car, the drugs and, the cash. Ngana had left wearing only his boxers. This was right before the Police had arrived.

[22] All of Mr Laimani's evidence of what Ngana told him is hearsay and inadmissible. It does not assist Mr Laimani. Furthermore, his account of events is implausible and I do not believe any of it occurred for the following reasons.

[23] First, the story developed in the telling. The details that Ngana and his girlfriend had sex and that Ngana had left the hut in his boxers were added during cross-examination, in an obvious effort to deal with the incongruence that the shorts that Ngana was said to have been wearing were found in the hut.

[24] Secondly, there was not a scintilla of credible evidence to support the story. Mr Laimani called no witnesses to confirm any aspect of the story (except perhaps Mr Makafilia who I deal with below). For instance, there was no evidence that when the search was carried out he was suffering from the effects of alcohol (remembering, that he claimed to have drunk alcohol until he passed out and had remained unconscious for many hours) or that Ngana's trousers were found in his hut.

[25] Thirdly, the narrative leaves many loose ends hanging and, is entirely unbelievable. Why would Ngana's girlfriend leave him at the hut with Mr Laimani, who was passed out? Having stolen the drugs and a large sum of money, why would Ngana then have returned to the hut? If, he had done so, why would he then leave the drugs and the money behind? If, as Mr Laimani says, Ngana intended to buy alcohol, why would he have left the red shorts

behind and gone out only in boxers? If Ngana intended to return to the hut once he bought alcohol, where were his trousers? If Ngana had indeed stolen what were large sums in cash and drugs why had he not returned for them, or even made some enquiry of Mr Laimani, before their chance meeting at the store? If that was not enough, this account leaves out a significant aspect of the night's events that was added by Mr Makafilia in his evidence.

[26] Mr Makafilia's evidence was that he called Ngana for repayment of a loan, and met Ngana at around 2-3am on the morning of 1 August 2018 to be paid. He knows Mr Laimani, and said that Ngana had been driving Mr Laimani's car. Ngana was wearing red shorts and he had a black bag which had small packets and money inside. He was with Ngana for about an hour and they smoked methamphetamine together. Clearly, the purpose of this evidence was to provide confirmation that Ngana had drugs, was wearing Mr Laimani's shorts and was driving Mr Laimani's car.

[27] I do not accept Mr Makafilia's evidence. Whilst he was certain as to the date these events happened he could not remember what day of the week it was. He had no reason to recall the date other than, he said, he was drunk that night. As he not only drinks but admits to smoking methamphetamine, I do not regard this as a credible reason he would recall the date almost a year later. He also offered no explanation why he would recall, or would have any interest in, what Ngana was wearing.

[28] Mr Makafilia was a defensive witness and his demeanour was intimidating. He has known Mr Laimani for some years and is on friendly terms with him. They are both presently in Hua'tolitoli. I have no doubt that his evidence is fabricated.

The facts that are proven

[29] Having carefully studied the evidence of all of the witnesses, the following facts were proved by the prosecution beyond any reasonable doubt:

- (a) On the morning of 1 August 2018, the Police executed a warrant, validly obtained from the Magistrate's Court, to search Mr Laimani's residence.
- (b) The Police arrived at Mr Laimani's residence at around 6am and conducted the search thereafter.
- (c) Mr Laimani's residence is a small one room hut on the property of Siaosi Faka'osi. Mr Laimani lives alone in the hut.
- (d) Before the search was conducted, the search warrant was read, shown and, explained to Mr Laimani. He was present throughout the entire search and made no complaint about it.
- (e) During the search, the Police found 24 plastic packets of methamphetamine in a black bag attached to red shorts belonging to Mr Laimani. They also found, at various locations within the hut, sizeable sums of cash (some of which was hidden) as well as empty plastic packets, similar to those that contained the methamphetamine and, weighing scales.
- (f) Mr Laimani was present when the drugs were found and acknowledged that the drugs were found in his hut by signing the diary of action.
- (g) The packets of methamphetamine were in the possession of Mr Laimani. He had physical control of them and actual knowledge that the packets contained an illicit drug. Such knowledge is to be inferred from the facts that they were found in his shorts, there is no credible evidence that anyone else had access to Mr Laimani's hut at any relevant time, Mr Laimani lied in his evidence as to the provenance of the drugs, the methamphetamine was contained in individual packets and, there were large sums of hidden cash and other paraphernalia (such as further empty plastic packets and a weighing scale) found in

the hut, consistent with Mr Laimani being involved in the distribution of illicit drugs.

- (h) The packets of methamphetamine were subsequently taken by Officers Leveni and Taufu to the ESR in New Zealand for analysis. The drugs were analysed and found to contain methamphetamine.
- (i) The ESR issued a scientific-analyst certificate signed by a scientific-analyst that the drugs contained methamphetamine. That certificate and a notice under s 36(2) of the Illicit Drugs Control Act were served on Mr Laimani's counsel at his committal hearing and neither Mr Laimani nor his counsel gave notice under s. 36(3) of the Illicit Drugs Control Act requiring the analyst to be called by the prosecution as a witness. The scientific-analyst certificate is satisfactory evidence that the drugs taken from Mr Laimani's hut contained methamphetamine (see also s. 34 of the Act).

[30] It follows, subject only to arguments raised by Mr Laimani in his closing submissions, that all elements of the offence have been proven beyond reasonable doubt.

Mr Laimani's arguments in closing.

[31] Mr Laimani argued that there were errors in the Police Officers' evidence, that they were lying and, that this tainted the case against him. I have dealt with the respective credibility of the witnesses and reject this submission.

[32] Mr Laimani's second submission, as I understand it, is that if the drugs were his, he would not have acknowledged ownership of the red shorts. I disagree. Mr Laimani could hardly deny ownership (or at least possession) of shorts found in a hut where he lived alone, containing his wallet, his bank card and, his drivers licence. The evidence of his knowing possession of the drugs is overwhelming.

- [33] His third submission is that the scientific-analyst certificate is untrustworthy as the drugs were never taken to New Zealand for analysis. Mr Laimani maintains that Officers Leveni and Taufa never travelled to New Zealand. I reject this submission. Both Officers gave evidence that they did travel to New Zealand and both produced their passports recording their departure from Tonga and their entry into New Zealand.
- [34] I should note at this juncture, there is a difference in the weight of the drugs as recorded by the Police and the ESR. The reason is that the Police weighed the drugs in the plastic packets, whereas the ESR did not. The scientific-analyst certificate is conclusive that the drugs were methamphetamine and Mr Laimani's challenge to it is groundless.
- [35] The fourth argument advanced by Mr Laimani was that his possession of the drugs was not proved as no one saw him put the drugs in the plastic packets, there was no evidence of his fingerprints on the packets and, he had proffered the explanation that the drugs were left by Ngana. The prosecution does not have to prove Mr Laimani packaged the drugs or that his fingerprints were found on them. There was no evidence that the Police searched for fingerprints. Mr Laimani's evidence as to how the drugs came into his possession has been rejected, for the reasons I have already given.
- [36] Finally, Mr Laimani submits that the search was illegal because it was not carried out in the daytime. The search warrant provided that the search was to be carried out whilst it was still daytime. The search was carried out at 6am in the morning. Mr Laimani contends that 6am is not daytime. This argument has no merit for two reasons.
- [37] First, the warrant was issued under s. 51 of the Magistrate's Court Act. The search warrant was in Form 6 of the Schedule to the Magistrate's Court Act. In determining what is meant by the term "daytime", as it is used in Form 6, regard must be had to s. 51(2) of the Act. It provides that, unless a Magistrate

shall direct otherwise, a search warrant may be executed between the hours of 5am and 8pm. This search warrant was executed within those hours.

[38] Secondly, if I was to regard the search as illegal, because it was not conducted in the daytime, I would not exclude the evidence obtained in the search. I agree with the approach of Cato J in *R v Kitekei'abo* (Unreported, Supreme Court, CR 36 of 2015, 27 July 2017, Cato J) at [24], that in considering whether to exclude illegally obtained evidence:

...the Court must balance the public interest in maintaining the integrity of search and seizure procedures, and ensuring 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.

[39] I am satisfied that the Police executed the search in good faith believing that (as I have found was the case) they were doing so during daytime hours. The evidence was that the sun was rising at the time that the search was conducted. There is no evidence that Mr Laimani was in anyway prejudiced by the search being conducted at that hour of the day and the offence with which he is charged is extremely serious. If the scope of the warrant was exceeded, it was a minor and technical breach and is not sufficient reason to reject the admission of convincing and vital evidence in this case.

The Result

[40] The prosecution has proved beyond reasonable doubt that on 1 August 2018 at Hofoa, Mr Laimani was knowingly in possession of the Class A drug, methamphetamine. He is guilty of the offence with which he is charged under s 4(a) of the Illicit Drugs Control Act and is convicted accordingly.

[41] The packets of methamphetamine found in the possession of Mr Laimani are to be destroyed.

[42] I will hear from counsel and Mr Laimani in relation to:

- (a) Any application for forfeiture of the cash found in the possession of Mr Laimani; and
- (b) A date for Mr Laimani to be sentenced.



A handwritten signature in black ink, appearing to read "O.G. Paulsen".

NUKU'ALOFA: 12 June 2019

O.G. Paulsen
LORD CHIEF JUSTICE