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

CR 70 of 2019

BETWEEN: REX

- Prosecution

AND: RODNEY TOMASI

- Accused

BEFORE LORD CHIEF JUSTICE PAULSEN

Appearances: Mr. T 'Aho for the Prosecution
The Accused in person

Date of Hearing: 1, 2, 8, 9 July 2019
Date of Ruling: 17 July 2019

VERDICT

The charges

[1] These are the reasons for my verdict, which I delivered orally on 17 July 2019.

[2] Mr. Tomasi pleaded not guilty on indictment to two counts of possession of illicit drugs, contrary to s. 4(a) of the Illicit Drugs Control Act (counts one and two), one count of bribery of a member of the Tonga Police, contrary to s. 165 of the Tonga Police Act (count three), three counts of possession of arms without a licence, contrary to s. 4(1) and 2(b) of the Arms and Ammunition Act (counts four, five and six) and, one count of

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possession of ammunition without a licence, contrary to s. 4(1) and 2(b) of the Arms and Ammunition Act (count seven). Mr. Tomasi elected trial by Judge alone and is self-represented.

- [3] The trial was subject to a number of delays and adjournments due, in part, to the unavailability of prosecution witnesses. At the start of the trial, I issued an evidential ruling that the prosecution could not rely upon a statement provided to the police by Mr. Tomasi's estranged wife. The prosecution was also unable to call three witnesses, who were engaged elsewhere on important duties. In addition, the prosecution never intended to call the Officer in Charge, Sergeant Sateki Tu'utafaiva, who I understand has left Tonga.
- [4] In closing the prosecution's case, Mr. 'Aho accepted that, due to a lack of evidence, acquittals should be entered on counts one, four, five, six and seven. I agreed with that assessment and Mr. Tomasi was acquitted on those charges. This ruling relates to the remaining two charges (counts two and three).
- [5] The particulars of count two (which was amended during the trial) and count three, read:

(Count two)

Rodney Tomasi of Lapaha, on or about 14 May 2018, at Ha'ateiho, you did knowingly and without lawful excuse possess a Class B illicit drug, namely 0.83 grams of cannabis.

(Count three)

Rodney Tomasi of Lapaha, on or about 14 May 2018, at Tongatapu, you did offer a bribe to members of Tonga Police, when you asked them what was their price to pay them so they refrain from arresting you.

The burden and standard of proof

- [6] The burden 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 charges and every constituent element of the charges. I have reminded myself that I must base my decision only on the evidence which I have heard in this Court. On the basis of the burden and standard of proof, the prosecution's case must stand or fall on the evidence which the parties chose to call before me. In a case where the prosecution has been unable to call all of its witnesses, the application of these fundamental principles have had a determinative effect.

The elements of the offences

Possession of an illicit drug

- [7] Cannabis is a Class B illicit drug. Section 4(a)(i) of the Illicit Drugs Control Act reads:

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

(a) possesses....an illicit drug

commits an offence and shall be liable upon conviction -

(i) in respect of a Class B drug in the quantity of less than 28 grams, to a fine not exceeding \$5,000 or imprisonment for a term not exceeding 1 year or both.

- [8] The elements of this offence that the prosecution must prove beyond a reasonable doubt in order to establish the charge are:

- (a) That Mr. Tomasi;
- (b) On or about 14 May 2018 at Ha'ateiho;
- (c) Knowingly possessed the Class B drug Cannabis.

Bribery of member of the Tonga Police

- [9] Section 165 (1) of the Tonga Police Act reads:

A person commits an offence if the person gives, or offers to give, to any member of Tonga Police, or to a person performing functions on behalf of Tonga Police, any money or other benefit as an inducement to do or refrain from doing any act in the execution of the police officer's duty as a member or in the performance of the person's function on behalf of Tonga Police.

[10] The elements of the offence that the prosecution must prove beyond a reasonable doubt in order to establish this charge are:

- (a) That Mr. Tomasi;
- (b) On or about 14 May 2018;
- (c) Offered money or other benefit;
- (d) To a police officer;
- (e) Intending to induce that police officer to refrain from arresting him;
- (f) Being an act in the execution of that police officer's duty as a member of the Tonga Police.

The evidence

[11] Much of the evidence related to the methamphetamine and firearms charges and is not relevant to the remaining charges that I am required to consider. The evidence relevant to these two charges falls within a small compass.

Officer Kalosi Tapueluelu

[12] He was the prosecution's principal witness. He had been, but is no longer, in the Drugs Task Force. He described himself as the Investigating Officer. His superior was Sergeant Sateki Tu'utafaiva.

[13] On 14 May 2018, he and Officer Leveni got information from Sergeant Tu'utafaiva that Mr. Tomasi was parked at Ha'ateiho and in his vehicle were arms, ammunition and drugs. They travelled to Ha'ateihio and located Mr. Tomasi sitting in his car near the Silapeluu fields. His car had

a flat tyre. Another man, called Fine, was there. Sergeant Tu'utafaiva was also present. Mr. Tomasi, Fine and the vehicle were searched. Officer Leveni found a "rolled joint" upon Mr. Tomasi. Mr. Tomasi denied that the joint was his. He was then arrested and cautioned.

[14] Officer Tapueluelu continued the search around the driver's area and found cash hidden in the seat and what appeared to be methamphetamine in a compartment of the door. Mr. Tomasi again denied that this belonged to him. Officer Tapueluelu opened the door at the rear of the vehicle and found a packet of Pall Mall cigarettes. It had most of its plastic wrapping still on it, and what appeared to be cannabis in two dealer bags inserted into the wrapping. Mr. Tomasi was taken to look at the Pall Mall packet and said that it was not his.

[15] Officer Tapueluelu then drove Mr. Tomasi and Officer Leveni to the police station in Mr. Tomasi's car. On the way Mr. Tomasi asked the officers "what is your number to release me." Officer Tapueluelu said he had heard that phrase many times, in his 6-7 years working in drugs operations, and his understanding was that Mr. Tomasi was asking how much the officers wanted to let him go. Mr. Tomasi was told that they would be taking him to the station to complete their work.

[16] In cross-examination, Officer Tapueluelu confirmed that he was told there were arms in the vehicle by Sergeant Tu'utafaiva. He said they did not have a search warrant but the Tonga Police Act allows searches without warrant. He said that he did not hear Sergeant Tu'utafaiva asking an observer for his phone and did not know about the deletion of a video taken of the search.

[17] Mr. Tomasi did not challenge Officer Tapueluelu on his evidence that Mr. Tomasi had asked for their "number" to release him. Before Mr. Tomasi finished cross-examining, I asked him if he wanted to ask Officer

Tapueluelu any questions about what took place on the way back to the station. He did not.

Officer Naianlai Tukuafu

- [18] She works in the Domestic Violence Unit. On 14 May 2018, Mrs. Seini Tomasi, who is Mr. Tomasi's estranged wife, came to the office for help as she was afraid of Mr. Tomasi. He had threatened her life and had a gun. She was instructed to take Mrs. Tomasi to Sergeant Tu'utafaiva, which she did. She told Sergeant Tu'utafaiva that Mrs. Tomasi was seeking help from the Domestic Violence Unit but there were firearms involved. Sergeant Tu'utafaiva told her to hand over the case to him.

Officer Leniti Pale

- [19] His duties include testing of cannabis, for which he has received training by the Australian Federal Police. He has appeared as a witness to identify cannabis in more than ten trials, including trials in the Supreme Court. He received exhibits taken from Mr. Tomasi of a joint and two plastic bags containing dried leaves. These were given to him by WPC Pousima, who is responsible for police exhibits and he had signed for them. He examined the exhibits and found them to be cannabis. He produced his report. He was not cross-examined by Mr. Tomasi.

Mr. Tomasi

- [20] Mr. Tomasi gave evidence that he had become estranged from his wife. He has a friend involved with drugs who has a "dealing relationship" with Sergeant Tu'utafaiva. He was warned he was going to be searched so he and another friend, called Kimi, swept his car clean and then drove into town to take dog meat to another friend. They got a flat tyre at Ha'ateiho. He called his wife to bring a spare tyre and he also called another friend, Fine, to help and Fine came over. The police arrived. He asked if they had a search warrant and they told him they did not and to get out of the

vehicle. He was handcuffed. Both he and the vehicle were searched. He was shocked and angry by the search when drugs were found and he called over to people watching that the police had planted things in his vehicle. A man was videoing what was happening on his phone but Sergeant Tu'utafaiva took the phone and deleted the video. The flat tyre was replaced and he was taken to the police station.

- [21] Under cross-examination, Mr. Tomasi denied that he had offered a bribe to Officers Tapueluelu and Leveni.

Other defence witnesses

- [22] Mr. Tomasi called two other witnesses to give evidence. They were present during the search but, as he acknowledged in his closing submissions, they said little that assisted him and as their evidence does not affect the outcome of the case, I do not need to refer to them further.

Discussion

The possession charge

- [23] Mr. 'Aho frankly acknowledged that there are holes in the prosecution's case (due to the unavailability of its witnesses) but submitted that there was enough evidence to be satisfied beyond reasonable doubt that Mr. Tomasi was guilty of this offence. I am unable to agree with that assessment.
- [24] The search of Mr. Tomasi and his vehicle was undertaken without a search warrant. Mr. Tomasi said, and I accept, that he challenged the police's right to carry out the search. Clause 16 of the Constitution protects against unlawful searches when it provides:

It shall not be lawful for anyone to enter forcibly the houses or premises of another or to search for anything or to take anything the property of another except according to law. And should any person lose any property and believe it to be concealed in any place whether house or premises it shall be lawful for him to make an affidavit before a magistrate that he believes it to be concealed in that place and he shall describe particularly the property so concealed and the place in which he

believes it to be concealed and the magistrate shall issue a search warrant to the police to search for the property according to the affidavit so made

[25] Mr. 'Aho argued that the search was not unlawful because it was conducted pursuant to s. 24 of the Illicit Drugs Control Act. Relevantly, ss. 23(1) and 24 provide:

23 Search Warrants

(1) If a Magistrate is satisfied, by information on oath, that there are reasonable grounds to suspect that there is in or on any place —

(a) an illicit drug, controlled chemical or controlled equipment;

(b) any evidence relating to the commission of an offence against this Act; or

(c) any property derived from an offence under this Act,

the Magistrate may issue a warrant empowering a police officer or a customs officer at any time, or at such time as the Magistrate may specify in the warrant, to enter the place, search for any illicit drug or thing and if found, seize it and search any person found at or in the place.....

24 Search and seizure without warrant in emergencies

(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.

[26] Mr. 'Aho submitted that the police were faced with an emergency situation as Officer Tapueluelu had been told by his superior, Sergeant Tu'utafaiva, that there were illicit drugs and firearms in the vehicle, and that during the search cannabis had been found. I note that Officer Tapueluelu also said

that the search occurred when there was no Magistrate available to issue a search warrant.

- [27] I am unable to accept Mr. ‘Aho’s submission, which fails to address the requirement in s. 24 that “the grounds for obtaining a warrant under [section 23] exist.” The first such requirement is that “there are reasonable grounds to suspect that there is in or on any place”, *inter alia*, an illicit drug. There is insufficient evidence before me to make such a finding.
- [28] Officer Tapueluelu said that he and Officer Leveni received instructions to undertake the search from Sergeant Tu’utafaiva, but he gave no evidence from which it can be inferred that reasonable grounds existed to suspect the presence of illicit drugs and Sergeant Tu’utafaiva did not give evidence. The lack of relevant evidence means also that I cannot be satisfied that the further requirements in s. 24(1)(a) and (b) were satisfied to justify a warrantless search. In addition, I note that there was no evidence of compliance with s. 24(3).
- [29] I understood Mr. ‘Aho to submit that I can infer that Sergeant Tu’utafaiva had reasonable grounds to suspect the presence of an illicit drug because cannabis was found. In doing so, he was advancing a logical fallacy (affirming the consequent). The fact that cannabis was found says nothing at all about whether, prior to the search, Sergeant Tu’utafaiva had reasonable grounds to suspect its presence.
- [30] It may be, as Mr. Tomasi suspects, Sergeant Tu’utafaiva was given information from Mrs. Tomasi which he acted upon, but there was no evidence that this was the case, when the information was given, or what information was given.
- [31] It follows that the search was not defensible under s. 24. Mr. ‘Aho advanced no other grounds to justify it. The police do have powers to search without warrant under s. 122 of the Tonga Police Act, but Mr. ‘Aho did not rely on that section, and it would not have aided him to do so. It

requires that there be “reasonable grounds” to believe that a person to be searched has an illicit drug in his possession and that it would be “impracticable, unreasonable or not in the interests of justice” that the police officer obtain a search warrant. There is, again, no evidence to support such findings. It follows that I am not satisfied that the search was lawful.

[32] Anticipating this possibility, Mr. ‘Aho argued that I should not exclude the evidence of the search, in reliance upon the approach taken by Cato J in *R v Kitekei’aho* (Unreported, Supreme Court, CR 36 of 2015, 27 July 2017) where the Judge said, at [24]:

...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.

[33] Mr. 'Aho submitted that the evidence should be admitted because there was no malice, the police acted in good faith in the belief that there were illicit drugs to be found and, the belief was proven to be correct.

[34] Once again, I am unable to accept Mr. 'Aho's submission, principally for the same reason that I found the search to have been illegal: the lack of evidence. In the absence of evidence from Sergeant Tu'utafaiva, I cannot know if the search was conducted in good faith or deliberate breach of the law, or whether the evidence could not have easily been lawfully obtained. Whilst I accept that the evidence is important (and the prosecution will fail without it), this case involves a modest amount of cannabis and the offence is at the lower end of the scale of drug offending. For those reasons, I consider the evidence of the search should be excluded. As a result, the charge is not proven.

[35] For completeness, I note that there was a further gap in the prosecution's case. There was no evidence as to what happened to the cannabis from when it was said to have been found until it was logged into the exhibits register at the police station at 21.25 hours by Officer Leveni. In circumstances where Officer Leveni did not give evidence, there are no photographs of the cannabis *in situ* and Mr. Tomasi gave, what I consider, credible evidence that Sergeant Tu'utafaiva deleted a video of the search, I cannot be satisfied that the items located in the search were the same items logged into the exhibits register and subsequently analysed by Officer Pale.

The bribery charge

[36] Officer Tapueluelu's evidence about what Mr. Tomasi said in the car on the way to the police station was not challenged and I accept it. I reject Mr. Tomasi's explanation that he did not challenge Officer Tapueluelu's evidence because he was upset. He was upset, but he was given time to compose himself over lunch before resuming his questioning. It was at that point that I asked him if he wanted to ask Officer Tapueluelu about

what had happened on the ride back to the station. He replied that he did not.

- [37] I am also satisfied that Mr. Tomasi's words were a clear invitation to accept a payment to release him. There is no doubt in my mind that is what Mr. Tomasi intended by his words.
- [38] But that is not an end of the matter for two reasons. First, the particulars in the indictment allege that Mr. Tomasi offered a bribe to the officers "so they refrain from arresting him." That is plainly not what occurred, as he had been arrested some time earlier. He offered a payment for his release from custody, which is a different matter. Had this been the only difficulty I would have been minded to remedy it by amendment of the indictment; but it was not.
- [39] The more significant matter concerns the requirement that the inducement be offered to a police officer in the execution of his duty. To understand why this is an issue, it is helpful to refer to the recent decision of the High Court (NZ) in *Webster v New Zealand Police* [2019] NZHC 1335.
- [40] Mr. Webster appealed from conviction for offences that included assaulting a police officer in the execution of his duty. Mr. Webster had called the police for assistance because of an altercation with his methamphetamine-addicted son. When the police arrived Mr. Webster was standing on his property inside the fence. A police officer entered the property and was told to get out by Mr. Webster and, when he did not, Mr. Webster pushed him. Mr. Webster was convicted of the offence in the District Court, from which decision he appealed.
- [41] The police relied, *inter alia*, upon s. 14 of the Search and Surveillance Act 2012 that provides a constable may enter a place, and take any action he or she has reasonable grounds to believe necessary to prevent offending or avert an emergency if he or she "has reasonable grounds" to suspect an offence was or was about to be committed that would likely cause injury to any person or

serious damage to, or serious loss of, any property or, there was a risk to the life or safety of any person that required an emergency response.

[42] After noting that it was a fundamental principle of New Zealand law that the coercive power of the State, “including entering onto private property, may only be exercised under lawful authority,” Palmer J held that s. 14 did not justify the police officer’s actions in entering Mr. Webster’s property because he did not have reasonable grounds to suspect an offence was about to be committed causing injury or that there was a risk to the safety of any person requiring an emergency response (at [30]). It followed that, although Mr. Webster undoubtedly assaulted the police officer, it had not been proven that the constable was lawfully on Mr. Webster’s property when the constable was assaulted and he was not, therefore, acting in the execution of his duty. The appeal against conviction was allowed.

[43] In the present case, Mr. Tomasi was arrested without warrant. The powers of the police to make an arrest without warrant are contained in s. 115 of the Tonga Police Act. It requires that a police officer believes on reasonable grounds that the person is, is about to, or had committed an offence. A person so arrested must be brought before a Magistrate or, if there is no Magistrate, the officer in charge of the police station, to be charged as soon as practical after being arrested (s. 116).

[44] The only basis for the police to believe that Mr. Tomasi had, was, or was about to commit an offence was that what was believed to be illicit drugs were found on his person and in his vehicle during the search. But I am not satisfied that the search was lawful and the evidence of the search is inadmissible in evidence against Mr. Tomasi. There being no other basis for Mr. Tomasi’s arrest, the prosecution has failed to prove beyond reasonable doubt that Police Officers Tapueluelu and Leveni were acting in the execution of their duty when Mr. Tomasi offered them an inducement to release him. This charge must be dismissed also for that reason.

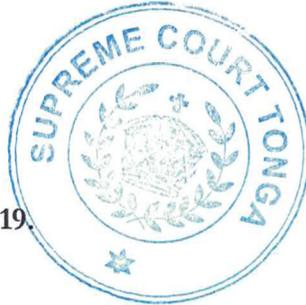
Result

[45] Mr. Tomasi is acquitted on all counts in the indictment.

Arms

[46] Counts 4 to 7 of the indictment relate to firearms and ammunition found by the police at Mr. Tomasi's home after they were invited on to the property by Mrs. Tomasi. Mr. Tomasi denies any knowledge of the firearms/ammunition and claims no interest in them. In those circumstances, I order their disposal under s. 34 of the Arms and Ammunition Act.

NUKU'ALOFA: 17 July 2019.



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

O.G. Paulsen

LORD CHIEF JUSTICE