

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

CR 50 of 2019

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BETWEEN: R E X - Prosecution

AND: PANGI PULOKA - Accused

BEFORE THE HON. ACTING CHIEF JUSTICE CATO

Counsel: Ms. T. Kafa for the Prosecution
Mr. V. Mo'ale for the Accused

RULING ON PRIMA FACIE CASE SUBMISSION

- [1] The accused, Pangi Puloka, was charged with one count of possession of methamphetamine contrary to section 4(a) of the Illicit Drugs Control Act initially said to be about 0.94 grams but by the end of the prosecution case this amount had decreased to a significantly lesser amount.
- [2] During the course of a search undertaken pursuant to warrant on the 21st June 2018 under the control of a former Inspector Sateki Tu'utafaiva and other police officers, Police entered the accused's residence which was a caravan on his parent's property to find him sleeping with his wife. The police left the room. Shortly after that, the accused came out of the caravan and was searched. Inspector Tu'utafaiva had instructed other officers standing near to search the accused. This was carried out by two Police constables. The first search was carried out by a police officer who patted down the accused from the rear and found no drugs. Another office Constable Fifita saw what appeared to be a small pocket on the front of Mr Puloka's T-shirt. He placed his fingers in the pocket and located a small plastic bag of a white substance subsequently identified by the ESR in Auckland to be methamphetamine.

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[3] At the close of the Prosecution case, Mr Mo'ale submitted his client had no case to answer. He contended that the affidavit of Inspector Tu'utafaiva lacked sufficiency and there was no basis established to justify the warrant being issued under section 51 of the Magistrate's Court Act. This required a Magistrate to be satisfied that reasonable grounds exist for believing that any property upon or in respect of which any offence has been committed is in any house or premises. He did so on the basis of an affidavit which was deposed by Inspector Tu'utafaiva relevantly as;

“Tonga Police have reasonable and reliable information regarding illicit drugs namely cannabis and ice that are kept at the town allotment and residence of Tei Puloka (m) of Hofoa where Pangi Puloka (m) Hofoa resides with his wife and others.”

[4] Mr Mo'ale submitted that this was an insufficient foundation for grounding a genuine belief in the Magistrate and the search of the premises was illegal. I have some misgivings with the affidavit and the paucity of information supplied to the Magistrate. Assuming that the information was provided by an informant and for that reason could not be divulged under the provisions of section 30 of the Illicit Drugs Control Act, a more comprehensive account of the nature of the information and when it was revealed to police should in my view have been included. If it was an informant then the officer should have provided information regarding whether that informant had reliably provided information in the past. As the affidavit exists there is no objective basis upon which the Magistrate could form any independent judgement of what the information was, whether it was likely to be reliable and whether in fact there were reasonable grounds for him to believe that drugs would be found on these premises. He is totally reliant on the conclusions and assertions and judgment of the deponent Inspector Tu'utafaiva that the information is reasonable and reliable. In Poelman (2004) 21 CRNZ 69 the New Zealand Court of Appeal, whilst upholding warrants issued in that case said;

“When police are drafting these applications and any affidavits in support, they should draft them with as much specificity as possible. The police are not drafting them so that they can safely later be given to defendants and defence counsel. It is essential that the judicial officer who determines the search warrant application gets as much information as possible, no matter how sensitive that may be. The police can rest assured that the Court will protect informant's identity by sanctioning appropriate excisions if and when defendants ask for copies of search warrant applications.”

- [5] The affidavit in Poelman which detailed two separate searches of the Appellant's premises had been heavily redacted before a copy had been released to the defence. This practice had been upheld even though the defence had not been able to sight all the information the Police had provided in the affidavit. I am conscious that New Zealand courts and Police may be more vigilant to protect disclosure of confidential information such as might likely identify an informant and commonly do so by redaction. However, there is no good reason why in Tonga the provision of more detailed information concerning the date or periods when the information was received by the police, the general nature of it, whether it was provided by an informant, and the known reliability of that informant could not be adduced without threatening the security of the identity of the informant. Where there is a risk that disclosure of information may compromise the identity of an informant, then the officer and Court should take particular care to ensure that any copy of a supporting affidavit that is provided to the defence should be redacted. There is a responsibility resting on the Officer in charge to ensure that his informant is not compromised and is protected so he should be vigilant and take appropriate steps to ensure that this kind of information is not released to the defence by a Court without appropriate redaction. This may mean he has to consult prosecuting authorities for guidance before an affidavit is released to the defence that is supportive of the grant of a warrant.
- [6] Obviously care has to be taken in the preparation and security of the information contained in affidavits in support of applications for warrants to search but in order to maintain the integrity of the warrant process in the public interest of privacy and freedom from arbitrary search, and preclude a Magistrate's authority to issue a warrant being more than a rubber stamp, in my view, more information should be included in an affidavit supportive of a warrant than was included in the affidavit in this case.
- [7] Ms Kafa quite responsibly submitted this was typical of the information that is provided in Tonga. That may be so, but a real concern I have is that with greater activity than hitherto in drugs particularly methamphetamine drug activity and the appearance in Tonga of overseas representation in connection with this kind of offending, it is predictable that sufficiency of affidavit material on which warrants are based will become serious issues. The integrity of some drug searches may be impugned where the supporting affidavits do not reveal a proper foundation.

Warrants that are the product of the police officer's belief rather than any genuine belief of the Magistrate based upon an objective and independent assessment of the information supplied may be successfully challenged with serious consequences where significant amounts of illicit drugs have resulted from a search. In Elzaw v Nikola [1992] 1 Qd R 145, the Court of Appeal of Queensland observed that a complaint grounding the warrant should have avoided setting out conclusion and allegations and instead should have set out the facts in such a way that the issuing justice could assess their reliability as a foundation for a conclusion that there were reasonable grounds for entertaining the relevant suspicion or belief. It may be a matter the Commissioner would like to consider and issue guidelines for the drafting and content of affidavits of this kind. This issue of police guidelines was also the subject of inquiry by the Court of Appeal in Poelman.

[8] I do not, however, have to rule on this affidavit because search of the caravan or house as it was called by witnesses (there was no reference to caravan in the warrant) where the accused was residing and his car did not result in the location of any drugs. There was some drug equipment located in the accused's car being pipes said to be used for methamphetamine use.

[9] What is relevant here is the warrantless search by the police officers of the accused himself that resulted in a small quantity of methamphetamine being found. Searches of the person are more intrusive than searches of residences. They may be carried out under section 13 of the Illicit Drugs Control Act which provides;

- a) If a police officer has reasonable cause to suspect that any person has committed an offence under this Act, he may detain and search that person.
- b) The police officer may seize anything found on the person relating to an offence under this Act."

[10] Section 122 of the Tonga Police Act also contains the following power (search of persons without warrant);

This section applies if a police officer is satisfied on reasonable grounds, that

- a) A person has any of the objects mentioned in 2 in his possession; and
- b) It would be impracticable, unreasonable or not in the interests of justice if the officer was required to apply for a warrant in order to search the person for objects.

- [11] Illicit drugs are included in the items mentioned in 2.
- [12] The standard of belief required under section 122 of the Police Act, that is satisfaction on reasonable grounds, would seem a slightly higher standard than reasonable cause to suspect under the Illicit Drugs Control Act. Be that as it may, whichever standard is adopted, the state of mind of the officer who initiates the warrantless search must be more than a hunch. Mr Mo'ale said that he wanted to cross-examine Inspector Tu'utafaiva on this issue. Probably, fortuitously for the defence, it was known that Inspector Tu'utafaiva had left the police, is overseas and could not be contacted.
- [13] I do not have his evidence before me on the threshold reason for giving the instruction to search the accused. Ms Kafa submitted that I could draw an inference from all the circumstances of the case that Tu'utafaiva had reasonable cause to suspect, but like Paulsen CJ, in a similar situation involving a warrantless search of a motor vehicle under section 24 of the Illicit Drugs Control Act, R v Tomasi CR 70/2019 17th July, 2019 (a copy of which Mr Mo'ale provided me with), the unavailability of former Inspector Tu'utafaiva also in that case had meant that a warrantless search in which illicit drugs and firearms had been located could not be supported by evidence as to the state of mind of the former Inspector and was consequently ruled an illegal search. Like Paulsen CJ, also, in the absence of evidence from Inspector Tu'utafaiva as to his reasons for ordering the search, I am unable to conclude that the search was conducted in good faith and so the evidence should not be admitted under the principles in Bunning v Cross (1978) 141 CLR 54 which I applied in R v Kitekei'aho unreported, Supreme Court CR 36 of 2015, 27th July 2017. I cannot speculate about the state of belief of the former Inspector's mind. In any event, I also agree with Paulsen CJ that, whilst the small amount of methamphetamine located is plainly cogent evidence, it is offending on the very low scale and does not in my view warrant the exercise of the discretion in the Prosecution's favour.
- [14] There being no admissible evidence of methamphetamine for the reasons I have given, there is no prima facie case established and the accused is acquitted of the charge of possession of an illicit drug.

NUKU'ALOFA: 29 August 2019

