

**IN THE SUPREME COURT OF TONGA**

**CRIMINAL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CR 49, 148 – 149 of 2019**

**R E X            -V-    KALAUSA TU'ALAU                            (CR49/2019)**

**REX             -V-    KEPUELI TAUTUA'A                            (CR148/2019)**

**REX             -V-    ERNIE FOTU                                        (CR149/2019)**

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**RULING (VERDICT)**

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**BEFORE:**                    **HON. JUSTICE NIU**

**Counsel:**                    Mrs. T. Kafa for Prosecution  
                                      Mr. S. Tu'utafaiva for Tu'alau  
                                      Mrs. L. Kuli for Tautua'a and Fotu

**Trial:**                        3, 4, 5, 6 and 11 December 2019

**Submissions:**            by L. Kuli on 10 January 2020  
                                      by Ms. T. Kafa on 29 January 2020

**Date of Ruling:**        27 March 2020

**Charges**

[1] The first accused, Kalausea Tu'alau (Kalausea), is charged with 2 charges:

Count 1:                    that he knowingly without lawful excuse possessed methamphetamine, contrary to S.4(a) of the Illicit Drugs Control Act;

Count 2: that he possessed 297 ammunition for a .22 rifle which exceeded the prescribed condition of his arms and ammunition licence, contrary to S.4(1) and (3) of the Arms and Ammunition Act.

[2] The second accused, Kepueli Tautua'a (Kepueli), is charged with 1 charge:

Count : that he knowingly without lawful excuse possessed methamphetamine contrary to S.4(a) of the Illicit Drugs Control Act.

[3] The third accused, Ernie Fotu (Ernie), is charged with:

Count : that he knowingly without lawful excuse possessed methamphetamine contrary to S.4(a) of the Illicit Drugs Control Act.

### **Pleas, elections and joint trial**

[4] All 3 accused pleaded not guilty and elected trial by judge alone, and raised no objection that they be jointly tried in this trial, which joint trial of course is appropriate because all charges relate to the same incident which took place in the bush area of the village of Fatumu, Tongatapu, on 25 June 2018.

### **Burden and standard of proof**

[5] The prosecution has the burden of proof, that is, of proving the charges against each of the accused and the standard of that proof is proof beyond reasonable doubt. That means that it must satisfy me that there cannot be any reasonable explanation but that each of the accused has committed the criminal offence or offences with which he has been charged in this trial. None of the accused is required to prove that he did not commit the offence or offences with which he is charged. That is because everyone is presumed to be innocent until proved guilty to the said standard of proof.

### **Admissible evidence**

- [6] The required proof, as stated above, means that there must be evidence that the 3 accused committed the offences with which they are each charged. But what is crucial is that the evidence must be admissible evidence, and the law provides for what is admissible and what is not admissible evidence. The prosecution must prove the charges with admissible evidence.

### **Evidence given**

- [7] In this trial, only the prosecution produced witnesses who gave oral and documentary evidence to prove the charges against the three accused. None of the accused gave any evidence, although they, through their respective counsel, cross-examined those witnesses on the evidence they gave in this trial.
- [8] Woman police officer, Ane Lavemaau, at the Mu'a police station, gave evidence that she received a phone call on 25 June 2018 and got information which she wrote in a note book and which she conveyed to another woman police officer, Sisi Tonga, who told her to convey it to the head of TRG (Tactical Response Group) of the police, and she did. She said she conveyed it to Officer, Semi Ve'ehala, head of TRG. She said she was instructed to convey it to police officer, Setefano and she did. She said that the information she had received was that there were weapons and drugs being present in the bush area between Lavengatonga and Fatumu. She said that she had rung back the person who had rung her and that person confirmed the information that was first given to her, but when she rang that number back a second time, the telephone was dead. She did not say who the caller was or what he or she was or any detail of the information she received, or the time she received it. She did not even produce or refer to what she had written in her note book. Neither counsel cross – examined her.
- [9] CID police officer at the time, but now a farmer, Viliami Nusi, gave evidence that on 25 June 2018, he and the police officer, Setefano,

went in a police vehicle to the bush area at Fatumu at about 8:30am. He said that there were two vehicles parked on the bush road there, a black Voxy van and a red van. He said that Setefano spoke to one man there, the third accused, Ernie, but he did not hear what they talked about, and afterwards, he and Setefano, left and Setefano dropped him off on the Liku Road to wait for the TRG team and he left in the police vehicle. He said that sometimes later, the red van drove past and left, and about 15 minutes later the TRG team arrived and he went with them to the black Voxy van.

[10] He said that there were the 3 accused there standing outside of the van when they arrived and the team had them raise their hands and their bodies were searched by them and that he himself did the search of the van. He said he found in a glove box in the dashboard (where the steering wheel was) two bags, one a clear plastic bag containing .22 bullets and a black fabric bag containing .22 bullets as well. He said that he also found a .22 rifle lying on the floor between the driver's seat and the front passenger seat with the barrel pointing to the front and the butt almost touching the rear seat behind the driver's seat. He said he also found in a hollow in the dashboard above the radio dial and air con controls, which are between the driver's seat and front passenger seat, a small clear plastic bag containing what appeared to be methamphetamine. He said that the little bag was hidden amongst a deck of cards which was in the hollow of the dashboard.

[11] That is the substance which the prosecution say is methamphetamine and with the possession of which each accused is charged in this trial as stated above.

[12] He said that neither he nor any police officer had any search warrant to search the motor vehicle or the persons of the three accused or of any person.

[13] He said that when they arrived there, all 3 accused were outside of the Voxy van and that the driver's door was open.

- [14] Woman police officer, Lu'isa Moala Takapu, the officer responsible for maintaining the register of exhibits at the Mu'a Police Station and the safe keeping of the exhibits was at the scene too but she only collected the items found in the search. Back at the station, she said that the bullets were counted and there were 200 bullets in the clear plastic bag and 71 bullets in the black fabric bag, and 26 loose bullets which were with the cash and packet of Winfield cigarettes, making a total of 297 .22 bullets. She said that the next day she and another Officer, Sione Ve'a, took the little plastic bag with the substance and had it weighed by the forensic evidence officer in Nuku'alofa, Sione Ve'a, and that the weight of the little bag together with the substance came to 0.37 gram, and she entered it in the Mu'a register and locked the bag in the exhibit room. She said that on 5 July 2018, she and Officer Ve'a took the little bag and handed it over to exhibits officer, Minola Pousima, at the Central Police station in Nuku'alofa.
- [15] Exhibits officer, Minola Pousima, gave evidence that on 8 November 2018, he handed over the little plastic bag with the substance to Officer, Karsten Leveni, to hand carry together with other exhibits to New Zealand to be analysed by experts there.
- [16] Officer, Karsten Leveni, gave evidence that he flew to Auckland, New Zealand with the little plastic bag and two other exhibits for analysis by the Institute of Environmental Science and Research (ESR) on 8 November 2018 and that he duly delivered all the exhibits to officer, Janine Wilson, of that institute the following day, 9 November 2018. He said that this particular plastic bag from the Mu'a station had a label on it called "Operation Halaliku" to differentiate it from the other two exhibits.
- [17] He said that the analysis report was received from the institute and he produced it in evidence – Exhibit 12. The report stated:

"EXH 51/18 A sealed plastic bag, marked in part  
"OPERATION HALALIKU, enclosing a self-

sealing plastic bag containing white crystalline powder.

The powder weighed 82 milligrams and contained methamphetamine.”

- [18] Both witnesses, Sione Vea, who went with the Mu’a station exhibit officer, Lu’isa Moala Takapu, to weigh the substance, and the officer at the forensic officer, Leniti Pale, who carried out the weighing, gave evidence and confirmed Lu’isa Moala Tupou’s evidence, that the weight of the substance including the weight of the little plastic bag was 0.37 gram.
- [19] Officer, Patelesio Tu’itavuki, gave evidence that he attended at the scene together with the TRG team and he took photographs, 12 of which he produced in evidence.
- [20] Officer, Kisepi Vimahi, of the TRG team gave evidence that he was one of the team that went and seized the scene to enable the search and arrest to be made and numbered from 1 to 12.
- [21] Officer and witness Sione Vea also read out and produced the records of interview of the three accused, their statement of charges and their statements made in writing to him. Mr. Tu’utafaiva asked that I note his client’s objection to the production of his record of interview, statement of charges and statement as evidence and that he would state his grounds for the same when he would file his submissions at the end of the trial. I accepted and duly noted it.

### **Defences of the accused**

- [22] Mrs. Kuli (former) counsel for second and third accused filed her written submissions and submitted as follows:
- (a) Because the search made by CID Officer Viliami Nusi, of the black Voxy van was carried out without any search warrant having been issued by the Magistrate’s Court under S.23 of

the Illicit Drugs Control Act, S.24 of the same Act required that the grounds required under S.23 for issue of a search warrant must exist before a search without warrant could be made (if it is necessary to do so in order to prevent the loss or disappearance of the required item). She submitted that no evidence was given that such grounds existed. Accordingly, she submitted that the search was unlawful and the substance found in the search could not be lawfully admitted into or as evidence against the accused. She referred to the case of *R v Tomasi* (CR70/2019) where Paulsen LCJ held the drug found was inadmissible as evidence.

- (b) The substance found in the search could not be proved to be methamphetamine because the substance which was analysed in New Zealand and found to be methamphetamine, differed from the substance which was found in the search because they had two different markings, the one found being marked no "41/18" whereas the one sent to New Zealand was marked no "51/18". But more importantly she submitted that whereas the substance found was weighed and confirmed in Tonga to be 0.37 gram (or 370 milligrams) the substance that arrived in New Zealand and analysed by ESR was 82 milligrams, and that there is therefore a reasonable doubt that what was found in the search was not what was analysed in New Zealand.
- (c) There was no evidence that either the second or third accused knew of the presence of the substance in the black Voxy vehicle and they therefore could not be held to be in possession of the substance. She referred to *R v Motuliki* [2002] Tonga LR 124 and to Archbold (2001 Ed) para. 26.61 which states that:

*"A person is in possession of something when he has knowledge of its presence and some*

*control of it; but he would not have possession unless he either knew, or the circumstances were such that he had the opportunity, whether he availed himself of it or not, to learn or to discover in a general way what the items were."*

She submitted that because the second and third accused did not know of the presence of the substance in the vehicle, they cannot be held to be abetting the first accused to have possession of it.

### **Submissions of the prosecution**

- [23] In response to Mrs. Kuli's submissions, Ms. Kafa for the prosecution submitted that –
- (a) the search of the motor vehicle was lawful,
  - (b) the substance found in the motor vehicle was methamphetamine,
  - (c) all three accused had possession of the methamphetamine found, and
  - (d) alternatively, the second and third accused abetted the first accused to have possession of the methamphetamine found, and
  - (e) the first accused was guilty of possession of 297 .22 rifle bullets when he was only allowed by his licence to possess 50 of them.

### **Search of motor vehicle without search warrant**

- [24] Ms. Kafa submits that the police officer who carried out the search, Viliami Nusi, had reasonable grounds to suspect that there was illicit drugs in the motor vehicle, the black Voxy van, because he had been taught in a 2 weeks training course that the symptoms

shown by a person who had just consumed or taken methamphetamine were exhibited by the 3 accused as soon as he saw them outside of the van at the scene. He said in his evidence that he saw that they all had blood shot eyes, and they were gnashing their teeth and were widening their eyes as if they were glaring at something with wide open eyes.

[25] I agree that that was what Viliami Nusi stated in his evidence when cross-examined by Mr. Tu'utafaiva. He said that he had undoubted belief there was drug in the vehicle and that he based that belief on his observation of their facial condition or appearance as he had described. And I accept that Viliami Nusi had a reasonable ground to suspect that there was methamphetamine drug in the van. I find that the search that he then proceeded to make of the van without a search warrant by reason of the circumstances at the time was lawful by reason of the provisions of S.24(i) of the Illicit Drugs Control Act, which provides as follows:

"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."

[26] The grounds for obtaining a warrant under section 23 is that the Magistrate is satisfied, by information on oath, that there are reasonable grounds to suspect that there is in or on any place an illicit drug, controlled chemical or controlled equipment. So that when Viliami Nusi had the reasonable grounds to suspect that there was methamphetamine in the van, there was then the reasonable grounds required to obtain a warrant under S.23.

[27] Accordingly, I am satisfied that the search of the van without warrant was lawful.

**Was the substance found in the van methamphetamine?**

[28] Ms. Kafa submits that the substance found inside a small self-sealed plastic bag found amongst a deck of playing cards found in a hollow on the dash board of the van between the driver's seat and front passenger seat of the van was methamphetamine, because an expert on drugs namely, Cameron Johnson, of the Institute of Environmental Science and Research (ESR) of New Zealand, found it to be so.

[29] Mrs. Kuli for the second and third accused of course submits that there is a reasonable doubt that the substance analysed by Cameron Johnson in New Zealand was the substance found in the van here in Tonga, not only because the number of the packet sent to New Zealand was not the number of the packet that was found in the van in Tonga, but more importantly, because whereas the substance found in the van was weighed and found to be 0.37 gram (or 370 milligram), the substance received and weighed in New Zealand was found to be only 0.082 gram or 82 milligrams.

[30] Ms. Kafa argues that the substance was the same substance found but that the difference in the weight was due to the weight of the empty self-sealed plastic bag in which the substance was contained. She refers to the evidence of the officer who weighed the substance in Tonga, Leniti Pale, who gave evidence that he weighed the substance together with the plastic bag, that is while

the substance was still inside the plastic bag, and it had the weight of 0.37 gram, and that he had also weighed identical or similar bags on their own some 50 odd times, and had found that their average weight was 0.27 gram. She says that if the weight of 0.27 was deducted from the total weight of the bag and the substance of 0.37 gram, there would then be a net weight of 0.1 gram (or 100 milligrams) of the substance alone. She says that when that is compared with the weight of 82 milligrams found in New Zealand, there was not that much difference.

[31] As to the difference in the numbers, she says that that was explained by the officer, Karsten Leveni, in his evidence, as a simple mistake in transcribing the correct no. 41/18 to the incorrect no. 51/18, and that there is no doubt they both related to the same substance found in the van.

[32] It is clear from the copy of the register of exhibits kept at the Nuku'alofa Central Police Station which was produced in evidence by Minola Pousima as Exhibit 11, that the correct no. is 51/18, because the no. before then is no. 50/18 as shown in it, but it was wrongly transcribed by officer, Karsten Leveni, into his list of exhibits to be taken to New Zealand as no. 41/18 because there was some overwriting over the no. 51/18 which made it to appear to be 41/18. The exhibit itself did have the no. 51/18 attached to it and that was what caused Cameron Johnson to comment as to the inconsistencies. I have no doubt that the error was only in the numbering.

[33] However, the difference in the weight of the substance is serious. It is such that I am not sure that it is the same substance that was found in the van. If Cameron Johnson had stated that he had weighed the self-sealed envelope together with the substance inside it and had found that it came to 0.37 gram or 370 milligrams, I would have had no doubt that it was the same substance that was found in the van. But he did not. We do not know if he had so weighed it. He said he only weighed the

substance inside the bag and found it to be 82 milligrams. That is what he meant when he said, as Ms. Kava points out,

“EXH 51/18            A sealed plastic bag, marked in part “OPERATION HALALIKU”, enclosing a self-sealing plastic bag containing crystalline powder. The powder weighed 82 milligrams and contained methamphetamine”

as I have underlined.

[34] It is true that Leniti Pale said that the average weight of such a self-sealing plastic bag is 0.27 gram or 270 milligrams, but if we use that average weight in respect of this self-sealing plastic bag in this case, the weight of this bag would be 288 milligrams or 0.288 gram instead, and that is a big difference. It would lead one to wonder, and not unreasonably, that the contents of the plastic bag, that is, the substance found in the van, may have been switched with a substance that contains methamphetamine and which weighed only 82 milligrams.

[35] And that is not far-fetched when I also consider the substance which Cameron Johnson said he analysed and found to have contained methamphetamine. I quote the following from the second page of his letter of 21 November 2018:

“Following is a description of the items and results found upon analysis:

A sealed paper bag containing the following:

EXH 46/18            A sealed plastic bag, marked in part “OPERATION FAKAMAHUAHU”, enclosing a plastic package containing white crystalline powder. The powder weighed 16 milligrams and contained methamphetamine.

EXH 49/18 A sealed plastic bag, marked in part "OPERATION TELIE" enclosing a self-sealing plastic bag containing white crystals. The crystals weighed 573 milligrams and contained methamphetamine.

EXH 51/18 A sealed plastic bag, marked in part "OPERATION HALALIKU", enclosing a self-sealing plastic bag containing white crystalline powder. The powder weighed 82 milligrams and contained methamphetamine."

[36] In EXH 46/18, he said that there was "white crystalline powder" and in EXH 49/18, he said that there was "white crystals" and in EXH 51/18, he said that there was "white crystalline powder". He is specific about the formation or appearance of the substance he weighed and analysed in each case, as to whether it is white crystalline powder or white crystals. In both EXH 46/18 and EXH 51/18, the substance was "white crystalline powder", and in EXH 49/18, the substance was "white crystals".

[37] The substance found in the van in the present case was not produced in evidence. It was not returned from New Zealand after the analysis was carried out, because the police in Tonga did not request that it be returned, as stated in the letter from ESR in New Zealand. But photographs of the self-sealing plastic bag with the substance inside found in the van were produced as evidence in Court during this trial – photographs 7, 10, 11 and 12.

[38] I have looked at those photographs carefully and closely and with a magnifying glass, and in particular photograph 11, which is the close up shot of the plastic bag, and cannot see any powder or powder – like substance in it. What I see is what appears to be crystals in the plastic bag, and I do not know if that is what Cameron Johnson described in respect of the substance in no.

51/18 (the Operation Halaliku – which is the name of the operation in the present case) as “white crystalline powder” in his report. He did not give evidence and I do not know what he would say if he was shown photograph 11. But on the only evidence which I have before me, photograph 11, I do not see what Cameron Johnson described that he received and analysed and found to contain methamphetamine.

[39] On the face of it, that appears to explain the big difference of 18 milligrams in the weight of the substance which Leniti Pale weighed and what Cameron Johnson weighed, and that is not an unreasonable explanation, in the absence of any other explanation offered by the prosecution, who has the burden of explaining it.

[40] I have therefore come to the conclusion that I am not satisfied beyond reasonable doubt that the substance found in the van and with possession of which the three accused are charged was methamphetamine or that it contained methamphetamine.

#### **Confessions of the three accused.**

[41] Ms. Kafa for the prosecution submits that (even if the finding of the little self-sealed plastic bag was to be excluded as evidence because the search was unlawful, it having been carried out without a search warrant upon no reasonable ground) the three accused themselves confessed and admitted to the police (Sione Ve'a) that what was in the little bag was methamphetamine, and that despite the failure of the police officer, Sione Ve'a, to inform them that they could telephone or speak to a relative, friend or law practitioner, such as is required under S.149 of the Tonga Police Act, I should exercise my discretion and admit those confessions as evidence against them that they thereby admitted that the substance in the little bag was methamphetamine and that they all had possession of it.

[42] I have to say that had I not have reasonable doubt, as I have explained above, that the substance found in the van (and with the

possession of which each accused is charged) was, or that it contained, methamphetamine, I may have considered exercising my discretion such as counsel has submitted. But because I do not know if the substance found was methamphetamine for the reasons I have given, I do not think that it is right that I should convict them of such serious charges, that is, of possession of methamphetamine which has not been proved to be methamphetamine. If I convict them of possession of methamphetamine simply upon their confessions, it would follow that the analysis of a substance by an expert in future would no longer be necessary. That would not be right. Illicit drugs must be positively proved to be illicit drugs because of the seriousness of such offence. That is why it is presently being done.

[43] I am therefore obliged to exclude the confessions of all the accused as evidence, that is, including the confessions of the second and third accused although they did not object to the production thereof as evidence.

#### **Ammunition charge**

[44] Only the first accused, Kalausa Tu'alau, is charged with possession of ammunition in excess of the amount authorised by his licence and he did not dispute the evidence of the armourer, Falekaono, which was produced in writing by consent of his counsel, Mr. Tu'utafaiva, and the prosecutor, Ms. Kafa. That evidence showed that the accused had a licence to possess a .22 rifle and up to only 50 .22 bullets for the same.

[45] He also did not dispute that he had the total number of bullets of 297 which were found and which were recorded in the register of exhibits.

[46] Accordingly, I am satisfied beyond reasonable doubt that he was in possession of 297 of .22 bullets or ammunition which was in excess of the 50 bullets he was authorised by his licence to possess.

## **Result**

[47] In the result, I find that the prosecution has not proved beyond reason doubt that methamphetamine was found in the black Voxy van in respect of which all 3 accused have been separately charged in their respective counts and I acquit them of those charges and discharge them.

[48] As to the charge that the accused, Kalausa Tu'alau, possessed 297 ammunition for a .22 rifle which exceeded the prescribed condition of his arms and ammunition licence, I am satisfied beyond reasonable doubt that the prosecution has proved it and I convict Kalausa Tu'alau of that charge.

**NUKU'ALOFA: 27 March 2020.**

Niu J  
**J U D G E**