

Count 2: that on 20 February 2019 at Havelu he unlawfully possessed a class A drug, namely, methamphetamine, contrary to S.4(a) of the Act.

Plea and election

[2] He pleaded not guilty and elected to be tried by judge alone.

Representation

[3] It appears from the records in the file that the accused has appeared for himself since committal from the Magistrate's Court and at the commencement of this trial he confirmed that he would represent himself.

[4] The Crown was represented by Ms. Fakatou, Crown Law counsel.

Admission of documents

[5] Before the trial commenced, Ms. Fakatou asked that she have half an hour to speak with the accused. I granted her her half hour. When the Court resumed, Ms. Fakatou informed me, and the accused confirmed that he agreed, that the following documents be admitted as evidence without the calling of the witnesses to produce them, and I directed that they be exhibited as follows:

Exhibit 1 : - memorandum from Acting Superintendent, H. Taufa, to Commissioner of Police dated 21 February 2019, 1400 hours. (1page).

- copy of email from Halatoa Taufa to the Commissioner of Police, at 2:42 pm 21 February 2019 forwarding the memorandum (report) as required by S.122(6) & 123(5) of the Police Act 2010, and of email from the Commissioner at 3:23 pm acknowledging receipt of the same. (1 page).

Exhibit 2 : - Record of interview of the accused at 1322 hours on 22 February 2019. (1 page).

- statement of charges (2 pages).
 - statement of the accused (1 page).
- Exhibit 3 : - Search list (1 page).
- Exhibit 4 : - Register of Exhibit page (1 page).
- Exhibit 5 : - Register of Exhibit Movements (1 page).
- Exhibit 6 : - Exhibit Room Diary (1 page).
- Exhibit 7: - Letter from ESR, New Zealand and formal written statement of the Analyst dated 1 May 2019. (3 pages).
- Exhibit 8 : - Certificate of Analysis by Laulelei Kava dated 12 April 2020.

The evidence

- [6] The Crown called 6 witnesses, all of whom are police officers.

Halatoa Taufa

- [7] Halatoa Taufa, the acting superintendent of police, said that he received information about the accused and he and a group of police officers went to the home of one Tapi Panuve in Havelu and there were only Tapi and the accused there. They were outside a workshop there and they were searched and Officer Fifita said he found a pack in the accused's hand. Taufa said that he asked the accused whose pack it was and that the accused told him that he had found it in the workshop. He said that he charged and arrested the accused with possession of illicit drug. He said that the police searched the workshop and vehicle inside the workshop and then they came out and searched a car parked outside. He said that Officer Fifita called him that there was pack of ice (methamphetamine) under the passenger seat of the car, and that he went over and had a look and that it was there. He said he asked the accused whose the pack was and that the accused said that it was not his. He said that he charged the accused with possession of an illicit drug, and that he arrested him for that offence as well. He said that when the search of the car was being

done, the accused had said that the car was his. He said that the search list was completed and they then left.

[8] When cross-examined by the accused, he said that it was not a complaint that the accused and others were smoking ice at Tapi's place, but that it was information that they had collected and they also had the help of a reliable informer. He said that he was at the back of the car when the cannabis pack was found in the accused's hand. He said that 3 officers searched the car, namely, Officer Fifita, Officer Fihaki and Officer Pohiva, and that they did not stop searching the car until they finished. He said that he did not know if the search of the car finished and that the officers had left the car, before Fifita called that he found something, but he admitted that the accused had argued that the police officers had just put the ice pack in the car themselves.

[9] I asked the witness who it was who had received the information from the informer, and he said he could not remember whether it was Pohiva or Fifita who had conveyed it to him. He said he did not know the informer.

'Apisai Fihaki

[10] 'Apisai Fihaki said that they had information that there was smoking of drugs being carried out at Tapi Panuve's home at Havelu, that it was the accused and others who were smoking the drugs. He said he did not receive the information and that he was only told of it. He said that Halatoa Taufu was the leader of their group. He said that he was driving the vehicle and that when they arrived, he saw the accused getting out of his car. He drew a sketch of the place showing the entrance to the place, the dwelling house, the workshop and the accused's car. It was Exhibited 9.

[11] He said that they searched the workshop and then Officer Fifita said that the accused gave him a pack of cannabis and Officer Taufu charged the accused with possession of illicit drug. He said that he and Officer Pohiva then searched the car, Pohiva searching the front seats area and he

searching the rear seats area. He said he pulled a rug from under the front left seat and Officer Fifita who was standing outside the front left door said that there was a pack of ice under the front left seat. He said that the accused said that we had just put the drug there ourselves. He said Officer Taufu was called and he charged the accused with possession of illicit drugs. He said that the accused did not agree that the pack was in the car before the search began.

[12] When cross-examined by the accused, he said that he and Pohiva did not move away from the car before the ice pack was found.

[13] In re-examination, he said that the rug was for the rear left passenger's feet but it had gone under the front passenger seat. He said that the pack of ice was lying on the floor between the front left door and the front left (passenger) seat.

Tu'amelie Fifita

[14] Tu'amelie Fifita said that there was a report from Havelu that there was drug smoking being carried out at Havelu. He said that he was not the one who had received that information but that it was a phone call and he did not know to whom the call was made.

[15] He said that when they arrived at the place, he saw Tapi standing in the workshop and the accused was sitting in his car. He said he had known the accused from before and he was sitting in the driver's seat. He said he ran up to the accused and shouted to him not to move. He said that the accused then put his right hand into his trouser pocket as, he, Fifita, opened the door and told him to get out of the car. He said that as the accused got out of the car, the accused got something out of his pocket. Fifita said that he grabbed the accused's right wrist. He said the accused said that he had something in his hand. He said he asked him what it was and that the accused said that it was a marijuana pack. He said he told Taufu of it and the accused then opened up his hand and showed the pack in it. He said that Taufu asked the accused whose the pack belonged to

and that the accused said that it was his. He said that Taufu then charged and arrested him for possession of illicit drug.

[16] He said that he and officers Pohiva and Fihaki then searched the accused's car, he searching the driver's area, Pohiva searching the front passenger's area and Fihaki searching the rear passenger's area. He said that he and Pohiva found nothing and they got out and watched with the accused whilst Fihaki was still searching the rear passenger's area. He said that Fihaki pulled out a rug from underneath the front passenger's seat and he noticed a pack of ice (meth) showing up underneath the front passenger seat close to the left side of the seat and he told Fihaki of it. He drew a sketch of the car and the seats and made a mark on it where the pack was. The sketch was produced as Exhibit 10.

[17] He said he knew straight away when he saw it that it was a pack of ice because he was acquainted with packs of ice in his work, and he spoke it out "It's an ice pack" and that the accused said that he, Fifita, had just put it there. He said that no one touched the pack until after Taufu had charged the accused with possession thereof. He said that the boot was searched and the house and workshop were searched but nothing was found in them.

[18] When questioned by the accused, he denied that he had continued to search the car after Pohiva and Fihaki had finished and had gone and stood in the verandah of the house. He was asked and he agreed that when he arrived and went to the accused, the accused was sitting in his car talking on the telephone. He denied that it was Pohiva who had found the pack of ice in the car, and said that it was him who found it.

Tevita Pohiva

[19] Tevita Pohiva said that they got reliable information that there were persons smoking drugs at Havelu and that they had to act quickly. He said that when they got there, the accused was inside his car and Tapi was in the workshop, and that Taufu and Fifita ran to the accused whilst

he, Fihaki and another officer, 'Uluheua, ran to the workshop where Tapi was. He said that they found nothing to show that smoking of any drug had been done. He said that Taufa then told him to come and help search the car of the accused, and that he, Fihaki and Fifita carried out the search of the car, he searching the front passenger area, Fifita searching the driver's area and Fihaki searching the rear passengers' area. He said the accused was standing on the left side of the car. He said that when he and Fifita found nothing in the areas they searched, they came and stood together with the accused on the left side of the car. He said that when Fihaki finished with the right side of the rear passengers' area, he went around to the left side of the rear passenger area and searched there. He said that Fihaki pulled out a rug on the floor and an ice pack fell out onto the floor of the gap between the front passenger seat and the left door of the car.

[20] He said that they all saw it and Fihaki told the accused to come and look and that they all looked at it. He said that Fifita saw the pack fall out and that Fifita said, "It's an ice pack". He said that the accused was shown the pack and that the accused said they, the police, had just put it there.

[21] He said that the only things they searched were the workshop and the car.

[22] When questioned by the accused, he denied that they had finished searching the car and were standing in the verandah of the house and that Fifita then prompted him, the witness, to come and open the door of the car. When asked by the accused why he had not seen the pack by the door, he said that he only searched the front seat itself and the area of the passenger's feet. When asked why he had not searched the area of the seat by the door, he said it was because he could not put his hand between the seat and the doorframe. He was asked whether the pack was under the seat and he said it was on the rug on the floor of the back seat. He then drew a sketch of the car seats and areas of the car and marked thereon the spot when he said the pack was. It was Exhibited 11. It

shows the spot about a quarter of the length of the rug lying from left to right with the spot being closer to the left edge but on the floor of the rear left passenger feet area. He said that the pack was on the floor of the back seat foot area.

[23] When the witness was re-examined by Crown counsel, it was pointed out to him that he had said in his evidence in chief that the pack was found in the gap between the front left door and the passenger seat, but that in cross-examination he said it was found on the rug on the floor of the rear passenger front area. He was asked which of these two positions was the correct position of the pack. He said that the correct position was the gap between the front left door and the passenger seat. He then drew another sketch showing it which he produced as Exhibit 12.

[24] I allowed the accused to question the witness again about the change of his answer in cross-examination, and the accused asked him why he was changing his evidence, and he said that it was just an error on his part.

[25] Witness Leniti Pale gave evidence but he had nothing of relevance to add.

Laulelei Kava

[26] Laulelei Kava said that he took 0.04 gm of the material in the cannabis pack and examined it, botanically by microscopic examination and then by chemical testing and found that the material was cannabis, as prohibited by the Illicit Drugs Control Act.

[27] Robyn Sommerville of the Institute of Environmental Science and Research in Auckland, New Zealand stated in her report dated 1 May 2019 as Exhibited 7 that the self-sealing plastic bag containing white crystalline powder, which was labeled with the name of the operation conducted by the police in the present case, was received by her and that she weighed the powder inside the bag and that it came to 129 milligrams and that it contained methamphetamine.

Defence Evidence

By the accused, Nisifolo Pisima'ake

- [28] Nisifolo Pisima'ake said that on that day, he had gone with another man named Ti Tahaafe and towed a vehicle over to Tapi's workshop to be fixed. They then went home to get the spare part, an alternator, to be installed on the vehicle but Ti Tahaafe had to go to do some work with another man and so he came to the workshop alone in his car.
- [29] He said that as he turned into Tapi's place, his sister in Australia rang him on his telephone, and so he drove in and parked and talked to her whilst sitting in the car.
- [30] He said that while he was talking to his sister, Tapi came up and saw him talking and crying on the phone, and handed him a pack and said that it was found in the vehicle that they had towed up to the workshop. He said that he told Tapi to wait until he finished talking on the phone and so Tapi turned and went to the workshop.
- [31] He said he continued talking with his sister for 10 to 15 minutes when he saw in his side mirror two police vehicles drive in through the entrance to the place. He said Fifita jumped out and ran up to him and opened his door and grabbed the front of his Tshirt and pulled him out of the car.
- [32] He said Ffiita said to him, "Come, you are caught red-handed". He said that he said to him "what?", and that Fifita said to him, "where is the ice?" He said that he said to him that there was no ice and that he handed to him what he had in his hand (which Tapi had handed to him). He said that Fifita called and told Taufu that he had found marijuana on him. He said that he said to Fifita that that was found in that car that they had towed up, but that Fifita told him to tell that to the Court, and he then cuffed his hands behind his back and told him that he was arrested and charged with possession of illicit drug, and told him that his car would be searched.

- [33] He said that Fifita then led him to stand by the driver's door while he went into the driver's seat and searched that area. At the same time, he said Fihaki searched the rear passenger seats area and that Pohiva searched the front passenger seat area.
- [34] He said that after about 5 minutes, Fihaki and Pohiva finished and they went and stood in the verandah of the dwelling house while Fifita was still searching the driver's area. He said that when he also finished searching, he went and stood with the other two in the verandah.
- [35] He said Fifita then called out to him "Nisi" and he looked over at them and saw him pulling Pohiva's hand so that Pohiva came to the car. He said that Pohiva came and opened the front left door (the front passenger door) and then Pohiva said to him, "Come and see what this is". He said he went over and looked and that he saw a pack lying in the gap between the front left door and the front passenger seat, and that he said, "what's that?"
- [36] He said that Fifita spoke out from where he was in the verandah of the house, "what else but an ice pack". He said that he then said to them, "Don't do that for it is made up. Who put that pack in the car?" He said one of them he was not sure who said, "you can tell the Court that". He said that he said to them, "what sort of work is that? You searched that just now. Why was this not found then?" He said no one said anything and that they just smiled.
- [37] He said that Taufu was in the workshop with Tapi at that time and that he did not know who told him, but he came over and charged him with possession of the pack of ice, and that he was then put into the police vehicle and taken to the police station.
- [38] When Crown counsel cross-examined him, the accused said that he was talking with his sister on the phone when Tapi gave him the pack. He said he wanted his sister to come over because their mother was very sick but that she said that she couldn't. He said it was so important to him that

she came over and that he was not thinking about what Tapi had handed to him while he was talking. He said he did not think to cut off their talk because it was his sister who had called and that he had no money to call her back later. He said he was crying at the time that Tapi gave him the pack.

[39] He said he knew what marijuana looked like because he had smoked it before but that he had not smoked it for over 10 years. He said he did not look or open the pack to see what was inside because it was important that he talked with his sister.

[40] He said that Fifita was younger than him but he, Fifita was bigger built and he could and did drag him out of the car because he held the phone in one hand and the pack in the other.

[41] He said that although he had not put the things which he had related in his evidence to the police witnesses, he did not and had not made up anything which he had stated in his evidence.

[42] He said that he had said in answer to the charge of possession of the pack of marijuana at the police station that it was true because he did have the pack in his hand, but that his statement that "I took a pack of marijuana from my pocket and gave it to the police and say that it was found in the vehicle we had towed there to fix" was not true, but that he had written it in his statement because Fihaki had told him that if he did, he would be released to go to his mother's funeral.

[43] He said that he thought it was more important to talk to his sister than to stop to examine what was in the pack that Tapi had handed to him. He said he was not sure what was in the pack because he thought the content looked like wheat.

[44] I asked the accused and he said that that sister was the eldest and that he had 2 brothers and 2 other sisters here in Tonga, and that their father had already died. He said that he cried because she said that she could

not come, and that they took long to talk because she was trying to calm him down and encourage him to be strong.

Sionatapi Panuve

- [45] Sionatapi Panuve was called by the accused. He said that when the police arrived, he was working in the workshop and the accused was sitting in his car. He said that 2 policemen came to him while 3 went to the accused. He said that the police took the accused out of the car and searched him and then he heard them arguing as to marijuana found on him. He said that the accused was then arrested and handcuffed and put into the police vehicle and search was made of the place but nothing was found and they left.
- [46] He said that the vehicle that was towed there had been towed there for sometimes before that day and that it was not true that the accused had gone to get an alternator to be installed on it.
- [47] He said that it was not true that he had handed to the accused a pack and said that it had been found in the car that had been towed there because there was no such thing.
- [48] At this stage, the accused appeared to be arguing with and to be cross-examining the witness, and Crown counsel objected. I ruled that the witness was hostile and that the accused could cross-examine him.
- [49] When he was further questioned by the accused about him giving him the pack, he said that he did not know why the accused was making him a part of the matter when it was all the accused own doing. He said that he did not know anything about it.
- [50] When cross-examined by Crown counsel, he said that the police had told him nothing when they arrived and that they did not say that they would search the place without warrant. He said that the police only told them that after they had finished and he was satisfied with that.

[51] He said that the vehicle had been towed there a few days before and he had found nothing in it. He said that he did not speak to the accused while the accused was sitting in his car, and he did not know if the accused was crying. He said he did not go to him. He said he did not know anything. He said that the accused was handcuffed and put in the police vehicle after the drug was found on him.

[52] I asked and he said that when the police came the accused was in his car talking on the phone and that he had been there for sometimes.

Submissions

[53] At the end of the evidence, I asked the accused if he could file written submissions of his defence and he said that he would not be able to and that he would only speak to it, but that he needed time to prepare for it. I then directed that the Crown file its submission by 28 April 2020 and that the hearing be held on 1 May 2020.

[54] When the hearing was held on 1 May 2020, the accused said that all that he wanted to say was that he felt that he was not guilty and that he would just leave this matter to God to deal with these false witnesses against him.

[55] Ms. Fakatou for the Crown made detailed submissions on the evidence given by the witnesses, including the evidence of the accused. She submitted that the evidence were such that:

- (a) the cannabis charge was proved beyond reasonable doubt because the pack containing it was found in his hand, and that he saw through the plastic cover that it looked like wheat or marijuana. Furthermore, he had stated when charged at the police station with possession of it at the scene at Havelu, that "the charge was true" and that he then made a statement "that when the police ran up I took out the marijuana pack that was contained in my pocket";

- (b) the claim by the accused that he was forced by the officer Fihaki to say that in his charge and statement so that he could be released, was too late because it ought to have been raised at the commencement of the trial so that a voir dire hearing could be held to determine the admissibility of those statements before the trial proceeded;
- (c) the methamphetamine charge was proved beyond reasonable doubt because the pack containing the methamphetamine was found between the door and front passenger seat of the car of the accused. She puts this way: The methamphetamine was found in the vehicle of the accused and it is submitted that it was his own. It was found in his vehicle and the accused accept that the vehicle was his. He also accepted that he was sitting in the vehicle at the time the police arrived. It is submitted by the prosecution that the accused ought to have known the contents of his vehicle because it is his vehicle”.
- (d) it is not disputed that the evidence proved that the pack found in the accused’s hand was cannabis, as proved by the witness Laulelei Kava, and that the pack found between the door and the seat of the car contained methamphetamine as proved by the report of Robyn Sommerville.

[56] I asked counsel whether it can be said that the accused had possession of the cannabis if at the time it was handed to him, his mind was not really on it if his mind was on the telephone talk he was having with his sister. She replied that it was clear that the accused did decide to continue to hold it in his hand despite saying that to him the contents looked like wheat or cannabis. Besides, she said that it was only his word that it was his sister that he was talking to on the phone.

[57] I asked her what if any effect was there that the accused was not informed that he could speak to a friend, relative or lawyer before he was questioned at the police station as was required by S.149 of the Tonga Police Act. She replied that the documents (that is the charge form and

statement concerning the cannabis) were already produced as evidence by consent of the accused at the commencement of the trial and so the Crown did not need to call the witnesses to produce those documents as evidence.

[58] I also asked her whether the Crown had to prove that there were reasonable grounds held by the police who did the search to suspect that there were drugs in the premises at Havelu, as was required by S.24 of the Illicit Drugs Control Act. She said that there were reasonable grounds for the police to suspect that there were drugs there.

The Law

Search without warrant

[59] The two charges against the accused have been brought because the police found a pack (small plastic bag) of cannabis and a pack of methamphetamine in a search which they carried out without a warrant. The police have the lawful authority to carry out searches without a warrant provided they comply with the provisions of the law authorising them to do so.

[60] The first of those laws is S.122(1) of the Tonga Police Act and it provides (as relevant) as follows:

"122. Search of persons without warrant

- (1) This section applies if a police officer is satisfied, on reasonable grounds,
 - (a) that a person has any of the objects mentioned in subsection (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 the objects."

Subsection (2) (b) lists "an illicit drug" as an object for the purpose of subsection (1).

[61] The second is S.123 (1) (a) of the same Act. It provides (as relevant) as follows:

"123. Search of places, vehicles, vessels and aircrafts without warrant.

(1) This section applies if a police officer is satisfied, on reasonable grounds, that:

(a) a serious offence has been committed, is being committed or is about to be committed in any place, premises, vehicle, vessel or aircraft 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 conduct a search in relation to the offence.

....."

[62] The third is S.12 of the Illicit Drugs Control Act. It provides as relevant as follows:

"12. Power to search vehicles and craft

(1) This section applies if a police officer has reasonable cause to suspect that there is in or on any vehicle or craft-

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

(b) evidence relating to an illicit drug

...

(2) The police officer may –

- (a) stop and detain any vehicle or craft for the purpose of searching it or any occupants or goods;
- (b) search any person in that vehicle or craft ...
...."

[63] The fourth is S.13 of the same Act. It provides as follows:

"13. Power to search a person.

- (1) 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.
- (2) The police officer may seize anything found on the person relating to the commission of an offence under this Act."

[64] The fifth is S.24 of the same Act. It provides as relevant as follows:

"24. Search and seizure without warrant in emergencies

- (1) A police officer may exercise any of the powers in section 23 without warrant, if the grounds for obtaining a warrant under that section exist ..."

The grounds for obtaining a warrant under S.23 are that "there are reasonable grounds to suspect that there is in or on any place an illicit drug", evidence or property relating to an offence under the Act.

[65] In all those provisions of the law where searches are to be made without warrant, the critical requirement is that the police officer must have reasonable grounds or cause to suspect that the person has committed an offence or that there is an illicit drug in the premises or on the person. And where a police officer has made a search without warrant, and has seized an object or substance found in such search, and has charged a person with the unlawful possession of that object or substance, he has the burden and obligation of proving and satisfying the Court that he had

such reasonable grounds or cause for the search he made without warrant. Such proof is not satisfied by simply saying to the Court that he had reasonable grounds or cause to do so. He must satisfy the Court what the grounds or cause were, that they existed and that they were reasonable.

[66] Both Lord Chief Justice Paulsen (in *R v Tomasi* (CR70/2019 – 17 July 2019)) and Justice Cato (in *R v Puloka* – CR 50/2019 – 29 August 2019) held that the police failed to prove that the police had reasonable grounds to make the searches without warrant and excluded the production of the substances found in the search as evidence and acquitted the two accused in those two cases.

[67] I agree with those two judges. Whereas it is desirable and it is in the interests of justice that offenders are brought to justice, the Legislature has expressly and specifically required that, where a place or a person is to be searched, with or without warrant, there must be reasonable grounds for suspecting that there is an illicit drug or unlawful object in the place or on the person before the search can lawfully be made.

[68] In the present case, no such evidence was given by any witness called by the Crown. Halatoa Taufa, the leader of the search party, said that he received information about the accused and he went with the party to the place. He said (in cross-examination) the information was collected by the police with the help of a reliable informer. He did not say what the information was, why it was reliable, who was the police officer who received it, when, and how. He said he was not sure whether it was Pohiva or Fifita who had passed the information on to him. He made no attempt to prove that there was reasonable grounds or cause to suspect the presence of drug in the place at all.

[69] Officer Fihaki simply said that they had information that there was smoking of drugs being carried out at the place by the accused and others there. He said he was not the one who received the information and that he was only told of it.

- [70] Officer Fifita said that there was a report from Havelu that there was drug smoking being carried on at Havelu and that he was not the one who received the report but that it was a phone call but then went on to say he did not know who received the call. How can he say it was a phone call if he did not know who answered it?
- [71] Officer Pohiva simply said that they got reliable information that there were persons smoking drugs at Havelu and that they had to act quickly. How did he know it was reliable?
- [72] As it turned out, the information was wrong and unreliable altogether because the police found no smoking of drugs being carried on at the place and there was no evidence that any such smoking had been carried out there.
- [73] There was just no evidence that any phone call from any informer was received. There was no reasonable grounds related by any witness to this Court at all. I am therefore not satisfied that there was reasonable ground or cause to make the search which was carried out in the present case without warrant.
- [74] I therefore hold that the search carried out by the police in the present case was unlawful, and that the two packs of substance found in that search be excluded as evidence found in the search.

The charges

- [75] Further to that finding which I have made in respect of the search without warrant, I have also made findings in respect of each charge.

The Cannabis charge (Count 1)

- [76] Officer Fifita says that when he ran up to the accused and shouted to him not to move, the accused then put his right hand into his trouser pocket, and that as the accused was getting out of the car, the accused got something out of his (trouser) pocket. He says that he grabbed that wrist of the accused and asked him what was in his hand, and that the accused

told him it was a marijuana pack. He says that he told Taufu of it and the accused then opened his hand and showed the pack in it. He says that Taufu asked the accused who the pack belonged to and that the accused answered that it belonged to him.

[77] That evidence of Fifita is not supported by any other witness. Officer Taufu said that the accused and Tapi Panuve were both outside the workshop and that they were both searched, and Officer Fifita then said that he found a pack in the accused's hand. He said that he asked the accused whose was the pack and that the accused told him that he had found it in the workshop. That evidence of Taufu contradicts Fifita's evidence. It in fact supports the evidence of the accused instead. I believe the evidence of the accused rather than the evidence of Officer Fifita.

[78] The claim by Fifita that the accused (whilst still in his car) quickly put his hand in his pocket and took out something from it when he called to him not to move does not make sense. If the accused had already put the marijuana pack into his trouser pocket, like Officer Fifita claims the accused had already done, then why would the accused need to take it out of his pocket there and then? To hide or throw it in the car? If so, he would have seen that Fifita would know exactly what he'd do with it. Then why would he take it out of his pocket when he was told not to move? There is no reasonable explanation for it.

[79] I believe that Fifita has made that claim up in his evidence to show that the accused had properly confirmed the contents of the pack and had consciously and knowingly taken possession of it by putting it away in his trouser pocket. I believe that he saw that the accused was more concerned with his telephone conversation than with what he had in his hand, namely, the marijuana pack, like the accused had told him, that Tapi Panuve had given him the pack whilst he was on the phone. He therefore made up his evidence that the accused had put the pack into his trouser pocket already before they arrived.

[80] For a person to have possession of an illicit drug, that person must be proved to have consciously and knowingly taken the drug into his care and control. Archbold 2003 para. 26-7 states it as follows:

“If knowledge cannot be proved possession cannot be established. Possession denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature, but you do not possess it unless you know you have it.”

[81] In the present case, I accept that the accused received the pack of marijuana from Tapi Panuve, and am satisfied that at the time he received it, he was engrossed in his conversation, an unhappy conversation, with his sister who was in Australia who said she was unable to come to Tonga to see their mother who was very sick, that he could not possibly comprehend the fact that he was holding in his hand an illicit drug for which he could be guilty of a serious offence. I believe that if he had comprehended that, he would have put it away, out of sight of any person who may pass by. The fact that he did not put it away rather supports his innocence of what he held in his hand. And Officer Fifita knew that and so claimed that the accused had just pulled it out of his pocket when he showed up.

[82] I am also satisfied that when he stated in his statement to the police that he had taken out the pack from his pocket when Fifita showed up, he was only saying it because Officer Fihaki had told him to say so so that he could be released to go to his mother who had died while he was in police custody.

[83] Accordingly, I find that the Crown has not been able to prove beyond reasonable doubt that the accused knew that what he held in his hand was cannabis or marijuana because I accept that his mind was preoccupied at the time he was handed it up to when the police arrived.

The methamphetamine charge

- [84] Having considered the evidence of the police witnesses in relation to the methamphetamine charge, I have reasonable doubt that the pack was in the car before the police searched the car. The pack was lying on the floor of the gap between the front passenger seat and the left door of the car. Yet, Officer Pohiva, who was searching that side of the front passenger seat of the car did not find it. It would have been normal for him to begin his search at the door way to the front passenger seat, while standing on the ground at the door way. If the pack was where it was later found to be, he would not have missed it. But he did not see or find it, and I believe it was because it was not there.
- [85] It is claimed by all 3 police officers, Fifita, Fihaki and Pohiva, that the pack was not there between the seat and door when Pohiva was searching there because it was under or on the rug which had gone under the front passenger seat and that when Fihaki pulled that rug out to the back, the pack fell out on to the gap between the door and the front passenger seat.
- [86] That further supports the inadequacy of the search carried out by Pohiva of the front seat area. It should have been normal for him to search under the front seat as well, by looking under the seat from the door way and by moving the seat backwards and forward and by putting his hand under the seat and moving any object there, including the rug that was supposedly under it. But it is clear that he did not do that at all and one wonders why?
- [87] In any event, the accused denies any knowledge of the presence of the pack in the car, and I believe him, and as I have stated above, "if knowledge of the presence of the pack cannot be proved, possession cannot be established. Possession denotes control plus knowledge of its presence". No evidence was given that the accused had knowledge of the presence of this pack of methamphetamine in his car.

Conclusion

[88] Accordingly, I have found, on the evidence in this trial that

- (a) the search carried out by the police in consequence of which the pack of cannabis and the pack of methamphetamine were found was unlawful, and the two said packs cannot lawfully be admitted as evidence; furthermore,
- (b) the prosecution has failed to prove the guilt of the accused in respect of the two charges beyond reasonable doubt.

[89] Accordingly, I dismiss the two charges against the accused and discharge him forthwith.

NUKU'ALOFA: 15 May 2020.



[Handwritten Signature]
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J U D G E