

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 175/2019

BETWEEN : REX

- Prosecution

AND : FAKA'OSI KATOA

- Accused

BEFORE HON. JUSTICE NIU

Counsel : Mr. F. Samani for prosecution.

Mr. S. Tu'utafaiva for the accused.

Trial : 4 - 5 May 2020.

Submissions : No submissions were made by Mr. Tu'utafaiva as directed.

by Mr. Samani on 20 May 2020.

Ruling : 9 June 2020.

RULING (VERDICT)

Charge

[1] The accused is charged with only 1 count: Possession of a Mith & Wesson pistol on 22 December 2018 at Hofoa without a licence, contrary to S.4 (1) of the Arms and Ammunitions Act. He pleaded not guilty and elected to be tried by judge alone.

Evidence

- [2] The prosecution called only 3 witnesses, namely, Patelesio Tu'itavuki, Tu'amelie Fifita and Carsten Leveni.
- [3] Patelesio Tu'itavuki, 45 years of age of Fasi, police officer in the forensic division, said that at about 2:15 am in the morning of 22 December 2018, he took 4 photographs at the home of one, Pangi Puloka, which he produced as Exhibit 1, with the photos being numbered 1 to 4.
- [4] In cross-examination, he said that photos 1 and 4 showed a caravan and that there is a verandah joined on to the caravan with a pool table under the roof of the verandah. He said that photo 3 was taken by him facing west that photos 1 and 4 were taken facing east, and that photo 2 is a photo of the inside of the caravan taken from the door shown in photo 1.
- [5] Tu'amelie Fifita, 24 years of age of Havelu, police officer, said he had been in the drug division for 3 years. He said that he had received information that this place had drugs in it, and that the accused and others were often there.
- [6] Mr. Tu'utafaiva objected to the witness giving evidence of the information which the informer had given him because it was hearsay. Mr. Samani responded that it was this witness who had received the information from the informer and it was reliable and formed basis for search without warrant.
- [7] I ruled that the witness could continue. He said that after he received the information he went and observed the place and that he saw many people coming to it especially in vehicles at night, over several nights before this particular night. He said that they then confirmed that they were to do the search in the night of the following day.
- [8] He said that in the night of the following day, they made the search of the place and he said that there were 6 persons there, including the accused. He said that they searched the persons, including the accused and drugs were found on some persons, but not on the accused. He said that upon the search of the caravan, Officer Tomasi Vaea found the pistol. He said it was found on the floor beside the left arm rest of the grey sofa shown in photo 2. He said that the accused was in the caravan when the pistol was found.
- [9] In cross-examination, he said that he had received the information about 1 week before the search was carried out. He said that he followed that information up by checking it out, to confirm it. He said he made visits to observe the place about 10 times, and that he also spoke with the village "police" who told him that they were fed up with this place. He said that as a

result of his checking, they decided on 21 December to carry out this search on 22 December 2018.

[10] Mr. Tu'utafaiva asked him why he requested no search warrant, and he said that it was because he had decided that the search be done at night and so there was no time to request a search warrant. He was asked whether or not he made a request for a search warrant, and he said that he did not think to make a request because if they were to wait until the following day to get a warrant, the drugs would disappear in the meantime. He was asked if he had acted under S.123 of the Police Act and he said yes. He was asked if he made a report of the search and he said no, but that Malolo Vi, the search leader, did.

[11] He said that he helped Tomasi Vaea to search the caravan. He also said that the accused was body searched although there was no warrant for such search because they were applying police protocol, namely:

- (a) to hold all persons there to sit where they were,
- (b) to explain to them what the police were going to do, and
- (c) to carry out the search, without warrant under S.123 of the Police Act.

He said that S.123 allowed the police to search persons without warrant.

[12] Mr. Tu'utafaiva put to the witness that the accused was not in the caravan when the caravan was being searched, but the witness said that the accused was inside the caravan. It was put to him that the accused was sitting by the pool table at that time, and he said that that was a lie. He said that they had all been asked who lived in the caravan and that the accused said that he did and that he was then told to go inside the caravan so that they could search it. He said that the accused was standing by the pool table when they arrived and that they told them to stay where they were. He said it was Officer Vi who had asked who lived in the caravan and that two named persons there said that the accused did.

[13] He said that he did not write it down anywhere that those answered that question although he agreed that it was important that it be written down. He said that when the gun was found, he thought it was Officer Vaea who told the accused of it, that the accused was by the door, and that he was not called to come in from outside.

[14] He was then referred to items 21 & 22 in the diary of action which the police kept on the case which stated:

- | | | |
|----------------|----|---|
| "/
0243 hrs | 21 | D/Vaea find 01 gun of type Mith Wesson pistol and Apiesa Puloka said that the person who used this room was Faka'osi Katoa (m) Vaini." |
| /
0249 hrs | 22 | D/Vi went and called Faka'osi to come and look at this and he said he did not know about it being in the room because he had his things in the room but did not know about this." |

and he said that the girl (who had written the entries) should be called to say why she wrote them.

Those 2 entries of the diary of action were Exhibited 2.

[15] He said that Vaea asked the accused what the gun was for and that the accused said that it was just a toy gun. Mr. Tu'utafaiva asked him whether he had written down in his own statement that the accused was in the room while it was being searched, and he said he did not. He was also asked whether he had written down in his statement that the accused had said that the gun was a toy gun and he said that he did not. He said it was important to write it down but he forgot to write it down. He was referred to his statement (of 19 March 2019) where he stated:

"A firearm revolver was also found and Faka'osi was charged with it because the house in which it was found was used by Faka'osi."

That part of the statement was exhibited as Exhibit 3.

[16] He was re-examined but added nothing more.

[17] I asked him if any bullet was found and he said no. I asked him what the things shown in photo 2 were and he described them.

[18] Sione Tupou Vaea said that he had been in the police for 10 years. He said that he and Fifita did the search in the house, and that the accused was present inside it while they were searching it. He said the accused was sitting on the chair at the table in front of the laptop screen shown in Photo 2. He said he found the gun at the back of the sofa. He said that he had pulled the sofa away from the wall and then saw the gun on the floor by the wall. He said that the accused was standing by the door at that time. He said he asked the accused what the gun was and that the accused said to him that it was only his toy. He said he could not say whether the gun was dusty but that it had leather binding on it. He said it was silver and that he could identify it. The gun was produced as Exhibit 4, but subject to objection by Mr. Tu'utafaiva which he would explain in his submissions at the end of the evidence.

- [19] In cross-examination, he said that he only began working in the CID division in October 2018. He said that he was in the search party and that when they arrived, the accused and one 'Aisea Puaka were in the house working on something on the laptop and that they came outside when they arrived.
- [20] He said that he only wrote his statement as a witness on 1 April 2020 and it was only given to Mr. Tu'utafaiva the morning of the trial. When he was shown items 21 and 22 of Exhibit 2 (diary of action), he said it was important that what he said that the accused said be written down but he did not tell 'Otuhouma (who made the entries) to write down what the accused had said to him. He said that 'Otuhouma was not there when the accused said the gun was his toy.
- [21] He was shown photo 2 and he said that the gun was underneath the sofa but towards the wall at the back. He said that it was not found on the floor beside the left arm rest.
- [22] There was no re-examination and I asked and he said that the present rusty condition of the gun was what the gun looked like when he found it, as he could recall.
- [23] Carsten Leveni said that he had been a police officer for 14 years. He said that he was in the search party and that he was handed the gun to keep in his custody and he identified the gun exhibited as the gun found in the search.
- [24] With that the prosecution closed its case and the defence called no evidence and the trial was concluded and I directed counsel to file their submissions.

Documentary evidence admitted by consent

- [25] I wish to add that before Carsten Leveni gave evidence (on 5 May 2020). Both counsel agreed that the following documents be admitted as evidence without the calling of the witnesses to produce them:

Exhibit 5 - 2 pages of the Exhibit movement register, the second page showing entry no. 116/18, dated 22 December 2018, 1 Mith & Wesson firearm found in a search without warrant at Pangi Puloka's home, and its hand over on 7 March 2019 at 1457 hrs to Officer Falekaono of the armorer office.

Exhibit 6 - 1 Page of the Armourer register showing that at 1457 hrs on 7 March 2019, the firearm was handed over by SC Leveni to Officer Falekaono of the armourer office.

Exhibit 7 - 3 pages of the Report of the armoury officer, 'Eliki Tomu, dated 7 March 2019 stating that the firearm was a .38 revolver pistol, model Smith & Wesson with a drum magazine of 6 rounds with a overall length of 23 cm, and that it was in good working order. It stated that the accused, Faka'osi Katoa had no firearm or ammunition licence to possess a .38 pistol or. 38 ammunition.

- He stated that it is prohibited to own a pistol in Tonga.

Exhibit 8 - 2 pages of a report by Officer Malolo Vi dated 22 December 2018 to the Commissioner of Police of the search without warrant which was carried out in respect of which this firearm was found.

Submissions of the Crown

- [26] Mr. Tu'utafaiva was to have filed his submissions for the accused on 19 May 2020 but he did not do so up to now despite reminders given by the Court staff. Mr. Samani has now filed his submissions, as directed, on 26 May 2020.
- [27] Mr. Samani submits that the only issue to be decided is possession. He says that after hearing the evidence of Officers Fifita and Vaea, it is clear that the pistol was found in the accused's hut and that they both said that after it was found, the accused was asked as to what it was, and that the accused said that it was his own play thing. He says that that proves that he had knowledge and control of it and that that proved possession.
- [28] He says that despite the strong cross-examination by Mr. Tu'utafaiva and the fact that they did not have that answer of the accused recorded in the diary of action, they did not waver from their said evidence.

Possession

- [29] I am afraid I do not agree. When the witness, Tu'amelie Fifita wrote his statement on 19 March 2019, he had written in it that "a firearm revolver was also found and Faka'osi was charged with it because the house in which it was found was used by Faka'osi". The words I have underlined is the reason which the witness knew as to why Faka'osi was charged with unlawful possession of the firearm. That is why he stated it in his statement. If it was because, as he now says, the accused (Faka'osi) admitted to him, and to Officer Vaea, that the gun was his play thing, that would have been a stronger reason because it was a confession by him altogether, and he would have written it down in his statement instead. I am satisfied that he

did not write such thing down was because the accused never said any such thing as the witness now says he did.

[30] That is supported by the entries no. 21 and 22 in the diary of action (Exhibit 2). Those entries confirm that when the accused was shown the gun, he said that he did not know about it being in the room because he had his things in the room but did not know about the gun.

[31] I also note that when this witness gave his evidence in chief, he never said anything about the accused having been asked and that he replied that the gun was his play thing. That is odd when that piece of evidence would have been the most important evidence to prove that the accused had the knowledge of and control of the gun. It was only when Mr. Tu'utafaiva cross-examined him that he happened to mention this critical piece of evidence.

[32] I am also very doubtful of the evidence of the witness Vaea. No statement was made by him at all for the Magistrate's Court. No statement of his was attached to the documents forwarded from the Magistrate Court to this Court. His name is not even included in the list of witnesses which was attached to those documents. It made me worry because he ought to have been a witness because it was him who had found the gun in the search, that is according to the evidence of Tu'amelie Fifita in this trial, but which he did not mention in his own statement of 19 March 2019. I therefore looked at Tu'amelie's statement of that date again and I noticed that the word he had written was "Neu" and not "Ne" in the beginning of the sentence in the third line from the bottom of the first page of his statement, so that what he in fact had written was this:

"Neu toe ma'u foki mo e x 01 me'afana revolver pea faka'ilo ki ai a Faka'osi koe'uhi koe fale na'e ma'u ai 'ae me'atau koe ki'i fale ia na'e ngaue'aki 'e Faka'osi".

Which translated, says:

"I also found 01 revolver gun and charged Faka'osi with it because the house in which the firearm was found was used by Faka'osi",

[33] That appears to explain why the name of the witness Sione Tupou Vaea was not included in the names of witnesses which were to give evidence in this trial and why he had no statement attached to the documents forwarded. It was because it was the witness Fifita who had found the gun instead.

[34] Sione Tupou Vaea's statement was only written on 1 April 2020, and it was only given to Mr. Tu'utafaiva on the morning of this trial, 4 May 2020, and the witness gave evidence in the afternoon. He stated that it was him who

had found the gun. That is supported by the entry no.21 in the diary of action already referred to. But what then happened was that Vaea then said in that statement and in his evidence that he asked the accused and that the accused said that it was his toy, which again conflicts with the entry no. 22 where it is stated that the accused said that he did not know anything about it.

[35] Accordingly, I am left with very serious doubt about the veracity of the two witnesses, Fifita and Vaea, such that I am not satisfied beyond reasonable doubt that the accused knew that there was a gun in the little house he occupied.

Unlawful search

[36] Mr. Tu'utafaiva did cross-examine witness Fifita that he did have time to obtain a search warrant but Fifita maintained that he did not and that he carried out the search because of the urgency of the matter.

[37] I have to say that there is no doubt at all that Fifita had more than enough time to obtain the search warrant. That is because he himself said that he and the other officers involved had discussed the matter and had agreed that the search would be carried out on the night of the following day, namely, they agreed on the 21 December 2018 that they would do the search on the night of 22 December 2018. That is some 24 hours later. Accordingly, there was ample time to draw up the affidavit and application for the search warrant and to attend before the Magistrate and seek its issue.

[38] I therefore find that the ground required for a search without warrant namely that there was no time to get a warrant, did not exist. I find that the search was unlawful and the gun, that is, with which the accused is charged, was found in an unlawful search and I accordingly uphold Mr. Tu'utafaiva's objection to its admission as evidence in this trial.

Conclusion

[39] I am therefore not satisfied beyond reasonable doubt that the accused did have in his possession a Smith & Wesson .38 pistol without licence as charged, and I dismiss the charge and discharge him.

NUKU'ALOFA: 9 June 2020.



[Handwritten Signature]
Niu J
JUDGE