

**IN THE SUPREME COURT OF TONGA**

**CRIMINAL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**CR 192 of 2019**

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**BETWEEN : REX**

- **Prosecution**

**AND : TALIKIVAHA PALEI POSONI**

- **Accused**

**BEFORE HON. JUSTICE NIU**

**Counsel : Mr. J. Fifita for the Crown**

**Ms A. Kafoa for the accused**

**Trial : 12, 13 and 14 August 2020**

**Submissions : by Ms. Kafoa on 24 August 2020**

**by Mr. Fifita on 27 August 2020**

**Ruling : 11 September 2020**

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**RULING (VERDICT)**

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**Charge**

[1] The accused is charged with one count only in his indictment:

“that you did knowingly and without lawful justification possess cocaine at Te’ekiu on 22 March 2019.”

## **The evidence**

- [2] Sometimes between 4:00 and 5:00 pm Friday, 22 March 2019, an informer told police officer, 'Apsai Fihaki, at the car park of the police premises at Longolongo that the accused was presently selling drugs at his (the accused's) home at Te'ekiu at that time, and that there were unlawful weapons there too.
- [3] About 4:45 pm, Fihaki informed the officer in charge, Halatoa Taufu, of it. He said to officer Taufu, "Sir reliable information has been received. Vaha (the accused) is presently selling illicit drugs and including unlawful weapons".
- [4] Officer Taufu organised a search team consisting of CID officers and Tactical Response Group altogether of 12 people and they went to Te'ekiu. They arrived at the accused's home at about 6 pm. The accused was not there but his wife was. She told them that the accused was at rugby training. A police vehicle went and brought the accused home.
- [5] In the presence of the wife, Officer Taufu informed the accused that they were to search his home for illicit drugs and weapons under the authority of the police under S.122 of the Police Act. The accused agreed to it. Two officers who were to do the searching, namely, Officer Hakalo and Officer Televave, were both searched by Officer Fihaki outside of the house in the presence of both the accused and his wife before they did the search. The search was carried out without a search warrant.
- [6] Whilst the wife and other officers, including Officer Taufu remained outside, the accused was with the two search officers whilst they were searching inside the house. Also present in the house was Officer Fihaki and female Officer 'Otuhouma who kept record of the search.
- [7] After the lounge was searched, the search continued into the bedrooms. The accused did not go in there with the two searchers, and Officer Fihaki told him to go and watch the search, but the accused did not go. He instead whispered to Officer Fihaki if Officer Fihaki would hide the drug. Officer

Fihaki whispered back "where's it?" The accused whispered to him that he would help him. The Officer asked him again where the drug was and the accused pointed to the area of the kitchen and told him that he would give him money and would help him.

- [8] Officer Fihaki noticed that the accused was worried (hoha'a) because he was unsettled, he was getting up and sitting down again. Officer Fihaki called Officer Malolo Vi, and in the presence of the female officer, 'Otuhouma, told him what the accused had just told him. Officer 'Otuhouma wrote it down in the diary of action she kept.
- [9] When the search of the rooms were finished the search then came to the kitchen and there, Officer Hakalo found the drug in a hole in the interior lining of the outside wall of the kitchen by the back door. It was in a self-sealing plastic bag with white crumbled substance inside. Also found with it was a glass pipe. The accused was asked whose they were and he said he did not know. Officer Taufu then arrested the accused for possession of illicit drug. He also cautioned him that he need not say anything and if he did it would used as evidence against him.
- [10] The wife was called and Officer Taufu asked her whose were the items found in the wall and she said that she did not know. Officer Taufu then arrested and cautioned her as well for possession of illicit drug. Officer 'Otuhouma recorded that in the diary of action at 1934 hrs.
- [11] At 1937 hrs, she recorded the following:

"1937 hrs. 14. Vaha Palei conveyed that what was found in the house was his, but to release his wife and he was dissatisfied and said to the police Fuck You and he was then informed and he agreed that his wife be released and that he alone take the charge and he signed it.

(Signed) T. P. Posoni

(Signed) H. Taufu."

Officer Taufu confirmed that that was what happened after he charged and arrested and cautioned the wife.

[12] In his evidence, Officer Taufu, with 21 years in the police and 2 years in the Drug Task Force, said that the substance that was found looked like ice or methamphetamine. In his statement which he wrote afterwards, he said that the plastic bag found contained ice and a pipe for smoking ice and he said in his evidence that ice was another name for methamphetamine.

[13] Officer Taufu wrote a report of the search to the Commissioner of Police the following morning and paragraph 3 of that report stated:

"3. DET then arrested Mr. Talikivaha Posoni (m) 33 yrs Te'ekiu on Ops LOUD with 01 pack of methamphetamine and its weight 21.54g ...."

[14] Officer 'Otuhouma said in her evidence that she saw the substance that was found and she said it was methamphetamine. Officer Fifita stated Officer 'Uluheua, in his presence, weighed the substance (with the plastic bag) and found it to be 21.54 gm of white powder suspected to be methamphetamine. He said Officer 'Uluheua locked the substance in the safe in the exhibit room and gave the key to Officer Taufu.

[15] Officer Hakalo who found the substance in the wall of the kitchen stated in his statement that when he picked up the plastic bag it was ice and a test tube for ice.

[16] The search list written which was signed by the accused and Officer Taufu listed no. 2 as "01 plastic pack with methamphetamine inside and 1 broken but taped test tube found in hole in the wall of the kitchen".

[17] Two photographs (nos. 3 and 4) of the substance were taken at the house, They show the substance as white granules.

[18] The Register of exhibits did not record these exhibits until 7 May 2019 when Officer Manumu'a received the substance from Officer 'Uluheua. The register entry stated "1 pack containing granules of methamphetamine". That was at 1204 hrs. And at 1725 hrs Officer Pousima recorded on the register that Officer Tu'itavuki has weighed the pack of substance and found it to be 21.66 gm. Officer Manumu'a stated in evidence that she had written "granules of methamphetamine" (momo'i methamphetamine) because that was what she saw the substance in the plastic bag to be and that Officers 'Uluheua and Hakalo also told her that it was "momo'i meth". She was shown photos 3 and 4 and she confirmed that that was what she saw.

[19] It also recorded that at 1200 hrs, 20 June 2019, the substance was handed over to Officer Pale to take to New Zealand.

[20] The number of the registration of this substance in the register was no. 81/19.

[21] That substance no. 81/19 together with some 38 other substances from various other operations were taken by Officer Leniti Pale to New Zealand on 21 June 2019 and handed them all to ESR in New Zealand for analysis.

[22] One, Robyn Somerville, an expert on the analysis of illicit drugs employed by ESR, emailed Officer Taufu here in Tonga the result of the test which she had carried out on the substance no. 81/19 as follows:

"81/19            A sealed paper bag marked in part "Loud Opr", containing a further self-sealing plastic bag containing off-white powder.

The powder weighed 20.4 grams and contained cocaine."

[23] Officer Pale stated in his evidence in answer to questions I asked that what is shown in photograph no. 4 is that the substance in the plastic bag was lumpy. He said he was acquainted with the appearance of

methamphetamine. He said that it looked like glass pieces (momo'i sio'ata) which sometimes look like crystals, and that some meth look like powder, that is much finer like dust.

[24] He also said that the plastic bag in which the substance was in was a much bigger bag than what are normally used for packing meth, and that this bag was being folded in two and then put into a same size plastic bag when it is photographed in photo no. 4. He said that he had not weighed such a large bag like that on its own but that it would be much heavier than the normal size plastic bag used for packing meth which is about 0.28 gm in weight on its own.

[25] The difference in the weight of the substance with the large plastic bag in Tonga (which was 21.66 gm) and the weight of the substance only as found by Robyn Somerville in New Zealand, which was 20.4 gm, is 1.62 gm.

[26] As to the colour, "off-white" as described by Robyn Somerville, Officer Pale said that that colour, "off white" is nearly cream colour, but that the colour of the substance as seen in photograph 4 is "white" and that it is not "off-white".

### **Submissions of the accused**

[27] Ms. Kafoa for the accused submits that there is reasonable doubt:

- (a) that the police had lawful justification to carry out the search of the accused's home and that the substance found be excluded as evidence;
- (b) because it was possible that the substance had been put where it was found by someone else whilst the search was being conducted;
- (c) because the admission made by the accused that the substance was his was not voluntarily made; and

- (d) that the substance found by the analyst in New Zealand to be cocaine was the same substance that was found in the accused's house.

### **Lawfulness of the search**

- [28] Ms. Kafoa argues that the search was unlawful because the prosecution has failed to prove that –
- (a) there was reasonable ground for Officer Taufa to be satisfied that a serious offence has been committed, or that
  - (b) it was impracticable or unreasonable or not in the interests of justice to apply for a search warrant.
- [29] She says that neither Officer Taufa nor Officer Fihaki took any step to confirm whether the information which was given by the informer to Officer Fihaki was true. She also says that Officer Taufa had ample time to apply for a search warrant because they had not gone to carry out the search for a whole hour after the information was received by Officer Fihaki. She says that even though the Courts were closed by then, the Magistrate could have easily granted the search warrant at his residence.
- [30] Mr. Fifita for the Crown says that the information received was reasonable because it was reliable and that it was confirmed by the finding of the drug at the accused's place.
- [31] Section 123 of the Tonga Police Act requires that the police officer must be satisfied on reasonable grounds of two things before he can carry out a search without warrant, one, that a serious offence has been committed, is being committed or is about to be committed, and, two, that action be taken right away ie. without a search warrant.
- [32] In respect of the first matter (the committal of a serious offence), the reasonableness of belief that it has been committed or is being committed or is about to be committed, is not determined by the fact that the offence is found to have been committed or is being committed or is about to be

committed because that is subsequent to the decision to make the search without warrant. It is determined by the reasonableness of the belief prior to the search without warrant. It must be determined upon the reliability of the information received by the officer alone.

- [33] In the present case, Officer Fihaki gave evidence of what persuaded him that the information was reliable. He said that the police had been using the information which this particular informer had provided to them for 2 years and he was sure that the information that he received from him on this occasion was as reliable as on previous occasions. He related what the informer told him: "This person, Vaha Palei, of Te'ekiu, is now presently selling drugs". He asked him what sort of drug, and he said, "It is a white drug and many vehicles always come to his home". He asked him if he had seen that drug and he said, "Yes, I have seen it myself". He asked him if the sales were still being carried on at that time, and he said, "Yes. And remember that the boy has weapons so be prepared or you would be injured".
- [34] Officer Fihaki said that he believed that that information was reliable and he accordingly acted on it and he went and conveyed it to Officer Taufu, and Officer Taufu asked him whether he thought the information was reliable and he said that it was reliable.
- [35] I accept Officer Fihaki's evidence and I accept that he was satisfied on reasonable grounds that a serious offence was being committed.
- [36] As to the second matter, it does not matter whether the information comes to the knowledge of the police officer during working hours or after working hours. The question is whether or not, in the reasonable opinion of the police officer, action needs to be taken right away without a search warrant.
- [37] I accept that Officer Fihaki and Officer Taufu were of the reasonable opinion that action be taken right away without a search warrant, because the reliable information they had was that sales of illicit drug was presently

being conducted at Te'ekiu, which was some distance from Nuku'alofa and they also had to have the protection and assistance of the Tactical Response Group and of the Kennel unit with the trained dog. With such a large group of some 12 officers, and with guns in readiness, there was need for careful and wise briefing to be conducted to ensure everyone knew where to go and what to do. It was imperative that they acted right away or they might not find any drug any more.

[38] Ms. Kafoa says that a search warrant could have been obtained during the period from 4:45 pm to 6:00 pm (when they got to Te'ekiu) because the Magistrate could have been consulted at his home. That may be so but it was also possible that the Magistrate may not be at his home. But that is not the point. The point is whether or not in the reasonable opinion of the police officer action was needed to be taken right away without a search warrant. In the present case, it was necessary that action be taken right away. It was reasonable to do that without a search warrant.

[39] I am therefore satisfied that the search carried out without warrant in the present case was lawful.

#### **The drug being "planted"**

[40] Ms. Kafoa says that it was possible that the drug found in the hole in the wall of the kitchen by the back door of the house of the accused could have been put there by someone else who could have come in the back door and left again without any one in the house knowing about it, because the back door had been left open and unattended while the search was in progress.

[41] Mr. Fifita disputes this and says that the accused himself admitted that the drug found was his, and that he made that admission voluntarily after he had been cautioned that he need not say anything and that if he did, it would be used as evidence against him.

[42] I have to say that what Ms. Kafoa is saying is a possibility and the question is whether or not such a possibility is a reasonable possibility, such that it constitutes a reasonable doubt. I have to say right away that it does not. It

is simply a fanciful possibility and it is not a reasonable requirement that all twelve persons who were in the search party be required to give sworn evidence that he or she did not plant the drug in the hole in the wall.

### **The admission be excluded**

- [43] Ms. Kafoa submits that the admission which the accused made to Officer Taufua that the drug found in the hole in the wall was his (alone) be excluded as evidence against him. She says that the admission was made under pressure and coercion because Officer Taufua was arresting his wife and charging her with the possession of the drug because he had denied that the drug was his. She says that proof of that was the fact that the arrest of the wife and the charge of the wife were immediately withdrawn when the accused made his admission.
- [44] Mr. Fifita disagrees with that and says that Officer Taufua properly charged the wife with possession of the drug because she too was living in the house, and that the accused had already been properly cautioned not to say anything and that if he did it would be used as evidence against him. He says that the admission made by the accused is admissible under S.22 (d) of the Evidence Act because he says that the accused answered a question he need not have answered.
- [45] I have to say that I would agree with Miss Kafoa if there was no reason to suspect that the wife did not know what the substance was, but it would appear that the wife knew or suspected what the substance was. Officer Hākalo said in his evidence that when he got the plastic pack with the substance inside out of the hole in the wall he did not know what it was. He said he asked the wife what it was and she said it was cooking powder before he gave it to Officer Taufua, meaning as I understood him, that Officer Taufua came in together with the wife. So that Taufua would have heard the wife say that the substance was cooking powder.
- [46] To me, it is an unusual place to put cooking powder, that is, to put it in a hole in the wall of the kitchen, such that you do not see it unless you stand

on tippy toe to see the tip of it, unless you yourself had put it there or knew it was there. If the wife did not know it was there, and that she did not know what it was, her normal reaction, if she was innocent, would be to ask: "What is it? Where did you get it? Let me see". Instead, she straight away said, "That's cooking powder". That straight away means that she knew what it was and that it was placed in the hole in the wall.

[47] Accordingly, I do not find that Officer Taufa did anything wrong, in charging the wife with possession of what he thought was illicit drug, namely, methamphetamine. If by charging her with the offence, it upset and got the accused, who is the husband, angry, that is not the officer's fault. I would say he was only doing what it was his job to do. And the admission (and confession) which the accused then made was not made as a result of an inducement, such as is provided for in S. 21. An inducement under S.21 must be an unlawful inducement made for the purpose of obtaining the confession.

[48] The burden of proving that the inducement was an unlawful inducement is upon the accused to discharge. He has not discharged that.

### **Identity of the substance analysed**

[49] Ms. Kafoa finally submits that there is reasonable doubt that the substance which was analysed by the expert analyst in New Zealand was the same substance which was found in the hole in the wall of the kitchen of the accused in his house. She points to the following evidence:

- (a) Officer Taufa stated in his statement which he admitted in cross-examination that what was found in the house of the accused was "a plastic pack with ice inside and there was also a pipe for smoking ice".
- (b) Officer 'Otuhouma wrote in entry no. 12 of the diary of action that "01 pack of methamphetamine was found, "and she also said in cross-examination that another name for methamphetamine was ice,

and that she wrote it because of what she saw and not because someone told her.

- (c) Officer Hakalo stated in his statement, when he was cross-examined,

“There are holes in the wall of the kitchen and I saw in it something which was a plastic pack showing up and I got it and it was 01 pack of ice together with an ice test tube ...”
- (d) Officer Manumu’a wrote on the Register of Exhibits (Exhibit 5) that he received 01 pack of methamphetamine weighing 21.54 gm.
- (e) Only the report from New Zealand stated that the substance was cocaine.
- (f) At first the weight of the substance was said to be 21.54 gm, then it was said to be 21.66 gm and finally the New Zealand person say it was only 20.4 gm.
- (g) Whereas Officer Pale said that the substance as shown in photograph 4 was white, the New Zealand person said it was off-white.

[50] In reply to those, Mr. Fifita says that there was a continuous chain of custody of the substance from the moment it was found to the moment it was handed over to the New Zealand analyst who confirmed that the substance was cocaine. He refers to **R v Vaha Palei** (CR84/19) where the substance was weighed in Tonga and was found to be 21.71 gm whereas it was weighed in New Zealand and was found to be only 20.4 gm. He says that Cato J who tried the case held that he was satisfied beyond reasonable doubt that the substance which was seized was the same substance that was analysed in New Zealand, and that he did “not consider any difference in weight to be a material or relevant concern”. What Mr. Fifita says is important is that the chain of custody of the substance is unbroken, such as Cato j found in that case. He accordingly submits that because the chain of custody of the substance in the present case was unbroken, there should be no concern that there was a difference in the weight of the substance in

Tonga and the weight of the substance when it was analysed in New Zealand.

[51] He also points to the evidence of Officer Pale who said that in his experience the weighing of substances in Tonga include the weight of the plastic pack in which the substance is contained, whereas the weighing of the substance by the ESR in New Zealand did not include the weight of the plastic pack, and he said that he believed that the difference of weight in the present case was due to the weight of the plastic bag in which the substance was contained. He said that Officer Pale stated that the average weight of the normal empty pack was 0.23 gm, but that the plastic pack in the present case was about 5 times larger. If that weight (0.23 gm) was multiplied by 5 there would be 1.15 gm for the large empty plastic pack, and if that 1.15 gm was deducted from 21.66 gm we would roughly arrive at 20.51 which is close enough to the weight found in New Zealand for the weight of the substance alone.

[52] I am afraid that the matter in the present case is not as clear cut as Mr. Fifita makes it out to be, as it was in the case of **Vaha Palei** to which he has referred. In that case the only difference was in the weight of the substance with and without the extra weight of the plastic bag in which the substance was contained. His Honour was quite right to have held that there was no difference in the substance found and the substance tested, because it was the same substance.

[53] In the present case however, there are two other relevant matters: one is that the substance found at the accused's house was seen in the photograph (no. 4) taken at the accused's house to be "lumpy" (or fetefete), as I saw it and Officer Pale agreed with it. They looked like granules. Officer Manumu'a stated in her evidence that she had written in the Register of Exhibits "momo'i methamphetamine" (granules of methamphetamine) because that was what she saw the substance to be and she said that Officers 'Uluheua and Hakalo had also told her that it was

“momo’i meth”. She was shown photographs 3 and 4 and she stated that that was what she saw and had described as “momo’i methamphetamine”.

[54] However, the analyst who tested the substance, Robyn Somerville, has stated that the substance that she received was a “powder”, and that the “powder” weighed 20.4 grams which contained cocaine. We all know what a powder looks like, and I can say that what is shown in photographs 3 and 4 as contained inside the plastic bag is not a powder, but granules “momo’i” or “fetefete” substance instead.

[55] And two, whereas the colour of the substance in the plastic bag is clearly white, the analyst Robyn Somerville has stated in her report that the powder was “off-white powder”, and I agree with Officer Pale when I asked him, he said that the colour “off-white” is like or a little like “cream” colour.

[56] There are therefore two distinct and crucial features in the analyst’s report about the substance she received as the exhibit no. 81/19, which do not match the substance which was found at the accused’s house. And it is unfortunate that the analyst was not present to give evidence and in particular to bring with her the substance (and plastic bag) she received and tested.

[57] However, I have to decide this case on the evidence which is before me, and I find that the evidence does not satisfy me beyond reasonable doubt that the substance which was tested and found to be cocaine in New Zealand was the same substance that was found at the accused’s residence at Te’ekiu on the 22 March 2019.

[58] Accordingly, I find the accused not guilty and I dismiss the charge against him and discharge him of it.

**NUKU’ALOFA: 11 September 2020.**



Niu J

**J U D G E**