

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 54 of 2020

BETWEEN : REX

- **Prosecution**

AND : TANIELA MOIMOI

- **Accused**

BEFORE HON. JUSTICE NIU

Counsel : Ms Lute Fakatou for the Crown

Mr Siosifa Tu'utafaiva for the accused

Trial : 24, 25 & 26 August 2020

Submissions : by both counsel in Court on 28 August 2020

Ruling : 30 September 2020

RULING (VERDICT)

Charges

[1] The accused is charged with 3 offences in his indictment:

count 1: Possession of 225.69gms of cannabis, a class B illicit drug at Tofoa on 29 April 2019 without lawful excuse contrary to S.4 (a)(ii) of the Illicit Drugs Control Act (the Act).

count 2: Cultivation of 4 cannabis plants, a class B illicit drug at Tofoa on 29 April 2019 without lawful excuse contrary to S.4(a)(ii) of the Act.

count 3: Possession of 500 .22 bullets and 52 .45 bullets without licence at Tofoa on 29 April 2019 contrary to S.4(1) and (2)(b) of the Arms and Ammunitions Act.

[2] He pleaded not guilty and elected trial by judge alone without jury.

Evidence

[3] The Crown called and 9 witnesses gave evidence. The accused gave evidence himself and called no other witness. Rather than relate the evidence given by each witness, I will only refer to those evidence as they relate and are relevant to the several issues which have been raised by both counsel in their submissions.

The issues

[4] Mr Tu'utafaiva, for the accused, has made submissions which raise four issues to be decided in this case. They are the following:

- (a) Were the materials which were analysed by the police analyst officer, Laulelei Kava, and which he found to be cannabis, the same material that were found and seized at the home of the accused?
- (b) Was the search without warrant which the police carried out at the home of the accused, in which they found and seized the material, and the bullets, lawful?
- (c) Did the accused have the knowledge that the material and the bullets were there at his home and did he have control of them that it would constitute possession of them?
- (d) Did the accused cultivate the 4 cannabis plants?

I use the term "home of the accused" to mean only his place of abode because the home in fact belongs to his sister and husband.

Identify of the material found and analysed

[5] Mr Tu'utafaiva submits that the prosecution has failed to prove beyond reasonable doubt that the 4 samples which Officer Kava analysed were each taken from the 4 material which were found and seized, namely:

- (a) the 4 plants (found growing in pipe pots in the saafa bush);
- (b) the material inside the glass coffee bottle (found in the compartment in the car);
- (c) the material wrapped in 3 little foil bundles (found inside a plastic box in the compartment in the car);
- (d) the material in 2 small plastic packs (found in the yellow bag in the car).

[6] He points to the following errors:

- (a) In the Drugs Task Force Register, copy of the relevant page of which was produced as Exhibit 6, it records: "04 cannabis plants in pipe pots (220)" and made no mention that the 4 plants had been cut up into pieces. Also in entries 33 and 34 of the diary of action (Exhibit 24) no mention is made of the plants having been cut up. But that in Exhibit 7 (Exhibit Room Register) it records: "04 cannabis plants already cut from the trunk weighed 220.30g". He says that when the material were produced in Court (Exhibit 10) they could not be identified as the 4 plants anymore because they were all in pieces. He says there was no reason to cut them for weighing because they could have been weighed without being cut up at all. And more importantly, each plant ought to have been analysed but they were not.
- (b) The Exhibit 6 Register (Drugs Task Force) records the CRB No.487/19, CRB No. 486/19 and CRB No. 485/19. However in Exhibit 22 (Certificate of Analysis), Kava recorded the case file no.s as CRB 486/19, CRB 487/19 and CRB 488/19. Kava told the Court that those numbers were on the labels of each sample

when he received them. No evidence was given as to where CRB 488/19 came from and what had happened to CRB 485/19 altogether. Mr Tu'utafaiva says that whichever item was labeled CRB 488/19 is not relevant to this case.

(c) There were big differences in the weights of the 4 samples which Leniti Pale signed for and what Officer Kava found when he himself weighed those samples.

[7] Mr Tu'utafaiva is quite right about the 4 plants having been cut up and no record of it being written in the diary of action or on the register of the Drugs Task Force and about the 4 plants not being able to be identified when the pieces were presented as exhibit in Court in this trial (Exhibit 10). But officer, Liliti Televave, gave evidence that he collected the items seized and recorded them on the search list which he produced as Exhibit 5. He then took them to the police station and entered them in the Task Force Register. He cut up the 4 plants and weighed them separately and entered their weights on the register and on the diary of action. He said he then put the cut up 4 plants in a bag (which he produced in Court as Exhibit 10). He said he placed all the exhibits in his cabinet and he then transferred them to the exhibit room on 23 May 2019. The officer WPC Pousima entered them on the register as "04 cannabis plants already cut from their trunks weighed 220.30g".

[8] The register also recorded that on "21 January 2020 WPC Pousima and Sergeant 'Aho hand over to Leniti Pale 0.40 gram of exhibit 4 cannabis plants, 0.41 gram of leaves from the glass bottle, 1 foil from the 3 foils of cannabis weighed 0.37gram and 1 pack of cannabis from 2 packs of cannabis for analysis". There is therefore a continuous record of custody of the plants and material found at the home of the accused to the hand over from Pousima to Leniti Pale. As to handover from Leniti Pale to Laulelei Kava, that is recorded by Laulelei Kava himself in his analysis reports. On each page of his 4 analyses, he wrote: "Received 01 plastic bag from IP Pale, containing 04 samples of plants. Sample A contains fragmented parts of a plant

material, greenish in colour and dry. Evidence bag marked as Moimoi Operation”.

[9] It is true that the weights of the samples recorded by Pousima, 'Aho and Pale are different from those recorded by Laulelei Kava when he received them but they are minimal, and I am satisfied that they were the samples which were handed over to Leniti Pale.

[10] It is also true that there is an inconsistency in the numbering, there being No. 487/19, No. 486/19 and No. 485/19 in the Taskforce Register, and No. 488/19, No. 487/19 and No. 486/19 in the Exhibit Register. Officer Televave spoke about those numbers. He said that they are the numbers of the charges of the accused, and that the “CR” is the short for criminal charge, and the letter B is added to have CRB before each number because the offence of cannabis is a class B drug, as different from Class A drug (methamphetamine etc). Those numbers had nothing to do with the exhibit identification. That is shown in this case where there were 4 samples which were marked A,B,C and D_all named “Moimoi Operation”, but there were 3 other numbers: CRB 488/19, CRB 487/19 and CRB 486/19. It is clear, and I am satisfied that they were the numbers of the charges against the accused CRB 487/19, CRB 486/19 and CRB 485/19, but wrongly written as CRB 488/19, CRB 487/19 and CRB 486/19. That error has no relevance to the samples taken from the exhibits to be analysed.

Was the search lawful?

[11] Mr Tu'utafaiva has submitted that the search without warrant which was carried out by the police at the home of the accused was unlawful. If that was so, the items which were seized were unlawfully seized and they may not be allowed to be produced as evidence in this trial. He says that the officer who ordered that the search be carried out, namely, Officer Ve'ehala, should have given his reason in his evidence for his order (which reason must be reasonable) but he did not. He refers to S.123(1) of the Tonga Police Act which provides that that 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”.

[12] He then refers to 3 things:

- (a) He says that according to Ve’ehala’s evidence, he received the information from Officer Giovanni Finau “about a residence in Tofoa in relation to Taniela Moimoi regarding arm and drug”. But according to officer Giovanni Finau’s evidence, he gave the information to Officer Vi who then talked to Ve’ehala, and Giovanni Finau did not mention the name Taniela Moimoi in relation to the information he received from the informer.
- (b) He says that the evidence of Giovanni Finau was unreliable because he did not write down the time that the informer had contacted him which he said was about 5 pm. And because his evidence that although he had finished work at 4:30pm, he had continued to stay at work to rest after the exercise that they had had, was not supported by the other police witnesses who had exercised with him.
- (c) He says that the alleged information from the informer should not be given any weight for the purpose of deciding the issue of the legality of the search because such person is not entitled to any protection under the Arms and Ammunition Act and he should have been summoned to give evidence as to what he witnessed. He says that alternatively, the police should have dealt with the alleged information by using their power to enter the residence under S.31 of that Act.

[13] As to point (a), the relevant evidence of Giovanni Finau was as follows:

"at about 5pm on 29 April 2019, I got a phone call from an informer. He said he knew of an 'api which had drug and weapon and I went and picked him up and he showed me the 'api, at Tofoa. He did not know whose 'api it was. The time then was 5:20pm. He showed me the container at the 'api where he said the bullets were taken from. The container was in front of the house inside the 'api. I reported to Officer Vi at 5:50pm. I made no note of that. Vi talked to Ve'ehala and Ve'ehala said to act right away. The search party was briefed and we left...

Why no search warrant? The Court had closed and there was a real risk and danger because the informer had told me the bullets were big ones, not .22 or 12 gauge but much bigger and more dangerous...

The informer was a taxi driver and he said that he took a passenger who wanted to buy bullets from there. He said that they stopped by the container and the container was opened and he came back with the bullets and showed them to him...

(in cross examination)

I had worked at 8:30am and finished at 4:30pm. I did not write down what the informer told me or his name, in order to protect him. It is unsafe to have it written down in case some unauthorized person might see it. But I do know his name and who he is. He contacted me at 5pm. We were still there because we had gone to the gym at 2pm, the Teufaiva gym, for may be 2 hours, up to 4pm and we just came back and sat and rested. I only noticed it was 5pm when the informer rang. I asked Vi to tell the other officers not to leave until I had gone and checked out the information I received.

I had known the informer already. He is a Tongan. I don't know where he lives. This was the first time that he conveyed any information. No payment is made to him. It is never intended that he be paid.

I did not know whose 'api this was. It had fence except where the container was.

The informer said that the bullets were big bullets and so I went with one large bullet from the armourer, a Glock 17 bullet. I did not know if the passenger of the informer had a licence (for the bullets) but the informer said that the passenger had got out and went to the house and he then saw the container door being opened.

Why not wait until the next day? Because such bullets as described by the informer would pierce and penetrate the vests used by the police. A Glock 17 bullet can have quite an impact on a vest but it does not pierce and penetrate it. It was therefore a real danger for us, if these bigger bullets were to be used against us. We could have had a surveillance kept on the place overnight but the persons keeping the surveillance may themselves be shot with the bullets themselves.

(on re-examination)

Photograph no.2 (Exhibit 1) shows the .45 bullets found. They are bigger than the Glock 17 bullets."

[14] I have set out all the evidence that I got from Giovanni Finau about what Mr Tu'utafaiva has pointed out. I agree with him that Ve'ehala was mistaken in his evidence that Giovanni Finau had said that the 'api in Tofoa was "in relation to Taniela Moimoi". I also agree with him that no other witness had supported the evidence of Giovanni Finau that he and the other officers sat around and rested from 4:00pm or so up to 5:00pm that day. But I also

point out that no witness contradicted what Giovanni Finau stated in his evidence either.

[15] But as to his submission that the information given by the informer be not given any weight in deciding the legality of the search, because such informer is not entitled to any protection under the Arms and Ammunition Act, and because he ought to have been summoned to give evidence as to what he had witnessed, I am afraid I do not agree.

[16] S.123 of the Tonga Police Act simply requires that the "police officer is satisfied, on reasonable grounds, that (a) a serious offence has been committed or is being committed or is about to be committed and (b) that it would be impracticable, unreasonable or in the interests of justice if the officer was required to apply for a warrant..." In this case, the first question I ask myself: Was police officer Giovanni Finau satisfied of both (a) and (b)? The answer is "Yes". Then the second question I ask myself: Were there reasonable grounds for him to have been so satisfied?

[17] That is a question for the Court to decide and it is decided simply on the information given to and knowledge which the officer had at the time. If that information and knowledge was reasonable, then the requirements (a) and (b) are satisfied and the search may then be carried out lawfully without a warrant. If the officer reasonably believed that the information which was given by the informer was true, then the requirement is satisfied, even though it may turn out subsequently that the information was untrue or incorrect. And the reason for that is because of the urgency of the situation. If the officer is required to verify and confirm that the information, though reasonable, is true, the need for immediate action is defeated. By the time the information is confirmed, the offender and any evidence may have disappeared. This is why this special provision for search without warrant was enacted by the Legislature. It must be interpreted and applied as intended by the Legislature.

- [18] In the present case, Giovanni Finau was informed by the informer that there were drugs and weapons at this particular home at Tofoa. The informer told him that there were sales of bullets, large bullets, at the home. The officer did not straight away believe him because this was the first time this informer had given him any information. He instead told him to meet him so that he could go and look at the place. He also thought to take with him a large bullet, the Glock 17 bullet, to see if it was the same size that the informer had seen the passenger had bought from that home. He went and got the Glock 17 bullet from the armourer to take with him. He told Officer Vi not to let the other officers leave until he had gone and checked out the informer's story.
- [19] The informer met him and they went to the home at Tofoa where the informer had told him he had taken his passenger. He saw the container by the house where the informer said the passenger had gone and got his bullets. The informer told him that the bullets which the passenger had bought were bigger than the .22 bullets and 12 gauge bullets. He was therefore concerned that the bullets may be Glock 17 bullets or even bigger. If they were Glock 17 bullets they would not penetrate the protective (bullet proof) vests which the police wore but they would still impact the officers shot. But what he was worried about was that the bullets were bigger than the Glock 17 bullets because such bullets would pierce and penetrate the vests and kill the wearer thereof. He was convinced there was a real danger and an urgent need to act straight away.
- [20] He then returned and reported what he found out to Officer Vi at 5:50pm and Officer Vi then talked to Officer Ve'ehala and that officer Ve'ehala ordered that they acted right away.
- [21] Having heard that evidence of Giovanni Finau, I am quite satisfied that he had reasonable grounds to be satisfied that a serious offence had been committed and that immediate action be taken right away. He properly explained that it was not reasonable to wait until the next day or to have any

surveillance carried out overnight, because of the danger of the surveillance officer or officers being shot, and of the bullets disappearing overnight.

[22] As to allowing the officer to give "hearsay evidence" of what the informer had told him, I have to decide the matter on what he says the informer told him, not on what the informer says he did in fact tell him. There is a good reason for that. The informer may change his story in order that he does not become a "target" for persons who might have been affected adversely by the information which he had given to the officer. Therefore the Court must not consider the evidence of the informers in Court for that reason.

[23] I therefore do not agree with the submissions of Mr Tu'utafaiva that the search carried out by the police in the present case was unlawful. I am satisfied that the search was lawfully carried out.

Was the accused in possession of the cannabis material? the 4 cannabis plants? 50 .45 bullets and the 500 .22 bullets?

[24] Mr Tu'utafaiva submits that the prosecution must prove beyond reasonable doubt that the accused knew of the presence of the 4 plants in the saafa bush, the plant material in the glass bottle, the plant material in the little white plastic box, and the plant material in the yellow bag in the car, and of the 500 .22 bullets and the 50 .45 bullets in the container, and that he had control of them.

[25] **The 4 plants:** In respect of the 4 plants, he submits that the accused had given evidence that he did not know about the 4 plants in the saafa bush at all and that he had only come with his wife and lived in the house in April, the same month that the police came and found the plants. He says that the police have not been able to prove how long the plants had been there.

[26] Ms Fakatou on the other hand says that the accused did know of the plants because the plants were planted in plastic pipes which the accused admitted were same as the pipes at his work place (PAO Plumbing Service) and which he said would be on the vehicle sometimes when he would come home. She

points out that the 4 pieces of pipe which were found in the container were the same as the pipes in which the plants were planted. She submits that it was natural for anyone who has only moved to a new place of abode to walk around and inspect every part of such place, and she says that the accused must be sure to have done just that and would be sure to have seen the plants in the saafa bush there.

[27] I do not think there is any reasonable doubt that the 4 pipes in which the plants were planted were cut in the same way as the 4 pipes that were found by the doors of the container, that is, by use of a hacksaw. They are all of the same size and diameter. Five of them have been painted black and three remain as their original grey colour. All the 4 plants were planted in 4 of the black painted pipes, and I believe that they were so painted so that they would be less discernible when placed in the saafa bush to prevent their being spotted by anyone. And because of the presence of the 4 empty pipes in the container, I believe that whoever had planted the plants, or who had put the plants in the saafa bush, did have something to do with the use and care of the container. It is worthy of note that the empty pipes in the container were found right by the door of the container, that is, at the front as one opens the container.

[28] I also consider the evidence of the accused that they went and lived there because his sister had asked them to come and live there and look after the home while she and her husband went to the U.S. I do not believe that his sister would have left her home if the accused and his wife were not going to move in on the same day that she and her husband would leave to the United States. That was what she had asked the accused to do and the accused said that he did do that. I therefore believe that the accused was wrong in his estimate that it was April 2019 that he and his wife moved in. I believe that they moved in on the same day that the sister and husband left_in February 2019. If that was not the case, and it was the fact that they did not move in until some 2 months later, there should have been some special reason why but he did not provide any such reason.

[29] I also consider that the evidence of Officer Misinale 'Ahohako (witness no.6) is the only evidence of the prosecution which mentioned anything about the doors of the container, and he only mentioned it in his evidence-in-chief. He was not cross-examined about it and none of the other 8 witnesses was cross-examined about the doors of the container at all. And yet, the accused made a point of emphasizing that the doors of the container could not be closed at all, let alone being able to be locked. I think that the point that he wanted to convey by it is that he could not have knowingly kept such dangerous things, let alone unlawful things, such as the bullets found, in the container because its doors could not be closed or locked. This is what he said in his evidence in chief:

"The container was not used by us for anything. When we got there, the doors couldn't be closed or fastened. I don't know why, but the two doors were uneven and so they couldn't be closed tight and fastened. So we always left it like that as it could not be closed. From memory, I can't recall ever opening it except maybe once or twice to put the sister's dogs inside when it rained because they had no kennel but it's my wife who did that".

When he was cross-examined about it, he said that the doors couldn't be shut.

[30] That evidence appear to contradict the evidence of Officer Misinale 'Ahohako about the doors of the container. The officer said in his evidence: "After searching the house we then went and searched the container which was at the home. The accused was always with us. The container was closed but not locked and it was then opened and we searched it..." I took his evidence to mean that the doors of the container were properly closed as they should close but that they were not locked. Yet it was not put to him in cross-examination that they were not properly closed such as the accused has subsequently stated in his evidence.

- [31] If the doors were really out of alignment with each other and that neither door could be closed, such as the accused has described in his evidence, then he must have found that out himself, by himself actually trying to close the doors. If he was trying to close the doors, then the doors must have been opened. He said that they were opened to let the dogs in out of the rain, and that he did not open it to do that because it was his wife who had opened the doors and let the dogs in. He said that in answer to the question by Ms Fakatou that he would have seen the empty pipes at the front of the container by the door. But as I have said he must have attempted to close the uneven doors like he said they were and if he did that he would have looked inside the container, especially by the doors to see if anything inside the container was obstructing the doors from closing properly. And he would have then seen the empty pipes by the right door where they were found.
- [32] I believe the evidence of officer Misinale 'Ahohako that the doors were closed properly but not locked. I believe that the doors were properly closed and were not uneven that they could not be closed such as the accused claims in his evidence. I believe that the accused has lied about not having opened the container and not looking at the contents of the container.
- [33] That is proved by the fact that when the bullets were found in the container and he was asked whose they were, he answered that they belonged to his brother-in-law. That answer revealed that he had already known about the bullets and that they were in the container. Because he knew that they were there, then it was true that the doors of the container were properly closed, just as Officer 'Ahohako said they were, and that he had seen and known that the bullets were in the container.
- [34] If therefore follows, and I accept as a fact that the accused also knew about the 4 empty pipes by the doors of the container, and I believe that the accused has lied about not knowing about the empty pipes because he knew of their connection of those pipes to the 4 cannabis plants in the saafa bush just outside the container.

- [35] It confirms my belief that he has not been truthful about when they moved into his sister's home. I believe that they had moved there in February like he said when his sister and her husband left to the U.S.
- [36] That is confirmed by the height of growth of the saafa bush where the 4 plants were located. Photograph no.6 shows the older saafa bush stalks being trampled and forced to the left of the photograph in order that the plant shown is exposed to more sunshine, and the new saafa stalks and leaves shown in the photograph which have grown up from the base of the bush show many weeks, even months of growth. The plant is shown to have grown away from the pipe, naturally, to gain as much sunshine as possible.
- [37] Officer 'Inoke Vi made a circle with a pen in photograph 6 around the black pipe from which the cannabis plant shown in the photograph grew. It shows that the whole plant was leaning away from the pot altogether, and that is confirmed by the plant on the far left in photograph 19.
- [38] That is evidence of tending or maintaining of the growth of the plants. That is cultivation of the plants. It is also possession of the plants.
- [39] I am therefore satisfied beyond reasonable doubt that the accused knowingly possessed and cultivated the 4 cannabis plants without lawful excuse.
- [40] **The cannabis in the glass bottle and small plastic box:** In respect of the cannabis leaves which were in the glass bottle and in the little plastic box which were found in the compartment of the car, I believe the evidence of the Officer, Giovanni Finau, who found them. He said he found them between the front seats of the vehicle and that Officer Taufu asked the accused what they were and that the accused said that they were cannabis or marijuana. He said that photograph 12 showed the compartment between the front seats with the glass bottle and the little which plastic box in it. He was not cross-examined about whether there was another compartment which fitted into the compartment at all. I therefore do not believe the claim which the accused has made in his evidence that there was such a compartment there

at the time which would have hidden the contents of the compartment shown in the photograph. I believe that the accused has made that claim in order to have me believe that he did not know of the contents of the outer compartment because the inner compartment hid them when he would look into the inner compartment. I therefore believe that he has lied about that because he knew that the cannabis were in the outer compartment.

[41] He was using that car for going to and from work. He had it locked when he got out of it and took the keys with him to ensure no one would go into the car.

[42] I am therefore satisfied beyond reasonable doubt that he knowingly possessed the cannabis in the glass bottle and in the little white plastic box found in the compartment in the car without lawful excuse.

[43] **The cannabis in the yellow bag found in the car:** In respect of the cannabis which was in the yellow bag which was also found in the car, I do not believe and I do not accept the evidence of the accused that he did not know that the cannabis were inside the yellow bag. He said that the bag belonged to a friend of his, and he gave the name of the friend. He said that the friend gave him the bag and told him that he had packets of Tongan tobacco in it with cigarette papers and filter tips, and asked him to sell them in the Tongan kava clubs for him. He said he did not know that there was also in the bag the cannabis which the police found.

[44] He however did not call the friend as witness to back up his story. I think I know why he did not call him. Because the friend would deny his story instead. He would deny it because he would be charged with an offence if he would say that the bag was his. I believe that he made up the story.

[45] That story went like this, in his evidence:

“As to the yellow bag, I knew of it. It was AB’s bag, my friend. He gave it to me maybe 2-3 days before, for me to sell (the stuff inside) for him. There were between 10 to 20 packs of Tongan tobacco for

sale to kava clubs. I'm in the Dolphin Kava Club at Fasi. I smoke but not Tongan tobacco. I don't know why the 2 scissors were in there. As to the electric power plug in there that was mine, I put it in there. There were also cigarette filters and papers there for sale. As for the 2 cannabis packs in there, I did not see them in there.

The yellow bag was in the vehicle. I looked inside the bag and I saw the things which I have said. I sold the tobacco. When someone wants to buy something, I pass the bag over to him and he takes what he wants and puts the money in the bag and then pass the bag back to me."

(in cross-examination)

"yes the yellow bag was AB's. It is passed to the buyers and then passed back to me. I remember one buyer was CD. I had the bag maybe 2-3 days before the police came. I had taken things out of it but I did not empty it out. I did have my plug in it. I did have the chance to check its contents and find what the police later found. I go with it to the kava clubs. I do not count the money after the bag is passed back to me. Only after all the tobacco and other things have been sold would I then check the money. The money which was found inside the bag was AB's money. No part of it had been paid to AB as yet. Previous monies had already been paid to him."

[46] Ms Fakatou submits that the accused had had ample opportunity to look inside the bag and determine for himself what was inside the bag, and that he was therefore deemed to be aware of the contents of the bag. That is true because the accused says he had had the bag for about 2 to 3 days. That is what the Court of Appeal of England held in the case of *R v Lewis (G)* 87 Cr.App.R270:

"A person is in possession of something where he has knowledge of its presence and some control over 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”.

I agree with her, that in accordance with the law of England on the matter, the accused is deemed to have had possession of the 2 packs of cannabis in the bag whether or not he availed himself of the opportunity to learn or discover them.

[47] But I also have to consider the actual wording of the law in Tonga, because the actual wording is different from that in England. In England, the offence is stated in S.(1)(I) of the **Drugs (Prevention of Misuse) Act** as follows:

“it shall not be lawful for a person to have in his possession a substance... specified in the Schedule to this Act”.

In Tonga, the offence is stated in S.4(a) of the **Illicit Drugs Control Act** as follows:

“Any person who knowingly without lawful excuse, the proof of which shall lie on him –

(a) possesses... an illicit drug... commits an offence...”

[48] I consider that the inclusion of the adverb “knowingly” and the verb “possesses” narrows the concept of possession in Tonga to actual knowledge, so that a person cannot be said to possess something unless he is proved to have actual knowledge that he possesses it. That does not mean that the accused must be proved to have stated or be seen or be heard that he had that actual knowledge. That actual knowledge can readily be implied or reasonably inferred from the circumstances of the case.

[49] For example, in the present case, it can reasonably be inferred that the accused had actual knowledge of the contents of the yellow bag, for the following reasons:

- (a) If the bag was really AB's bag, and that he himself (AB) had put the Tongan tobacco packs, together with filter tips and packets of cigarette papers, inside the bag, like the accused has said, then AB would have knowingly put the 2 packs of cannabis into the bag himself, because there would be no way he could have mistakenly put the cannabis packs in the bag as tobacco packs because they are much smaller and they do not have the label or other things inside the pack like the tobacco packs. If he had knowingly put them in the bag, why would he not tell the accused of it? Such packs would be sold for much more than the packs of tobacco (including the tops & papers) which the accused said he was selling for \$8.00 per pack.
- (b) If the packs of cannabis had been put in there by AB by mistake, AB would be sure to have found out his mistake soon afterwards and would have told the accused of it straight away, but no such mistake was conveyed to the accused for 2 to 3 days.
- (c) The accused had put an electric plug of his into the bag himself. He thereby used the bag as his himself.
- (d) There were 2 pairs of scissors in the bag but the accused says that he did not know why or for what purpose they were in the bag. Again that shows that the bag was being used by him for carrying the scissors.
- (e) The accused would have been sure to count the number packs of tobacco which were given to him so that he could account for them so that he would not end up paying for unaccounted packs of tobacco. If the buyers simply put the money in the bag and take out the tobacco, like he says they did, he would be sure to count the packs and the money immediately or soon afterwards to be sure that the buyer took only the pack he bought and to

have put in the correct money. He would be sure to look in the bag to do that. He would be sure to see the packs of cannabis in there then.

[50] I just do not believe his story at all. I do not think that a responsible person like him, being the manager of the business PAO Plumbing Service, would conduct the business of his friend like that. He says he had no record of the contents of the bag when he received the bag from his friend and he had no record of the proceeds of sale and of the remaining stock in the bag. But he has tendered that story to prove that he never looked in the bag and had not seen the 2 packs of cannabis in there! On the contrary, it has proved to me that he had looked and knew that they were there. The fact that he has offered such a story convinces me that he knew the contents of the bag. I believe he would have counted the money in the bag, if the buyers just put in the money like that, not only to ensure that the correct money was put in by the buyers, but more importantly to ensure that the buyers do not steal any money from the bag. To do that he would have emptied it out the bag to ensure all the money was counted. He would then have seen the 2 packs of cannabis in the bag.

[51] I therefore am satisfied beyond reasonable doubt that the accused knowingly possessed the 2 packs of cannabis in the yellow bag which was found in the car.

[52] **The 500 .22bullets and 50 .45bullets:** In respect of the 500 .22bullets and 50 .45bullets, I have already stated above that I have found that I am satisfied beyond reasonable doubt that the accused knew that all those bullets were in the container because he told Officer Taufa that they belonged to his brother in law, and he has also stated in his evidence that his sister and her husband (that is his brother in law) had asked them to come and stay in their home and look after it for them while they went to the U.S. The container was in the care and custody of his sister and husband (because

it belonged to Dateline Shipping who has since taken it). And its contents belonged to his sister and her husband.

[53] When the care and custody of the container and its contents were passed on to and were accepted by the accused and his wife, the accused thereby not only had the knowledge that the bullets were in there, but he also had the control thereof.

[54] I am therefore satisfied beyond reasonable doubt that the accused knowingly possessed the said bullets without lawful excuse.

Drug analysis

[55] It has not been disputed by the accused that the 4 plants, the material in the glass bottle, the little white plastic box and in the 2 packs in the yellow bag were cannabis, as the analyst officer, Laulelei Kava, has certified in his report produced as Exhibit 22.

Armourer report

[56] It has also not been disputed that the said bullets were live and in good condition and that the accused had no licence to possess them as the officer, 'Eliki Tomu, has certified in his report produced as Exhibit 23.

Conclusion

[57] Accordingly, I am satisfied beyond reasonable doubt that the accused is guilty of the three offences with which he has been charged and I convict him of them as charged.



Niu J
J U D G E

NUKU'ALOFA: 30 September 2020.