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**IN THE SUPREME COURT OF TONGA  
CRIMINAL JURISDICTION  
NUKU'ALOFA REGISTRY**

**CR 61 of 2019**

**BETWEEN:**

**R E X**

**-Prosecution**

**AND:**

**LISIATE 'OTUHOUMA**

**-Accused**

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**VERDICT**

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**BEFORE:** Justice Cato

**Counsel:** Mr. T. 'Aho and Ms. H. Aleamotu'a for the Prosecution

Mr. S. Tu'utafaiva for the accused

1. The accused, Lisiate 'Otuhouma, was charged with one count of possession of an illicit drug contrary to section 4(a) of the Illicit Drugs Control Act particulars of which were that on or about the 17<sup>th</sup> April 2019 at Fahefa, he did knowingly and without lawful justification possess a Class A illicit drug when he had in his possession 3000.4 grams of methamphetamine that is about three kilos of methamphetamine.
2. The evidence was in a narrow compass. To summarise this;
  - i. On or about the evening of Friday 17<sup>th</sup> April 2019, Senior Constable Tapueluelu of the Drugs Enforcement Taskforce received what he regarded as reliable

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information from a police informant that methamphetamine could be found at the accused's residence in Fahefa.

- ii. The accused was living there with his wife and mother in law.
- iii. As a consequence, Tapueluelu consulted with a more senior officer Vi, about this information. This resulted with other officers travelling to the accused's residence to first survey the residence. As a consequence, Tapueluelu was directed to leave to conduct a search of the accused's residence, and other officers went to another residence of interest at Utulau.
- iv. A number of officers were assigned to the search which commenced in the evening. The officer in charge was Fihaki. The search was a warrantless search and no complaint was made about this by the defence. The search commenced sometime after 9pm.
- v. Officer Fihaki informed the owner of the residence why Police were present namely to search for illicit drugs. Tapueluelu believed that she was the mother of the accused's wife.
- vi. Prior to the search, members of the Tactical Response Team who were armed had cleared the residence. Tapueluelu said one member with a gun in a holster had remained inside.
- vii. The accused, according to Tapueluelu, was asked where his room was and he identified this. He led officers to the room. Other officers present were 'Otuhouma, Pohiva and Vainikolo. The accused was present throughout the search.
- viii. In a wardrobe in the bedroom of the accused (and his wife) was located a bucket in plastic that was sealed. That had been located by officer Pohiva. Tapueluelu said that he looked inside the closet where men and women's clothes were hanging.

- ix. Tapueluelu said that when Pohiva located the bucket, he asked the accused what was in this bucket and the reply was this is what you were looking for. He was then asked by Tapueluelu to confirm what the contents were and he replied that it was ice.
- x. He said also that, as they had entered the room, the accused had said he knew what they were looking for but what we are looking for could be found at Utulau and it is best that we depart immediately and search for the substance at Utulau.
- xi. Tapueluelu said these words were directed at him. The accused was told that the work must be completed at this residence before moving elsewhere.
- xii. The bucket was closed and taped and covered with plastic. When opened it held a large amount of a white substance subsequently analysed in Auckland by the ESR and found to be methamphetamine or ice. According to Tapueluelu, the accused was then cautioned by Officer Fihaki who had been called over when the drug was located.
- xiii. Tapueluelu was cross-examined by Mr Tu'utafaiva, and confirmed that the information he had received from the informant was around 7-8pm. He suggested to Tapueluelu that the accused had not responded that this is what you are looking for and instead suggested that the accused had said that it was a package brought together with lollies or candies. Tapueluelu denied this.
- xiv. Tapueluelu admitted that there was a packet of lollies found. He denied the packet had been found first and that the accused had said that it was a gift.
- xv. He further denied that he was wrong about the accused saying that is what you came looking for. He confirmed that the accused had told him that it was ice. He also

denied that he accused had said, when searched outside, what was the illicit drug police say is in the residence.

- xvi. It was also suggested to him that the accused had not said to him that they should go to Utulau because he knew what they are looking for and they should leave immediately. Mr Tu'utafaiva suggested that the accused had said the conversation was about X and a relative of hers Y, the use of Y's vehicle by X and that Tapueluelu had asked to be directed there. Tapueluelu said that was not so. He later said that he was aware there had been a second search at X's carried out by another group of police at the same time as they searched Fihaki.
- xvii. Tapueluelu also said that he accused had not asked for his wife or his wife's mother to be present when the search was conducted and he was told to sit down or he would get the shit slapped out of him.
- xviii. Officer Fihaki said that he spoke to Melaia, the accused's wife's mother on the night of the search and had told her that they had received information of drugs in the residence. She gave them consent to search. He said the reason that there was a warrantless search was that it was a matter of urgency or concern that the drugs may be lost
- xix. Officer Pale gave evidence about continuity which Mr Tu'utafaiva admitted was not in issue, nor that the drug located was methamphetamine was in issue. His evidence was accordingly short.
- xx. Officer Pohiva gave evidence of locating the drug, in a bucket wrapped in plastic. He said that he asked the accused what was in the bucket and he replied that is what they were looking for. He then said Tapueluelu asked the accused what was inside the bucket and he had said ice. He said he was able to hear this conversation. Further, he said that a packet of lollies had been located first and that they had been wrapped in a plastic packet and you could see inside. He confirmed that the accused

had said that they were a gift, and that may be they had come from someone who was fruit picking overseas. He admitted that he had said it was a gift.

- xxi. He said the white bucket (that contained the methamphetamine) was sealed with cellotape and it could not be opened without being cut.
- xxii. It was also put to him that the accused had said that the accused had told him that was a gift brought together with the lollies. This was denied.
- xxiii. He then was asked whether he had asked the accused what is that gift or package and he had replied he did not know. He denied this occurred or that he had asked this question.
- xxiv. He confirmed that he had heard the accused say that is what you are looking for, and then Tapueluelu ask him what was in the bucket and the accused had replied ice.
- xxv. The accused gave evidence and said that he had been at the hospital with his wife when his employer a man named Y, who resided at Utulau, asked him to go to his wife (Z) or defacto's residence and pick up his car. After they had picked up the vehicle, Z said to them to inform Y that those are all the stuff in the vehicle. They went to Y's residence at Utulau. They greeted him and told him of the information from Z. He was told to bring the stuff in the car. One was a large plastic bag. It was really heavy. There was also a cardboard box which was cellotaped. Saia took the box he said to his room and he stood at the door. Saia came back with a bucket that was not wrapped and it was full of lollies. He was told to take the bucket with the lollies for his children to have and the other bucket that was wrapped that he said had been taken to Z and did not know why it had been returned. He asked Y whether he should take it back and Y told him to take it to his place and someone would pick it up. The accused said he had thought there would also be lollies in that bucket. He said that he was happy to take it because he thought that it would be lollies.

- xxvi. He said his wife distributed some of the lollies and he placed the sealed bucket in the wardrobe, in the closet. He told his wife's mother that it was for someone else.
- xxvii. They then went to Church and after returning 3 doors were kicked in, and the police arrived. He said he was subsequently searched. He said he had asked the officers what illicit drug they were looking for and he was told "block".
- xxviii. He said that he directed them to his wife's room, and stood at the door of our room. He said he confirmed it was their room. He said he had felt scared seeing police with arms. It was when the search commenced that he had asked for his wife or mother in law to be present. He said the lollies were found in the closet. He told the officers they were a gift. He said a bucket was found in the same place and he was asked about that. He said the person said what is this bucket and he told him that the bucket was one that Y gave him and he bought it from Utulau. He said that it was brought together with lollies and he said this person replied that is what we were looking for. He said the police had said that is what they were looking for, and he had not said that as they had said. He said that he had said that it was "block" because the police had said that to him when he was searched. He said he had not said that it was ice. He said they had a cell phone and took photographs of the drugs on the bed. He said later they took him to Utulau where another search was running. He denied that he had said earlier to police that what you are looking for is at Utulau. He said that the police had talked to him about X and whether he worked with her, and he had said no. He did not know who they were referring to. Then, the police said X is using Y's vehicle and then he understood who the police were referring to. Then he said that he told police that X was Y's cousin and that she used Y's vehicle because Y had a pig farm at her residence. He said that after that the police asked him for directions to X's house. This conversation occurred before the bucket was found.

- xxix. He was asked where Y lived and it was 150 to 200 meters from X. He was asked whether he recalled being cautioned after the drugs had been found and he said no.
- xxx. Under re-examination, he said he had worked for Y for 12 months. He said his wife also worked for Y as a cook. It emerged also that Y had produced two buckets, one with lollies. He also said that Y had said that it was lollies in the bucket (parcel) that was to be picked up. It was put to him he knew what was in the bucket that Y had said would be picked up and that it was drugs and he denied this. He said that it was his belief that Y had given him two buckets of lollies. He said that he put the sealed bucket in the wardrobe because he thought it was safer to do so because of the children.

### Verdict

3. I listened closely to the evidence of the accused. Whilst as it stood, it was not an explanation that could be dismissed as entirely incredible, I found it strange that the accused had been asked to bring back a car belonging to Y from his girlfriend Z in town which contained two buckets (sometimes called packets) the accused having been told to inform Y by Z that all the stuff was in the vehicle. One of the packets contained it seems lollies which Y had given to the accused and yet the other which contained a very sizable amount of methamphetamine in a still sealed plastic covering was apparently to be returned to Z. The accused had said that he thought or hoped this was also lollies although it is not clear, precisely in the evidence whether he hoped this was the case or because Y had told him this, nor why this was so because the arrangement was that this was to be picked up by a third party to be arranged by Y and delivered back to Z. Nor, indeed why at all the accused had to hold onto this container or bucket that Y seemed to reject rather than Y had simply arranged for it to be either picked up from him and sent back directly to his partner if it was hers and not intended for him. Accepting the accused's version to this degree for the purpose only of these proceedings, that he took the container along with the container containing lollies at Y's direction, I am strongly suspicious that Y was attempting to distance himself from such a large amount of methamphetamine being on his premises,

and wanted it off his premises as soon as possible. Whilst I am highly suspicious of the relationship of the accused to Y as being a simple employer- employee relationship, and also of the accused's assertion that he did not know what was in the sealed bucket, it is not so incredible that it can simply be dismissed out of hand without there being something more to reject it beyond a reasonable doubt, as being not possibly true.

4. The case really turns, in my view, on whether I am able beyond a reasonable doubt to accept the evidence of officers Tapueluelu and Pohiva that incriminating verbal admissions were made by the accused during the search. If I do accept these, then this negates the accused's assertion, (that Mr Tu'utafaiva submitted was the only issue in the case) that the accused had no knowledge that the container that he had allegedly been asked to hold on to by Y held methamphetamine or ice. I have closely considered the evidence of both officers and the way they responded to the cross-examination by Mr Tu'utafaiva concerning the verbal admissions which Mr Tu'utafaiva had said in relation to each officer that they were either mistaken or wrong. Mr Tu'utafaiva did not impeach them directly suggesting that they had conspired to give false evidence implicating the accused but that inevitably was the thrust of his cross-examination.
5. I have addressed my mind to the approach suggested by the High Court of Australia in *Carr v The Queen* (1988) 165 CLR 314 and in particular I direct myself to the need for care before relying on the evidence of these two police officers in relation to the search based on verbal admissions. As the Court observed there have been occasions where verbal admissions have been manufactured by police, and further the observation that police are professional witnesses and some may be practised liars.
6. I was concerned that Officer Tapueluelu had not carried a notebook and unable to make any notebook entry of the verbal admissions. Pohiva was not questioned about this. In Tonga, electronic recording of Police interrogations is not, possibly for economic reasons, the practice adopted. It is usually a written record taken by an officer with a corroborating officer present, as it used to be in other jurisdictions before electronic records became the norm. Verbal confessions in England had caused judicial concern, as was emphasized by

Lawton LJ in the famous case of *Turner v The Queen* (1975) 61 Crim LR 67, at 77 leading to electronic recording of police records of interview being adopted in the 1980s in England, and elsewhere. In other cases, note books should be carried and used, and the accused invited to authenticate the notebook entry of a verbal admission. One way to ensure the integrity of verbal admissions, as Deane J suggested in Carr in the modern age would be by way of a handheld recording device carried by an officer when conducting a search to capture any admissions made by an accused of the kind recounted here. Some of the concerns expressed by the High Court such as an inherent and unquestioning respect for the police precluding a jury member from dispassionately considering whether it may be dangerous to rely on a verbal admission, are not present here. At the end of the day, the determination I have to make after giving myself the warning to take care is whether I accept the officers' evidence that the accused made certain highly prejudicial admissions which negate his denial of knowing what the contents of the sealed bucket were.

7. The conclusion is that I do accept the Police officers version of what was said. I reject the accused's version. This was not a case where the accused simply stated he said nothing at all to the police. Various alternative versions were put by Mr Tu'utafaiva of what had transpired and what his client had said to the police, I have closely considered all he had to say, warned myself of the need to take care, and closely observed the demeanour of both officers when giving their evidence and under cross-examination and I do not have any reason to reject their evidence or consider that it is possibly untrue and the product of invention. I do not accept and indeed reject the versions put by the accused beyond any reasonable doubt. In particular, I accept that;
  - i. The accused did attempt to, divert the search, by stating that what they were looking for was at Utulau;
  - ii. That he had said when Tapueluelu and Pohiva were conducting the search and the sealed container had been located that is what you are looking for;
  - iii. When asked by Tapueluelu what was in the container, he had responded ice.

8. I consider that these were spontaneous and not manufactured utterances made by the accused at the time of the search and shortly before he was cautioned by Officer Fihaki after the drugs had been found and before he was given legal advice not to make a statement when later invited at the police station to do so. I do not consider either police officer was mistaken or lying about the evidence he gave as was suggested to them by Mr Tu'utafaiva.
9. I also reject various other allegations, namely that he asked for his wife or mother in law to be present during the search, that he was rudely abused by Tapueluelu and told to sit down or he could expect a violent response before the search, or that he had a discussion about X such as he had recounted. There was evidence that police had independently proceeded upon a search of those premises in Utulau at the same time as they searched the accused's residence.
10. For these reasons, I reject the accused's evidence to the effect that he had no knowledge of the contents of the container. His evidence is in direct conflict with the admissions he made to the officers. As a consequence, I find beyond reasonable doubt that on the 17<sup>th</sup> April, 2019 he was in possession of meaning that he had custody and control of 3kg of methamphetamine, and he is accordingly convicted of having illicit drugs in his possession. He is remanded in custody for sentence and a probation report is ordered.
11. I also make the comment that for sentencing purposes I will unless advised otherwise, approach this case on the basis that, on the 17<sup>th</sup> April 2019, the accused was in possession of 3 kg of methamphetamine, an amount which was obviously capable of being distributed by him personally or on behalf of another for very considerable financial gain. I do not accept on his uncorroborated evidence alone that he was merely holding it for another temporarily, or that he was not working with Y and or others in association with the distribution of this very large amount of methamphetamine. I would invite a further response from both counsel as to the foundation I should adopt for sentencing.

**NUKU'ALOFA: 29 September 2020**

