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

CR 227 of 2019

BETWEEN:

R E X

-Prosecution

AND:

HARRIS ISBELL SATINI

-Accused

VERDICT

BEFORE: JUSTICE LANGI

Counsel: ✓ Ms Halaevalu Aleamotu'a for the Crown Prosecution
The Accused In Person

Date of Verdict: 02 October, 2020

A. THE CHARGE AND PRELIMINARY MATTERS

1. The Accused is charged with two counts of possession of illicit drugs under the Illicit Drugs Control Act:
 - a. Count 1: that on 5 October 2018 he knowingly and without any lawful excuse possessed a Class A drug, namely methamphetamine contrary to section 4(a) of the Act;
 - b. Count 2: that on 5 October 2018 he knowingly and without any lawful excuse possessed a Class B drug, namely cannabis contrary to section 4 (a) of the Act;

rec'd 13/10/20
llc

2. I have reminded myself at the outset that the onus of proof lies on the prosecution at all times and it is to the standard of proof beyond a reasonable doubt in relation to the charge and every constituent element of the charge.
3. Before I can convict the accused the prosecution must prove the following elements beyond a reasonable doubt:
 - a. That on 5 October 2019 at Vaini;
 - b. Mr. Satini knowingly possessed;
 - c. A class B drug, cannabis/A class A drug methamphetamine
4. At the beginning of the trial, the prosecution informed me that after discussion with the accused, they have narrowed down the issues in this case to the following issues:
 - a. Legality of searching the accused and the premises not named in the search warrant;
 - b. The chain of evidence in relation to both Class A and Class B drugs;
5. The accused informed me that he does not dispute that illicit drugs were found in his possession but the police had searched him without a warrant and the evidence was therefore obtained illegally and should not be admitted into evidence.
6. He also confirms that illicit drugs were found at his residence but that his defence is that the drugs taken by police were not the same drugs that were tested.

B. THE EVIDENCE

7. I heard evidence from 12 witnesses for the prosecution.
8. The first witness was Police Constable Kalosi Tapueluelu. He had received information from an informer that the accused was involved with the use of illicit drugs. He informed his superior, Inspector Malolo Vi, who then applied for a search warrant. He was part of the team that went to Vaini to execute the search warrant. He said that when they arrived at the accused's house early in the morning they found that another couple and their children were living at the accused's house. The couple told them that the accused was at their house next door doing some construction work on their house because it had been destroyed during the Gita cyclone. He said that he walked over to the next-door neighbour's house to look for the accused. When he neared the house, he saw the accused peering at him from inside and then quickly put something inside a packet of Winfield cigarettes. He immediately ran over to the accused and

took the packet of cigarettes from him. He opened it and found a small plastic bag containing 'ice'. He said that Officer Pohiva arrived and he searched the accused and found a branch of suspected cannabis inside the back pocket of his pants. He also said that he asked the accused who the items belonged to and the accused told him that they were his. He then cautioned the accused. He said that by that time Inspector Vi then arrived at the scene and he was informed of the items that he and Pohiva had found. Inspector Vi then cautioned the accused a second time and read out the warrant. He said that after they had searched the area where the accused was found, they took him back to his own house where he further found a pack of cannabis in the accused's room.

9. In cross-examination, the accused put to him that the content of the search warrant that was read out to him clearly indicated that the warrant was for his house and not the house next door where he (the accused) was found. He agreed but stated that he had come to look for the accused so that he could be brought back to his house but because of the suspicious nature in which he was seen trying to hide something inside the packet of cigarette he was required to act quickly.
10. The second witness was Inspector Malolo Vi. He is the Acting Superintendent of the Drugs Task Force unit. He gave evidence of having obtained a search warrant from the Magistrates Court to search the residence of Harris Satini at Vaini. He led the search from shortly before 6am on 5th October 2018. He confirms PC Tapueluelu's evidence that the accused was not at home when they arrived. Other officers went to the house next-door to look for the accused and when he arrived he was informed that Tapueluelu had found 'ice' on him. He cautioned the accused and read out the search warrant to him. He said that all the items that were found were listed in the search list and both he and the accused signed it. He produced the search warrant.
11. The only point in cross-examination worth noting is the challenge to the legality of the search warrant. The accused put to him that when he came and read out the search warrant, the police had already commenced searching and the search was therefore unlawful. He replied that it would depend on the circumstances of each case as in certain situations there would be an urgent need for police to act quickly in case evidence is destroyed and therefore act without a warrant. The rest of the cross-examinations of this witness challenged him on points of detail but this served no useful purpose. For instance, he challenged the witness on the fact that the application for a warrant refers to 'stolen goods' when in fact they had searched for illicit

- drugs. The witness replied that the part in the application that refers to 'stolen goods' is crossed out, meaning that they were not looking for stolen goods but for illicit drugs.
12. The third witness was Police Constable Pohiva. He was part of the search team and had gone to the house next door to look the accused. He had searched the accused and had found cannabis inside the pockets of his pants. In cross-examination the accused asked the witness whether he had seen him being locked up and he put to him that he had been locked up before the search began. The witness replied that the only time he was locked up was after they had found the drugs. The rest of the cross-examinations made were again on matters of detail such as challenging the witness on who arrived first and who searched him first.
 13. The fourth witness was Tu'amelie Fifita. He confirmed that the search warrant was read out to the accused at the next-door neighbour's house. He and another officer found a pack of cannabis inside the accused's room. Most of the cross-examinations of this witness were on immaterial matters such as the correct order of photos in the booklet and the right to be present when photos are taken at the lab and a western union receipt that was one of the items taken by police.
 14. The Fifth witness was Police Constable Patelesio Tu'itavuki. He took and produced photographs he had taken of all the exhibits that were seized from Vaini. Again, most of the cross-examination question for this witness were on minor issues such as not being present at the lab when he was taking the photos of the items.
 15. The sixth witness was Police Constable 'O'ra Palefau. She prepared the search list and made entries in the diary of action. The accused had signed the search list and the entries relating to the finding of the drugs and cash at the premises at Vaini. She produced the search list and the diary of action. In cross-examination she was accused of adding further information to the search list when she added the words 'western union receipt' after the accused told her that she had forgotten to write those words She denied making any new entries to the search list and could not recall the accused asking her about a western union receipt.
 16. The seventh witness was Sione Tupou Vaea. He was also part of the search team. He found 27 cannabis seeds on a table inside the house they had found the accused in. The accused was shown the seeds and asked who they belonged to and the accused told him and Inspector Vi that they were for his. In cross-examination, it was put to him that the police had searched the accused before the search warrant was read out to him. The witness replied that the police had

apprehended the accused and they had waited for Inspector Vi to arrive and read out the warrant.

17. The eighth witness was constable Carsten Leveni. He was the exhibit keeper at the search at Vaini and his main duty on the day of the search was to collect all the exhibits seized. He returned with them to the police station and the methamphetamine and the cannabis were weighed and labelled. He said the methamphetamine was weighed in its plastic packet and recorded a weight of 1.32g. He then handed the exhibits over to be kept in the safe custody of the exhibit room.
18. In cross-examination, it was put to him that he had not just been responsible for collecting and keeping the Exhibits but he had in fact, joined the rest of the team in searching the residence. It was put to him that his evidence was inconsistent as he claims to have only been the exhibit keeper but the entries in the station diary record him as having found the black and white tin. The witness replied that his main duty was to keep the Exhibits but that he had also joined in the search. The accused also put to the witness that the weight of the methamphetamine was inconsistent as he is charged with 1.32 grams but the lab results came back and it was only 1.0grams. He put to the witness that there is a likelihood that it is not the same exhibit given the differences in the weight. The witness answered that when the items were measured they did not take out the powder from the plastic bag because they do not have the correct equipment for taking out the drugs for weighing. They had therefore weighed it together with its plastic bag.
19. The ninth witness was WPC Pousima. She is the exhibit keeper at the Nuku'alofa police station. She received the exhibits from PC Leveni and recorded all the items in the exhibit register. She produced an excerpt of the exhibit register book which showed this handover which had been signed by her and PC Leveni. She stated that PC Pale picked the exhibits from her again on 08 November 2018 and returned them back to her the same day.
20. The tenth witness was Police Constable Leniti Pale. He had taken the methamphetamine from the exhibit room on 08 November 2018 to be weighed again in preparation for taking to New Zealand to the ESR. He recorded a weight of 1.31g. He took the exhibits back to the exhibit room and uplifted them again on 20 June 2019. He flew to New Zealand with the exhibits on 21 June 2019 where he handed them over to Hannah Carrington that same day. This handover was recorded in the Exhibits for Laboratory Examination Form and tendered in evidence as exhibit number 11C. The recorded weight of the drugs after analysis in New Zealand was 1.0g.

In cross-examination he stated that the reason for the discrepancies in the weight is because when the substance is weighed in Tonga it is weighed together with the small plastic bag which contains the drugs. The reason for this is that they do not have the correct tools to take out the suspected drugs from the plastic bag, and it is therefore weighed together with the bag. He further stated that he has weighed the plastic bag on its own and it weighs approximately 28grams. Therefore, the reason for the discrepancies in the weight recorded in the report from New Zealand and the results in Tonga is because the illicit drugs had been taken out of the plastic bag and weighed. He had also uplifted the cannabis exhibits from the exhibit room on 1 September 2020 and handed them over to PC Kava for testing. In cross-examination, the accused put much emphasis on whether or not they had looked for his prints on the plastic bag to confirm that the bags were actually the same ones they took from him. The witness replied that in this case, it is possible for the fingerprints to be lost but as for the actual drugs and the chain of evidence, he has no doubt that it was the same drugs. He was also questioned in relation to the factors that would affect the measuring scale to cause an increase or a decrease in the weight of the drugs. The witness replied that from experience, there is always some small difference in the weight of items that are weighed. Certain things like the air, can affect the weight as the scale is very sensitive. The accused also put to the witness that it would have been fairer if the exhibits had been brought to court as he would be able to identify his own drugs. The witness replied that the drugs taken to New Zealand are left there and destroyed unless there is a request for them to be returned to Tonga.

21. The eleventh witness was Robyn Faith Somerville. She is a senior Forensic Scientist employed by ESR in the field of illicit drugs. She has worked in this field for more than 30 years. She analysed the exhibit handed to her and confirmed that they were methamphetamine. In cross-examination she was asked whether there was a legal requirement for conducting a fingerprint test on the bags. She replied that the drugs and the bag had already been destroyed in November 2019. She was then asked whether it would have been possible to run a fingerprint test if the items had not been destroyed. The witness replied that she had no knowledge of that as it was not her field of expertise.
22. The last witness was PC Kava. He works in the Forensic Unit as an analyst. He had been responsible for carrying out the drug test for the cannabis. On 01 September 2020, PC Pale handed over to him 4 packs of plant material containing suspected cannabis leaves. He tested the items on 07 September 2020 and concluded that they are cannabis. The results of that test

were only handed to the accused on the morning of the trial. He did not produce the report into evidence. He was cross-examined extensively on his expertise to carry out the tests. He stated that he is not familiar with the details of the cannabis plants but only on how to test and determine whether or not a plant is cannabis. The only training he received was a training conducted in 2019 by experts from the Environmental Science and Research (ESR) where he was taught to conduct botanical and chemical tests to determine cannabis.

C. DISCUSSION

23. As stated at the outset, the accused does not dispute that illicit drugs were found in his possession. His defence is that the illicit drugs were obtained unlawfully from the search of a place that was not named in the search warrant and were also taken before the search warrant was read out to him. He also disputes the chain of continuity and states that the illicit drugs that were taken from him are not the same drugs that were tested. Therefore, the issues for me to consider and determine are as follows:
- a. Was the search and taking of evidence from a residence not named in the search warrant lawful?
 - b. Has the Prosecution proved beyond any reasonable doubt that the methamphetamine found in the possession of the accused the same illicit drugs that were eventually received by the analyst Ms. Robyn Somerville?
 - c. Has the Prosecution proved beyond any reasonable doubt that the cannabis found in the possession of the accused the same illicit drugs that were received by the analyst PC Kava?

Was the search of a residence not named in the search warrant lawful?

24. As I understand it, there is no dispute to the search warrant that was issued to search the land, dwelling house and property of the accused at Vaini. On the evidence I have heard, I am satisfied that the search warrant had been lawfully obtained.
25. However, the accused's position is that the search conducted by the police went against section 16 of the Constitution when they came over to the next - door neighbours house and searched and took illicit drugs that were found there without a lawful warrant. This is because the warrant only authorized the police to search the accused's land, dwelling house and property

and not the next-door neighbour's house. According to the accused, the police had gone beyond the scope of the search warrant and the search was therefore 'unlawful.

26. The police in this case do not dispute that the search that occurred at the next-door neighbour's house was made without a warrant. But according to PC Kalosi Tapueluelu, the circumstances required him to act quickly when he saw suspicious actions on the part of the accused. He stated that the law allows him to search without a warrant if the circumstances are such that evidence may be destroyed or damaged.
27. In her closing submissions, counsel for the prosecution submitted that the police are authorized under section 24 of the Illicit Drugs Act to search and seize evidence without a warrant if they have reasonable grounds to suspect that evidence may be concealed, damaged or destroyed if they do not act immediately.
28. I agree with the prosecution. Not only does section 24 of the Illicit Drugs Act authorize police to search and seize without a warrant but section 122 (1) (a) (b) and section 123 of the Tonga Police Act also allows for the search of persons and property without a warrant in circumstances where the police officer is satisfied, on reasonable grounds, that it would be impracticable, unreasonable or not in the interests of justice if the officer was required to apply for a warrant in order to search the person for objects or conduct a search to a place where a serious offence may have been committed.
29. In this case, officer Tapueluelu had walked over to the neighbour's house to look for the accused so that the warrant could be read to him to enable the police to lawfully conduct the search of his residence. However, he saw the accused peering out at him and quickly put something in a packet of Winfield cigarettes. This caused him to suspect that the accused was trying to hide something so he ran over and took the packet of Winfield from him. His suspicions were correct when he opened it and found a plastic bag containing what he referred to as 'ice' or meth.
30. This discovery led to police searching the accused and finding in his back pockets a pack of suspected class B drugs. They also searched the house where they further found more cannabis seeds and plants. I am satisfied that the police had reasonable cause to conduct the search without a warrant given the circumstances. It would have been unreasonable for the police to make an application for a warrant as there was a risk that the evidence would have been damaged or destroyed. I therefore find that the search conducted on the accused and the house he was in, lawful.

Has the Prosecution proven beyond a reasonable doubt that the Class A drugs found in the possession of the accused the same unaltered materials that were received by the analyst?

31. The accused's point of defence in this case is that the drugs seized by the police and identified as methamphetamine by the analyst has not been proven to the necessary standard to be the same drugs seized from his premises at Vaini. His main argument is that the police failed to take fingerprints from the plastic bag containing the illicit drugs to prove that the same plastic containing the drugs was the same plastic bag received by the analyst in New Zealand. I do not accept that the police must take a fingerprint test to prove the chain of evidence.
32. PC Tapueluelu found the suspected methamphetamine inside the packet of Winfield cigarette. This was recorded as serial number 2 on the search list which was signed by the accused.
33. It was then handed to the exhibit keeper, Officer Carsten Leveni. This item is recorded in exhibit 5 (the search list) which had been prepared by Officer Palefau as serial number 02 (or exhibit 2) as "01 packet Winfield containing 13 sticks of cigarettes, 01 pack with ice (meth) and 01 \$5 digicel card. This search list was signed by the Accused and Inspector Vi.
34. The material was then in the safekeeping of Officer Leveni who took all the exhibits to the Police station and around 0951hrs he labelled them in preparation for photographing. This action is recorded in the Diary of Action (Exhibit 8) as diary entry number 40.
35. PC Tu'itavuki then took photographs of the labelled exhibits before they were returned to Leveni for weighing. The weight of exhibit 2 labelled as 01 pack meth was 1.32grams. These actions are recorded in the Diary of Action as entry number 41 and 43.
36. On 11 October 2018 PC Leveni took the exhibits including the pack containing methamphetamine to the Exhibit Room at the police station. He handed the exhibits to PC Pousima. This handover is recorded and signed by both Leveni and Pousima in the Exhibit Diary with the exhibit number 90/18. This was tendered into evidence as Exhibit 10. The illicit drugs is recorded in that diary as '01 packet Winfield with 13 sticks inside, 01 pack ice (meth) – 1.32 grams which was wrapped in a greyish piece of paper and \$5.00 digicel card.
37. On 18 November 2018 the exhibit was taken by PC Pale from WPC Pousima for weighing and labelling in preparation to be taken to New Zealand. The weight recorded by PC Pale is

- 1.31grams. They were returned to the exhibit room on the same day. This exchange is recorded in the Exhibit Diary.
38. The exhibits remained in the Exhibit Room until PC Manumu'a handed it over again to PC Pale on 20 June 2019 to take to New Zealand for testing. This exchange is recorded in the Exhibit Diary and signed by both PC Pale and PC Manumu'a.
39. On 21 June 2019, PC Pale took the exhibits to New Zealand and handed it over to Ms. Hannah Carrington of the ESR. This handover is recorded in the Exhibits for Laboratory Examination Form which was signed by both PC Pale and Ms. Carrington and tendered in evidence as exhibit number 11C. On that form, the subject name is recorded as Sima Operation. The exhibit number recorded is 90/18 with the description 'suspected methamphetamine – 1.31g'.
40. The exhibit was then handed over to Ms. Robyn Somerville for testing. Her report identifies the item given to her as '90/18 A sealed plastic security bag marked in part "SIMA OPERATION" containing a self-sealing plastic bag containing white crystals. The crystals weighed 1.0 gram and contained methamphetamine.
41. I accept the explanations given by PC Pale and Ms. Robyn as to the discrepancies in the weight of the methamphetamine tested.
42. I am satisfied that the manner the exhibits were handled and kept did not suggest that any interference could have been made or had given any opportunity for some unauthorized access.
43. I am satisfied that the prosecution has proven the chain of continuity in this case and I am satisfied beyond any reasonable doubt that the methamphetamine found in the accused's possession were the same unaltered materials delivered to the analyst.

Has the prosecution proven beyond any reasonable doubt that the cannabis seized from the accused's premises the same ones that were received by the analyst?

44. According to Officer Pohiva's evidence, he searched the accused and found a piece of paper in the right back pocket of his pants. Wrapped inside the piece of paper were cannabis leaves, a small plastic bag containing two screws, 1 tube used for smoking cannabis, 1 pack of cannabis leaves and cash. This is recorded in the search list under serial number 1 and also in the Diary of Action under Diary entry number 07.

45. Detective Vaea also found 27 cannabis seeds on top of a glass table inside the house where the accused was found. This is recorded in the Station Diary as entry number 11 and also in the Search List as serial number 04.

46. Detective Leveni also found a piece of paper inside a broken machine at the premises where the accused was found. Wrapped inside the piece of paper were cannabis leaves. This is recorded in the Station diary as entry number 14 and also in the search list as serial number 05.

47. Detective Tapueluelu found a bag inside the accused's room. Inside the bag was a small plastic bag containing cannabis leaves and earbuds.

48. All the exhibits were handed to the exhibit keeper at the scene, Officer Carsten Leveni, who took them to the Police station. At around 0951 hours he labelled them in preparation for photographing. This action is recorded in the Diary of Action (Exhibit 8) as diary entry number 40.

PC Tu'itavuki then took photographs of the labelled exhibits before they were returned to Leveni for weighing.

49. On 11 October 2018 PC Leveni took the exhibits to be kept in the Exhibit room. He handed the exhibits to PC Pousima. This handover is recorded and signed by both Leveni and Pousima in the Exhibit Diary with the exhibit number 90/18. This was tendered into evidence as Exhibit 10. The cannabis exhibits recorded during this handover included:

- a. Cannabis branch and leaves wrapped in a piece of paper 1.92g;
- b. 1 pack cannabis 0.86g;
- c. 1 pack containing cannabis leaves 0.70g;
- d. 1 piece of paper containing fragments of cannabis leaves, inside a small plastic 0.11g;
- e. 01 green and black small bag containing a pack of cannabis 0.51g

50. The cannabis exhibits listed in the Exhibit Diary are consistent with the exhibits listed in the diary of action (exhibit 8) when PC Leveni had labelled and weighed them.

51. All the cannabis exhibits were then left in the exhibit room until they were handed over by PC Lolohea to PC Pale on 01 September 2020 for testing. This exchange is recorded in the exhibit diary and signed by both PC Pale and PC Lolohea.

52. According to the evidence of PC Pale he took the exhibits and handed them to PC Kava for testing. This exchange of exhibits was apparently recorded in a Scientific analyst report

prepared by PC Kava. This report was not tendered into evidence because according to the prosecution, the cannabis had only been tested a day before the witness was to give evidence and therefore did not comply with section 36 of the Illicit Drugs Control Act. Section 36 requires that the prosecution serve the copy of the report on the accused 28 days before it is to be tendered in court. The report had only been handed to the accused on the morning of the second day of trial when the analyst was to give evidence.

53. The prosecution stated that the only purpose for calling PC Kava was to establish the chain of evidence.

54. In my opinion, this is where the chain of continuity fails. The evidence of PC Kava seemed rushed and incomplete. He did not describe in detail the exhibits he had received and examined save to say that he had received 4 packs of plant material from PC Pale. He referred to the CRB numbers 1036/18 and 1037/18 and the name of the operation as SIMA OPERATION.

55. The cannabis exhibits were also not tendered in court. Though there is no legal requirement for the exhibits to be tendered in court, it would have given the witnesses account some weight especially when the scientific analyst report was not tendered into evidence. His description of the items he tested did not match the items listed in the exhibit diary. He made no reference to the cannabis seeds that were wrapped in a piece of a paper or to the cannabis branch. This may have been detailed in the analyst report but there is no evidence of that and the witness did not refer in detail to the exhibits he had tested.

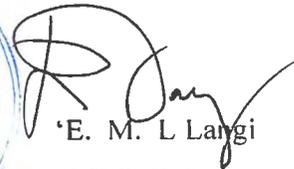
56. It is unfortunate that the scientific analyst report could not be produced in evidence. Section 36 of the Illicit Drugs Act specifically states that the 'production of a certificate purporting to be signed by a scientific analyst shall be *prima facie* evidence of the statements stated therein'.

57. In *R v Pohahau* [2004] TOSC 3, Chief Justice Ward referred to the strict standard of proof necessary to establish the chain of evidence beyond reasonable doubt. As he said, the Court can only convict the defendant if it is satisfied that the evidence presented to it proves beyond reasonable doubt that the material in the possession of the defendant was cannabis; and the proof that it is cannabis depends on the analyst, so the court must be satisfied that there is no real doubt that the substances he identified as cannabis are the actual, unaltered material taken from the possession of the defendant.

58. In this case, although the accused does not dispute he was in possession of cannabis, the prosecution is still required to prove that the cannabis taken from the accused were the same unaltered materials tested.
59. Additionally, the exhibits had been given to the analyst on 1 September 2020 but he had only tested them on 5 September 2020, day before he was to give evidence. There was no explanation put forward as to where they had been kept for the four days prior to testing. This may not be fatal to the prosecutions case without any evidence of interference but taken together with the fact that no certificate was produced and the evidence of PC Kava did not support the description of the exhibits listed in the search list and the exhibit diary, I am left in doubt as to whether or not the cannabis seized from the accused were the same unaltered materials tested by the analyst.
60. For the reasons given above, I convict the accused on the first count of possession of a Class A drug and acquit him on the second count of possession of a Class B drug.

NUKU'ALOFA: 09 October 2020




E. M. L. Langi
JUDGE