

Seen + fl. DPP
Crown Law

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

CR 217 of 2020

BETWEEN: R E X -Prosecution
AND: SESILIA UAISELE -Accused

VERDICT

BEFORE: JUSTICE LANGI

Counsel: Mr Fatai Samani for the Crown Prosecution
Mr Siosifa Tu'utafaiva for the Accused

Date of Verdict: 15 January, 2021

A. THE CHARGE AND PRELIMINARY MATTERS

1. The Accused is jointly charged with Tevita Fatongiatau (CR 216/20) with one count of possession of illicit drugs contrary to section 4 (a) (iii) of the Illicit Drugs Control Act 2003. The charges against both Accused persons were filed on the same indictment. Counts 1 and 2 are charges only against the co-Accused. The Accused in this matter is jointly charged with Mr. Fatongiatau as follows:
 - a. Count 3: that on 02 March 2020 she knowingly and without lawful excuse possessed a Class A drug, namely 0.02 grams of methamphetamine;
2. Both matters had been called before His Honor Justice Cato on 24 September 2020 where a bench warrant was issued for the Accused for failing to appear. Both matters were then referred to me for arraignment.
3. On 1 October 2020 the matters were called for arraignment and the Accused again failed to appear. A bench warrant was issued for her arrest.

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4. However, the co-Accused, Mr. Fatongiatau was arraigned and he pleaded not guilty to the charges against him. He requested that a trial date is set for his matter as it was unclear when the Accused person would be found.
5. The Crown agreed that there would be no prejudice if the matters were dealt with separately. Given that the co-Accused had consistently shown up in court and it was unfair for him to wait for the Accused to be found, I allowed for the trials to run separately.
6. I reminded myself 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.
7. Before I can convict the Accused for possession of an illicit drug the Prosecution must prove the following elements beyond a reasonable doubt:
 - a. That on or about 02 March 2020;
 - b. The Accused Sesilia Uaisele;
 - c. knowingly possessed;
 - d. A class A drug methamphetamine

B. THE EVIDENCE

8. The Crown called 7 witnesses to prove their case against the accused.
9. On or about 02 March 2020 at around 11pm, the police received reliable information from an informer that the Accused and a man named Tevita Fatongiatau were selling drugs from Mr. Fatongiatau's vehicle at the western bus station at Nuku'alofa. Because of the nature of the information received, the police were required to act quickly. Detective Malolo Vi therefore gathered the police drugs taskforce and officers from the Tactical Response Group to carry out a search without a warrant pursuant to section 24 of the Illicit Drugs Act 2003.
10. The police then went to the western bus station and saw Mr. Fatongiatau's vehicle parked there. The Accused Sesilia was at an ice-cream truck parked nearby. The police approached the vehicle and informed Mr. Fatongiatau of who they were. The Accused was brought to the vehicle and the police then commenced the search of the vehicle.

11. Detective Malolo Vi found one test tube in the front passenger side where it was alleged the Accused was sitting. Inside the test tube were particles of white crystals. Also, on top of the passenger seat was a feminine bag and a purse beside it. Inside the bag and the purse, the police found a large amount of cash.
12. The police also found a small half empty pack of methamphetamine which had spilled on the floor of driver's seat where the co-Accused was sitting. This was collected and given to Detective Sione Ve'a who was tasked with safekeeping the exhibits at the scene. Officer Ve'a took the exhibits back to the Police station where he weighed them. He had scraped the white substance inside the test tube and put them inside a plastic pack before weighing. The weight recorded for the white powder inside the test tube was 0.12 grams. Officer Ve'a labeled this as Exhibit 1. The white powder found on the floor of the driver's seat was recorded as weighing 0.15 grams. This was labelled Exhibit 2 in the Police Diary.
13. On 4 March 2020 Officer Ve'a handed both Exhibits over to Officer Minola Pousima to be kept in the exhibit room. This was recorded in the Exhibit Registrar and the hand over signed by both officers. The Exhibit Register was produced as Exhibit 2.
14. On 10 July 2020 Officer Viliami Maumu'a handed over the exhibits to Acting Inspector Leniti Pale who carried out the scientific analysis using the TruNarc Analyser. He weighed the white powder without the plastic bags and recorded a new weight of 0.02 grams. Officer Pale then prepared the Scientific Analyst Certificate which has been produced in this trial as Exhibit 1.

C. SUBMISSIONS FOR THE ACCUSED

15. The Accused elected not to give or call evidence. In his closing submissions, Mr. Tu'utafaiva submitted that the Crown has failed to prove two of the main elements of the charge.
16. Firstly, Mr. Tu'utafaiva submits that the Crown has failed to prove that the alleged illicit substance is in fact methamphetamine. He submits that Officer Pale is not an expert witness as required by section 24 (1) of the Evidence Act and he is therefore not a scientific analyst. Mr. Tu'utafaiva submitted that Officer Pale is only an expert at operating and maintaining the Trunarc Analyzer but it is in fact the machine that produces the reading or results of the test. Moreover, Officer Pale was not able to explain how the library of different substances inside the machine were installed and programmed.

17. Mr. Tu'utafaiva further submitted that no color test was carried out by Officer Pale for Exhibit 1. Counsel also asked that the court take note of the fact that Officer Pale had never undertaken any training to conduct color tests on illicit substances. which is supported by the Officer's statement that he is not aware of the name of the chemicals used to carry out the color test.
18. Alternatively, Mr. Tu'utafaiva submitted that if the Court were to accept that Officer Pale is an expert and accepts the results stated in the Scientific Analyst Certificate, then there is doubt as to whether the illicit drugs found by the police in the vehicle were the same drugs tested by Officer Pale. The evidence of Officer Vi was that the police found a test tube containing remnants of methamphetamine. However, Officer Vea's evidence is that he had used a straw to scrape off the white powder from the test tube.
19. Moreover, Counsel submitted that the weight the of the white powder scraped from the test tube was recorded by Officer Vea as weighing 0.12 grams. In contrast, Officer Pale gave evidence that the same exhibit weighed 0.02 grams.
20. Secondly, Mr. Tu'utafaiva submitted that the Crown has failed to prove that the Accused had possession of the illicit drugs. He said that Officer Vi gave evidence that he had asked the Accused who the test tube belonged to and she had denied any knowledge of it. Additionally, the police had failed to take fingerprints from the test tube to determine whether the Accused's prints were on it. Counsel submitted that Officer Vea had given evidence of hearing the co-Accused Talia'uli saying to the Accused 'you will take the fall for this'. For these reasons, counsel submitted that it has not been proven beyond any reasonable doubt that the Accused was in fact in possession of the methamphetamine.

D. CROWNS SUBMISSIONS

21. The Crown submitted that I should convict the accused because they have proven all the elements of the charge beyond a reasonable doubt.
22. Mr. Samani conceded that Officer Pale was not giving expert opinion in relation to the use of the Trunarc Analyser. He stated that the only expert in relation to the device would be the person who actually programmed and made the device. However, he submitted that Officer Pale has special skills and knowledge to operate the device, skills that neither he nor the Defence counsel hold. These skills are therefore sufficient to prove that the results are reliable and should therefore be accepted by the Court.

23. In relation to the differences in the weights of the two exhibits, Mr. Samani conceded that there were two different weights recorded. However, he submitted that Officer Pale had stated in his evidence that he had weighed the exhibits together with the plastic bag but that he had also stated in his evidence that the final weight recorded in his report was the weight of the illicit drugs without the plastic bag. Crown counsel further submitted that even though Officer Pale did not carry out a colour test on Exhibit 1, the officer had given the reasons for not doing so and had further stated in evidence of physically identifying the substance by its nature and physical appearance as methamphetamine.

24. In reply to Defence counsel's submission that there is doubt as to whether the substance tested by Officer Pale was the same substance that was inside the test tube, Mr. Samani disagreed and stated that there was no evidence to suggest that the substance tested was not the same one taken from the test tube. He stated that the fact that Officer Vi saw white powder and Officer Vea scraped white powder from the test tube was not sufficient to raise any doubt that the substance tested was the same substance taken from the test tube. Mr. Samani submitted that both Officers were present when the test tube was found and Officer Vi had handed the test tube to Officer Vea for safe keeping. As such, there could not have been any mix up and the substances tested were the same substances taken from the test tube.

E. DISCUSSION

25. After hearing the evidence of the Crown and submissions by both Parties, the issues for me to consider and rule on are as follows:

- a. Whether or not Officer Pale is qualified as a scientific analyst in order for the court to accept the contents of the Scientific Analyst Certificate;
- b. Has the Prosecution proved beyond a reasonable doubt that the substance tested by Officer Pale is the same substance taken from the test tube?
- c. Whether the Accused had the required knowledge and therefore possession of an illicit drug;

Is Officer Leniti Pale qualified as an expert witness?

26. The gist of the argument by the Defence in relation to this issue is that the Crown has not proven that the substance inside the test tube is in fact methamphetamine. This is based on the argument that Officer Pale is not an expert pursuant to section 24 (1) of the Evidence Act and his opinion should therefore not be accepted. I respectfully disagree with this submission by the Defence. The

evidence given by Officer Pale is not evidence of an opinion but rather evidence only on the operation and results of a scientific instrument. This is similar to the drug reports received from the ESR in New Zealand where the analyst who prepared the report is not giving expert opinion evidence but producing the results of scientific testing.

27. I accept the Crown's submission that Officer Pale does hold special skills and knowledge to operate the Trunarc device. Officer Pale is an Acting Inspector in charge of the Police Forensic Unit. He has been with this unit for 15 years since he joined the force in 2002. He has tested hundreds of exhibits from drug operations using the TruNarc Analyser. He had prepared the Scientific analyst certificate in this case after testing the suspected illicit drugs seized from Mr. Fatongitau's vehicle using the TruNarc Analyser.
28. Officer Pale gave evidence of the training he had undertaken to be able to use the TruNarc device to test the substances. He said that he had completed the Thermo Scientific Portable Analytical Instruments (Safety and Security) Training which had been conducted by the Thermo Scientific and Warsash. After the one day training he and other participants were awarded certificates to acknowledge that they were capable of operating the TruNarc Analyser. He produced into evidence two print-outs which formed the Scientific analyst certificate. The first report contained his qualifications and how he had used the Trunarc Analyser to conduct the test of the drugs. The second report was the TruNarc Scan report
29. In relation to the failure of Officer Pale to conduct a colour test of Exhibit 1, I do not believe that this is sufficient to raise any doubt in my mind that the substance seized from the vehicle was methamphetamine. In my oral judgment delivered on 15 January 2021, I had accepted the explanation provided by Officer Pale in relation to the reasons he had not conducted a colour test on Exhibit 1. However, in hindsight and after reviewing section 34 of the Illicit Drugs Control Act, I change my views and believe that the failure of Officer Pale to conduct a test on Exhibit 1 and the reasons he put forward are imprudent and the police should be aware that they cannot simply take shortcuts on important matters such as proving the chemical composition of exhibits seized. Section 34 of the Act deals with a factual presumption relating to samples where it is presumed that the results for a sample taken from a substance or particle would be the same for the rest of the substance or particle. The two exhibits referred to in the Analyst Certificate had been found inside the vehicle in two different locations. As such, the two exhibits should have both been tested as the results of the test for one exhibit cannot prove beyond a reasonable doubt

that the second exhibit. Had the only evidence available in this case been that of the colour testing I would have reached a different view in this matter.

30. However, I accept the submission by the Crown that Officer Pale has the necessary expertise to give an opinion of visually identifying the white powder in Exhibit 1 as methamphetamine because he testified in this case to participating in hundreds of arrests and being able to visually identify illicit drugs. His experience outlined above is in my view more than sufficient to qualify him to give an expert opinion on what he saw and I therefore accept Officers Pale's opinion evidence that the substance he saw was in fact an illicit drug, namely methamphetamine.
31. Section 36 (1) of the Illicit Drugs Act 2003 states that **"the production of a certificate purporting to be signed by a scientific analyst shall be prima facie evidence of the facts therein stated"**. In my opinion, there are no further requirements attached to this section that would require me to explore further whether or not this court is required to evaluate the reliability of the method used by the scientific analyst in forming his conclusions stated in the certificates produced. Section 36 (1) of the Act only requires that I be satisfied that the police officer who produced the Scientific analyst certificate is qualified as a Scientific analyst. If I accept that he is a Scientific analyst then section 36 (1) can be engaged to use the facts stated in the Scientific analyst certificate as prima facie evidence. In light of the discussions above, I find that Officer Pale is qualified as a scientific analyst and the certificate is therefore accepted as evidence in this case.

Has the Prosecution proved beyond reasonable doubt that the illicit drugs tested by Officer Pale the same drugs taken from the test tube:

32. As I understand it, the reasons put forward by the Defence in relation to this issue is that firstly, the descriptions given by Officer Vi and Officer Vea of the white substance inside the test tube differ and secondly, the recorded weight of the substances as tested by Officer Vea and later by Officer Pale are also different.
33. In relation to the differences in the descriptions given by Officer Vi and Officer Vea, I agree with the submissions by the Crown that this is not sufficient to raise doubt that the substance tested by Officer Pale was different from the substance tested by Officer Vea. Both Officers were present when the test tube was found by Officer Vi. The test tube was handed to Officer Vea who was the exhibit keeper at the scene. Officer Vea took the exhibits back to the Police station where he weighed them.

34. On 4 March 2020 Officer Vea handed both Exhibits over to Officer Minola Pousima to be kept in the exhibit room. This was recorded in the Exhibit Registrar and the hand over signed by both officers. On 10 July 2020 Officer Viliami Maumu'a handed over the exhibits to Acting Inspector Leniti Pale. There is nothing in the evidence to suggest to me that there was any interference with the exhibits from the time they were found to the time they were eventually tested by Officer Pale.
35. I also find that the difference in the weights recorded by Officer Vea and Officer Pale insufficient to raise doubt that the substance tested by both Officers were not the same illicit drugs taken from the test tube. When he was asked whether the white powder had been weighed together with the plastic pack he stated "I cannot really remember but I do remember that I had scraped it into a plastic pack and weighed them together". In the Scientific analyst certificate Officer Pale recorded that he had only weighed the drugs on its own. That was the reason for the differences in the weights.
36. In another case involving the same co-Accused in this case, *R v Fatongiatau* CR 160/2020, I had acquitted the accused in that case because the Prosecution failed to adequately explain the differences in the weights of the drugs seized from the Accused. In that case, the first recorded weight was 0.36. It was later weighed again by the analyst and he recorded 0.38 grams. However, when the substances were taken to the ESR in New Zealand, the recorded weight was 0.087 milligrams. I found that to be a substantial difference and without any explanation provided for the differences I had acquitted the Accused in that case.
37. In the current case, I accept the explanations for the difference in the weights given by the witnesses. Additionally, there was nothing to suggest to me that the exhibits had been tampered with and that there was a missing link in the chain of evidence to suggest that the drugs seized from the co-Accused's vehicle had been altered in any way. I am satisfied that the drugs seized from the car were the same unaltered drugs that were tested by Officer Pale.

Did the Accused have knowledge and therefore possession of an illicit drug?

38. It is trite law that to have possession of something requires the person to have physical custody or control over it plus the required knowledge of its presence.
39. The legal meaning of the word 'possession' was set out by Ford J in *R v Motuliki* [2002] TOSC 22; CR 92/01 (24 May 2002) as:

“Archbold, 2001 edition, deals with the situation where drugs are found in premises occupied by or associated in some way with an accused. After referring to the authorities, the text states (para 26.61):

“A person is in possession of something when 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”.

40. That reference still stands in Archbold 2005 at para 26-61, and it is clear from other cases referred to in Archbold that direct proof of knowledge is not essential and that it may be inferred or imputed from the circumstances. It has been said that possession ‘is defined by modes or events in which it commences or ceases, and by the legal incidents attached to it’: Lord Wilberforce in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER356, 392 (HL). Explaining that further, Lord Wilberforce said (at 393):

“By [the modes and events] I mean relating to typical situations, that [the jury] must consider the manner and circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it, his legal relation to the substance or package (including his right of access to it). On such matters as these (not exhaustively stated) [the jury] must make the decision whether in addition to physical control, he has, or ought to have imputed to him the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance”

41. On the evidence I have heard, I find beyond a reasonable doubt that the Accused had knowledge that the substance inside the test tube was in fact illicit drugs and she was therefore in possession of them. The drugs were found inside the car on the passenger side where the Police found her bag and purse. I do not accept the Defence submission that the police should have lifted fingerprints from the test tube to prove that she was in possession of drugs. Whilst finding a print would have been supportive, the evidence before me is in my view, sufficient to prove possession. She did not deny she was a passenger in the car that night. The test tube containing methamphetamine was found in the passenger side of the car. A substantial amount of money was found in her bag and purse. Empty plastic packs were also found in the car. All these items are consistent with items possessed by someone dealing or using drugs. I have no doubt that she knew exactly what was in the test tube and she that like her co-Accused, she was involved in dealing with drugs.

42. Additionally, Defence counsel highlighted in his closing submissions that the co-Accused had said to the Accused “you will take the fall for this”, insinuating that the Accused was being wrongly blamed for this offence. In my opinion, these words further support the view that both accused persons knew exactly what was inside that test tube. I do not accept that she was an innocent passenger inside the car that night.

43. The Prosecution has succeeded in proving all the elements of the charge beyond a reasonable doubt and accordingly, the Accused is convicted of possession an illicit drug.

NUKU’ALOFA: 15 January 2021



The seal of the Supreme Court of Tonga is circular, featuring a central emblem with a crown and a cross, surrounded by a laurel wreath. The words "SUPREME COURT TONGA" are inscribed around the perimeter, with a star at the bottom.


E. M. L. Langi
JUDGE