

Sam & PL.

DPP  
Crown Law

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

CR 194 of 2020

REX  
-v-  
FOKETI TONGA FATE

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## REASONS FOR VERDICT

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BEFORE: LORD CHIEF JUSTICE WHITTEN  
Counsel: Mr F. Samani for the Prosecution  
The Accused in person  
Date of trial: 25, 26 January 2021  
Date of verdict: 26 January 2021

### Introduction

1. At the conclusion of the evidence and submissions in this matter, I delivered my verdict ex tempore. This is the transcript of those reasons, edited only as to form, not substance.
2. In this matter, the Accused, Foketi Tonga Fate, stands charged with one count of possession of 41.51 grams of cannabis and one count of possession of a single .22 cartridge without a licence. On 25 September 2020, the Accused was arraigned and pleaded not guilty to the cannabis count but guilty to the ammunition count, for which he was convicted and discharged pursuant to s.204 of the *Criminal Offences Act*. In relation to the cannabis count, the Accused elected trial by judge alone and the matter was listed for trial commencing yesterday.

### Elements of the charge

3. Mr. Samani, who appeared for the Prosecution, provided a helpful written opening submission in which he identified the elements of the Prosecution's case, namely that:

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- (a) on 13 March 2020;
  - (b) the Accused;
  - (c) knowingly possessed;
  - (d) 41.51 grams of cannabis.
4. The Accused appeared in person and was not represented by Counsel. He had, however, at or about time of his arraignment been provided with a document produced by the Court containing information for self-represented defendants on the criminal trial process. The Accused confirmed that he had received that document and considered it. He was also advised that if he had any questions about the trial during the course of it, he could simply ask the court and they would be answered.
5. Of the elements to the Prosecution's case, the only one in dispute was whether the Accused was knowingly in possession of the cannabis. That the plant material found on the day in question was later tested and found to be cannabis was not disputed by the Accused. The certificate of analysis and covering letter pursuant to s.36(2) of the *Illicit Drugs Control Act* was tendered by consent. Similarly, the Accused did not take issue with the chain of custody from when the cannabis was seized consequent upon the search until it was eventually handed to the analyst for testing. Accordingly, excerpts from the police exhibit and drugs movement registers were also tendered by consent.

#### **Prosecution evidence**

6. The Crown called five witnesses.

#### ***Tu'amelie Fifita***

7. Officer Fifita is currently a member of the Serious Crime Unit having previously served in the Drugs Task Force for three years. He gave evidence that on 13 March 2020, around 12pm, he received information from an informer in relation to a bush allotment owned by Siaosi Makafi at Fua'amotu containing cannabis. The informer told Fifita that there were others there at the allotment to take

cannabis. Officer Fifita explained that he had worked with the informer on many cases before this one, and that on all previous occasions, the information had led to successful investigations. He said that he was still working with the informer to this day and that he trusted the informer.

8. As a result of that information, Officer Fifita formed the view that the police needed to move urgently because any drugs that were at the allotment could be removed within a very short time. For that reason, he decided to mobilize a team of two groups of officers to conduct a search without warrant. The two groups went out to the area near the back of Tupou College in Fua'amotu. Officer Fifita and his team parked their vehicles and walked to Fua'amotu near the airport. He said that as they were walking near the allotment in question, he received further information from the same informer about a vehicle that was about to leave the allotment and that the vehicle had cannabis in it. He shared that information with the other officers. They then saw a vehicle coming from the allotment. They decided to hide on the side of the road or track so that they could stop the vehicle when it came near. As the black vehicle approached, Officer Fifita said he could see the driver and a person in the passenger seat. The police then stopped the vehicle. Officer Fifita went to the front passenger side. He saw officers on the other side of the vehicle pulling the driver and another person from the rear passenger side out of the vehicle and laying them on the ground. Officer Fifita opened the front passenger door and pulled the Accused out of the vehicle and laid him face down on the ground.
9. In answer to a question from the bench, Officer Fifita said that he maintained sight of the left side of the vehicle from the bushes right up to when it was stopped, that is, a period of about 30 seconds. He said that, during that period, he did not see any of the car doors open or windows wound down, nor did he see anything thrown from the vehicle. He said he also maintained sight of the Accused in the front passenger seat the whole time. The Accused did not do anything unusual other than sit in the vehicle. He said that after he pulled the Accused from the vehicle and laid him on the road, he called another officer to come and hold the Accused down.

10. Officer Fifita said that he then ran towards the allotment that the team were targeting. He said it took between 30 and 40 seconds for the other officer to come and attend to the Accused. That officer was not beside the Accused when Officer Fifita ran off to the allotment. I pause here to record my reservations about Officer Fifita's account in this regard because I fail to see how he could have known how long it took the other officer to come around to and attend the Accused when he, Fifita, had already run off towards the allotment.
11. Perhaps, more importantly, Officer Fifita said that when he laid the Accused on the ground, and before he was restrained, Fifita did not see anything on the ground beside the car.
12. In cross-examination, the Accused asked Officer Fifita whether any drugs were found on the Accused and, naturally, by reference to the terms of the charge, Officer Fifita said that no drugs were found on the Accused himself.

*Litili Televave*

13. Officer Televave gave evidence that he is currently a member of the Drugs Task Force. He was part of the team of officers who searched the vehicle on 13 March 2020. He confirmed Officer Fifita's evidence about the early stages of the search where the police heard the vehicle coming from the allotment and that they hid on the side of the road before stopping the vehicle. He was one of the officers who informed the occupants of the car that the police were conducting a search without warrant. He was also one of the officers who went to the driver's side of the vehicle. He removed the rear passenger from the vehicle. The rear passenger's name was Kilikoni Fate. He is the Accused's younger brother.
14. Officer Televave said that Officer Fifita told him to go and look after the Accused. As Fifita went off towards the allotment, Televave said that he went around the back of the vehicle towards where the Accused was lying and that he then saw a plastic bag containing cannabis beside the left rear wheel of the vehicle. He said it took about 30 seconds from when Fifita told him to go to the Accused to when he got to the Accused. That period of time, it will be seen, is critical to the Crown's case. Televave mentioned that when he was coming around the back of the vehicle, an officer by the name of Langi was behind him.

15. Televave described the position of the bag as being about a metre from the feet of the Accused where he was lying down and about six inches away from the wheel of the vehicle. Televave noticed that the car windows were still up and the doors were closed. In answer to a question from the bench, Televave explained that photographs were taken by the police during the search, but due to a systems crash, those photographs had been lost. That was an unfortunate aspect of the Prosecution case. I recommend that, in future, when photographs are taken digitally, they be printed off as soon as practicable.
16. He described the bag in question as similar to a shopping bag, about 12 inches wide and 18 inches high. It was 'loose' meaning it was not taped up. He weighed the bag of cannabis and recorded a weight of 41.51 grams at entry 17 of the police station diary before storing the cannabis.
17. Officer Televave also gave evidence that during the search, Kilikoni was found to have some cannabis leaves in his pocket. That evidence, it will be seen, was detrimental to the Crown's case against the Accused.
18. The Accused put to Officer Televave that the officers had turned his head away to the bushes and then called out that a bag of cannabis had been found. Officer Televave denied the allegation and reiterated that when he came around the back of the vehicle and saw the Accused on the ground, he saw the bag of cannabis next to the vehicle.
19. In answer to a question from the bench as to why Officer Televave did not then say something about the bag, he said that his intention was to handcuff the Accused otherwise he might have run away. He said that Officer Langi was the one who said "we've found the plants".

*Viliami Pua*

20. Officer Pua currently serves as a member of the Tactical Response Group. He was also part of the operation on the day in question. He gave very brief evidence in chief mainly concerned with being one of those officers who informed the occupants of the vehicle about the search without warrant and that, at the

conclusion of the search, the occupants indicated that they were satisfied with the police work.

21. However, at the end of even briefer cross-examination by the Accused about the police having turned his head while he was on the ground, that it was raining and there was mud around, I asked the witness what he recalled of the search itself. Officer Pua said that Officer Televave was the one who found the bag of cannabis and that he called out to Pua who then went and saw the bag. Unlike the previous witnesses who had described the Accused as lying alongside the vehicle on the ground, Officer Pua described him as laying perpendicular to the vehicle with his head toward the bushes.
22. Importantly, Officer Pua said that before the discovery of the bag, he had remained in position for about a minute watching the Accused on the ground. He said that at one stage the Accused tried to get up but Pua told him to lie back down. The Accused complied. During that time, Pua did not see any bag beside the vehicle. He said that he did not see the Accused throw any bag and he did not see the bag before Televave came around to handcuff the Accused. Once he did see the bag, he described the distance between it and the Accused as less than two metres.
23. At the conclusion of Officer Pua's evidence, Mr. Samani asked for the matter to be stood down. Approximately half an hour later, the trial resumed.

***Filipe Langi***

24. Officer Langi was also a member of the TRG division and a member of the joint task force conducting the operation on the day in question. He was the supervisor in charge of the TRG operatives. He was part of the other team referred to by Fifita in his evidence.
25. Picking up at the point in the narrative when the search was conducted, Langi described how he told his team to divide up and hide on either side of the road as the vehicle approached them. He said that because the road was quite rough, the vehicle was not travelling very fast. As the vehicle approached and got to about 1.5 metres away, Langi, who was on the driver's side of the vehicle, and

with a firearm, stood up and told the driver to stop the vehicle and turn off the engine, which the driver did. He then told the driver to open the door and get out, which the driver also did. Langi then reached in and removed the keys from the ignition. He saw a male passenger in the rear who also got out of the vehicle and both he and the driver were laid down on the road beside the car. Langi noted that the doors and the windows of the car were all closed.

26. He went around to the rear of the vehicle to observe the licence plate number. As he did so, he saw a white plastic bag near the left rear wheel of the vehicle. He made a point of recalling that the bag was still clean whereas the road on which it was placed was quite muddy. He continued around to the passenger side of the vehicle where he saw the Accused lying on the road. He said he saw other officers on that side of the vehicle but did not recognize them. By the time Langi saw the Accused on the ground, he had been handcuffed.
27. Langi did not hear anyone say that they had found the plants. He was with Televave at the time. He told Televave to record in the police investigation diary everything that was said and done. When he saw the bag, he told Televave to go to the Accused and sit him up. Langi then went to the plastic bag, opened it and saw plants inside.
28. The other occupants were then told to stand up. According to Langi, all three of the occupants in the vehicle were asked what was in the bag and they all said "marijuana". The accused was asked to whom the cannabis belonged. He said he didn't know and that maybe it "fell there". The driver was asked who owned the marijuana. He responded that it belonged to the Accused and pointed at him. Langi then asked the Accused where he got the cannabis from. The Accused said that it came from the allotment where the officers were heading. However, Officer Langi did not warn the Accused before questioning him. He believed that Sgt. Pua had warned the occupants in the car. I pause to note that that was not mentioned in Officer Pua's evidence nor in any of Officer Televave's diary entries. The Accused was then arrested.
29. Officer Langi was then asked to go back over the events surrounding the actual search itself and the position of the various officers comprising the joint task force

that day. He said that when he first saw the driver and rear passenger, he did not see any bag like that later found on the ground. He confirmed that there were officers on both sides of the vehicle although he could not recall who they were. He also explained that he was the first to see the bag of cannabis and confirmed that no one said anything about it before he saw it even though there were officers positioned on that side of the vehicle.

30. Officer Langi reviewed the entries made by Televave in the police diary and confirmed that there were no records of any admissions made by the Accused. Rather, the diary entries recorded the statements of the other two occupants that the cannabis belonged to the Accused. Those diary entries were tendered as part of evidence in the trial.
31. The Accused put to Officer Langi that the police kicked him when he was on the ground. Officer Langi denied that assertion.

***'Apisia Fihaki***

32. On 16 March 2020, Officer Fihaki prepared a report pursuant to s.24(3) of the *Illicit Drugs Control Act* which was ultimately presented to Principal Magistrate Mafi reporting on the outcome of the search. That report noted that as a result of the operation, one pack of cannabis, one plastic bag containing cannabis branches and leaves and one .22 ammunition cartridge were found and seized. The report also recorded that following the seizure of those items, the Accused and his younger brother, Kilikoni, were arrested.

**Unsworn statement by the Accused**

33. After being reminded of his rights, the Accused elected to make an unsworn statement from the Bar table. In summary, he repeated his earlier admission of having possession of the .22 cartridge but denied having anything to do with the cannabis.

**Prosecution's submissions**

34. In his closing submissions, Mr Samani:



- (a) acknowledged, quite rightly, that there was no direct evidence that the Accused had the cannabis in his possession at the relevant time;
  - (b) candidly conceded what he described as “huge inconsistencies” between the evidence of Officers Fifita, Televave and Langi and that of Officer Pua. To address that inherent problem, Mr Samani submitted that the court should accept the evidence of Fifita, Televave and Langi as being more consistent;
  - (c) identified the linchpin to the Crown’s circumstantial case as being the 30 second period between when Officer Fifita told Officer Televave to attend to the Accused during which time, the Accused was left unattended, before Televave and arguably Pua came to him. That, he submitted, provided the opportunity for the Accused to place or throw the bag of cannabis beside the rear of the vehicle and was sufficient to found the only reasonable inference that the Accused threw the bag of cannabis away from himself when he was apprehended;
  - (d) drew attention to the tendered entries in the police investigation diary of statements made by the other occupants against the Accused which he said “supported the narrative” that it was “none other than the Accused who possessed the cannabis”;
  - (e) submitted that pursuant to s.24 of the *Illicit Drugs Control Act*, the search without warrant was lawful based on the evidence of Fifita as to the reliability of the informer whose information instigated the operation that day, including the further information whilst the team was on their way that the vehicle in which the Accused was ultimately found had just left the allotment with cannabis; and
  - (f) submitted that the Crown had proven all the elements of the offence beyond reasonable doubt.
35. The Accused declined a further opportunity to make any submissions in response to those of the Prosecution.

## Consideration

36. Section 24(1) of the Act provides, in terms, that a police officer may conduct a search without warrant if the grounds for obtaining a warrant under s.23 exist, namely, that there are reasonable grounds to suspect that there is in or on any place an illicit drug relevant to the Act.
37. Additionally, s.24 requires that the officer suspects on reasonable grounds that it is necessary to conduct the search without warrant in order to prevent the concealment, loss or destruction of anything connected with an offence under the Act, and that the circumstances are of such seriousness and urgency as to require the immediate exercise of the power without the authority of the warrant. Further, subsection (2) provides that a police officer may, for the purposes of the section, stop any vehicle where the officer suspects on reasonable grounds that anything connected with an offence under the Act is upon or in the vehicle.
38. Having regard to the stated requirements of s.24 and the evidence of Officer Fifita, I am satisfied that the search without warrant on this occasion was lawful. I should add that no issue was taken by the Accused in this regard.
39. Section 4 of the Act provides, relevantly, that any person who knowingly, without lawful excuse, the proof of which shall lie on him, possesses an illicit drug, commits an offence.
40. Given the narrow scope of controversy on the elements in dispute in this case, the only issue for consideration is whether the requisite components of the offence of possession have been proven by the Crown beyond reasonable doubt.
41. As recently discussed by Acting Judge Langi in *R v Tupou* [2020] TSC 91, in *R v Tau & ors* [2005] TLR 418, Ford CJ noted that there is no special statutory definition of the word 'possession'. His Honour adopted a passage from the then current edition of the seminal text by Archbold on Criminal Pleading, Evidence and Practice that:

*"A person has 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 discover in a general way what the items were.*"

42. From that statement of principle, the elements of knowledge and control are distilled.

43. In relation to knowledge, Ford CJ went on to observe that:

*"The question to be answered in each case is whether on the facts, the Accused was proved to have or ought to have imputed to him or her the intention to possess or the knowledge that he or she did possess what was in fact a prohibited substance".*

44. In *R v Moimoi* [2020] TSC 75 at [48], Niu J observed that the inclusion of the adverb "knowingly" and the verb "possesses" in s.4 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, for knowledge can readily be implied or reasonably inferred from the circumstances of the case.

45. As this case concerns circumstantial evidence about those two elements, or at least on the element of control, I am reminded again of the remarks of Acting Justice Langi in the recent decision of *R v Uasike* [2020] TSC 88 at [20] where her Honour noted from various cases in the Kingdom that:

*"... circumstantial evidence can be powerful evidence, but it is important that it is examined with care and to consider whether the evidence which the Prosecution relies upon in proof of its case is reliable and whether it does in fact prove guilt. Additionally, before convicting on circumstantial evidence, it is important to consider whether the evidence discloses any other circumstances which are or may be of sufficient reliability or strength to weaken or to destroy the Prosecution's case. The Court must also be careful to differentiate between arriving at conclusions based on reliable circumstantial evidence and mere speculation."*

46. On the first element of knowledge, to recap the Prosecution's evidence, according to Officer Langi, during questioning of the three occupants of the vehicle, they were asked what was in the bag and they all said "marijuana". The Accused said he did not know to whom the cannabis belonged. The driver said

it belonged to the Accused. There was no evidence about what the Accused's brother said in relation to that. Importantly though, Officer Langi said, as I have noted previously, that when the Accused was asked where the cannabis came from, he said it came from the residence of the allotment where the officers were heading.

47. Putting aside for the moment any issue as to whether the Accused was warned that he did not have to say anything and that if he did say anything, it may be used as evidence against him, the evidence of Officer Langi just recounted was hearsay. Section 88 of the *Evidence Act* defines hearsay evidence as where it is sought to prove any fact by evidence of oral or written statement made by any person not called as a witness. Insofar as the Crown did not call the driver of the vehicle or Kilikoni Fate, the evidence given by Officer Langi as to what each of those men said against the Accused, if it were to be relied upon as proof of the fact or truth of those statements, contravened s.88. However, s.89 of the *Evidence Act* provides exceptions to the hearsay exclusionary rule. Subsection (c) provides that the court shall not admit hearsay evidence *except* where the statement was made in the presence and hearing of the person against whom the evidence is tendered and where that person had an opportunity to reply to such statement. In this case, the evidence of the driver and Kilikoni against the Accused that the cannabis belonged to him falls within that exception. I therefore receive the evidence of Officer Langi in that regard.
48. There is also the evidence from Officer Langi as to the Accused himself saying that the cannabis came from the allotment the police were intending to target. That evidence may be accepted as an admission in respect of the element of knowledge. The Accused did not seek to refute that evidence during his cross-examination of Officer Langi.
49. For those reasons, I am satisfied that the Crown has proven so much of the element of knowledge that the Accused knew that the material in the bag was cannabis.

50. However, it is the further aspect of knowledge, being the *mens rea* or guilty mind, by which the Crown is required to establish that the Accused intended to possess the cannabis and the element of control that require further consideration.
51. For the reasons which follow, even if I am satisfied that the Accused intended to possess the cannabis, I am not satisfied that the Crown has demonstrated beyond reasonable doubt the requisite element of control. I will endeavour to explain the reasons for that finding by stepping through the relevant evidence in chronological order:
- (a) The informer did not specify the Accused as being the person who had the cannabis.
  - (b) There were three occupants in the vehicle. Of those, the only person on whom any cannabis was found was Kilikoni. That, in my view, militates against any inference that the Accused had possession of the bag of cannabis.
  - (c) None of the officers, who gave evidence about the subject, saw anything being thrown out of the vehicle as it approached them. As the vehicle was said to only be travelling slowly, if anything had been thrown out the vehicle, it would have been behind the vehicle by the time it came to a halt. That the bag was found beside the rear left wheel therefore suggests that if the bag came from the vehicle, it came at a time when the vehicle was stationary.
  - (d) It is unclear in those circumstances how the bag, described as still being clean or white, was in that state given the road was described as muddy at the time.
  - (e) The location of the bag also raises further questions. It was found near the passenger side rear wheel which is of course close to the rear passenger door. The only person in the rear of the vehicle, before being removed, was Kilikoni.
  - (f) When Officer Fifita went to the front passenger side door to remove the Accused, he did not give any evidence to the effect that the Accused had on him or even appeared to have on him the bag of cannabis. Given the sizeable dimensions of the bag described by two of the police officers, it

was very difficult to see how the bag could have been secreted on the Accused's person before he was taken out of the car and placed on the ground.

- (g) The position of the Accused relative to the bag was also inconsistent in that a number of the police officers said that he was laid down alongside, that is parallel with, the vehicle with his head towards or away from the bag, whereas one of the officers said that he was positioned perpendicular to the vehicle with his head towards the bushes.
- (h) The difficulty with the Crown's reliance upon the 30 seconds or so when the Accused was left unattended lying face down on the ground, between Fifita leaving him and Televave attending him, is that the evidence of Officers Pua and Langi, which I accept, was to the effect that other officers in the team which conducted the search that day were on both sides of the vehicle. Officer Pua, in particular, was adamant that he stood on that side of the vehicle watching the Accused the whole time and, at one point, the Accused tried to get up and Pua told him to lie back down, which he did. Critically, Officer Pua said he did not see any bag on the ground near the Accused until Officer Televave came around and handcuffed the Accused.
- (i) While the Crown submits that I should prefer the evidence of the other three officers to that of Officer Pua, I observed nothing in his evidence which gave me any cause for doubt about the accuracy of his account. Upon acceptance of his account, it is impossible to see how the Accused could have thrown the bag from wherever it may have been to behind his feet down towards the rear of the vehicle.
- (j) Finally, I am fortified in that view, and do not need to discount the evidence Officer Pua, because of the other three officers who gave evidence, Officer Langi, a man of seniority amongst the team, confirmed that throughout the course of the search, there were officers positioned on both sides of the vehicle. I accept Officer Langi's evidence, including that nobody said anything about a bag being discovered until he saw it; and he saw it only after Officer Televave had gone around to the Accused and handcuffed him.

52. For those reasons, I am not satisfied beyond reasonable doubt, or conversely, I do have reasonable doubts, about the element of control and to put it simply: where the bag came from. As I cannot be satisfied beyond reasonable doubt on the Prosecution evidence that the bag came from the Accused or that it was in his possession, I cannot be satisfied that he had the requisite control over it to constitute the offence of possession of illicit drugs.
53. Accordingly, the Accused is acquitted of the charge and is free to go.
54. Pursuant to s.32 of the *Illicit Drugs Control Act*, I order that the cannabis the subject of this proceeding be destroyed.

NUKU'ALOFA  
26 January 2021



A handwritten signature in black ink, appearing to read "M. H. Whitten".

M. H. Whitten QC  
LORD CHIEF JUSTICE