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

CR 126-129 & 131 of 2020

BETWEEN:	R E X	- Prosecution
AND:	PANGI PULOKA	-First Accused
	FAKA'OSI KATOA	- Second Accused
	SIONE SONGO'IMOLI	- Third Accused
	VILIAMI NA'A	- Fourth Accused
	'ISITOLO SAKOPO	- Fifth Accused

VERDICT

BEFORE: JUSTICE LANGI

Counsel:  Mr Inoke Finau for the Crown Prosecution  
 Mr 'Atalasa Pouvalu for the First Accused  
 The rest of the Accused Persons appear on their own

Date of Verdict: 08 February, 2021

A. THE CHARGE AND PRELIMINARY MATTERS

1. The Accused Persons are charged as follows:

PANGI PULOKA AND FAKA'OSI KATOA

- a. Count 1: that on 19 April 2020 at Hofoa, they did knowingly and without any lawful excuse possessed a Class A drug, namely methamphetamine contrary to section 4(a)(iii) of the Illicit Drugs Control Act 2003;
- b. Count 2: that on 19 April 2020 at Hofoa, they did knowingly and without any lawful excuse possessed a Class B drug, namely cannabis contrary to section 4 (a)(i) of the Illicit Drugs Control Act 2003;

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*[Signature]*

SIONE SONGO'IMOLI

- c. Count 3: that on 19 April 2020 at Hofoa he did knowingly and without lawful excuse possess a Class A drug;

VILIAMI NA'A

- d. Count 5: that on or about 19 April 2020 at Hofoa, he did knowingly and without lawful excuse possess a Class B illicit drug;

'ISITOLO SAKOPO

- e. Count 8: that on or about 19 April 2020 at Hofoa, he did knowingly and without lawful excuse possess a Class A illicit drug;

- 2. The sixth Accused, Ma'ulupekotofa Soakimi CR 130/20, pleaded guilty to one count of possession of cannabis on arraignment and his matter has already been dealt with.
- 3. 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.
- 4. Before I can convict the Accused Persons the Prosecution must prove the following elements beyond a reasonable doubt:
  - a. That on or about 19 April 2020 at Hofoa;
  - b. The Accused knowingly and without lawful excuse;
  - c. Possessed a Class A drug methamphetamine/Class B drug cannabis,
- 5. To prove 'possession', the Crown must prove:
  - a. Physical custody and control of an illicit drug;
  - b. Without lawful excuse, proof of which lies on the defendant;
  - c. Knowledge that it was an illicit drug;
- 6. Mr Finau for the Prosecution informed the Court that the Crown offers no evidence in relation to Count 4 of the indictment against the Fourth Accused, Mr. Viliami Na'a, and that the Crown will proceed with the charges against him in count 5 only.
- 7. Mr. Finau also informed the Court that the Scientific Analyst Certificate had been served on all Accused persons in compliance with section 36 (2) of the Illicit Drugs Control Act. None of the Accused persons had given written notice under section 36 (3) of the Act that they require the

Analyst to be called. No challenge was made by the Accused persons and the Scientific Analyst Certificate was therefore tendered as Exhibit 1.

## THE EVIDENCE

### CROWNS' EVIDENCE

8. The Prosecution's case is that on or about 19 April 2019 at approximately 11:00pm, the Police received information that a drug deal was being held at the First Accused's residence at Hofoa. The information was that there were several vehicles at the house and that the people at the house were playing pool and that they had illicit drugs on them. The informer had previously provided the police with information on drug-related offences and in those cases the police had been successful in locating illicit drugs. The Police relied on the information provided to be truthful and commenced putting together a search team. Officer Kalosi Tapueluelu drove to the area to check out the information and returned and reported to Officer Malolo Vi that there were many vehicles parked at the residence. Officer Malolo Vi then put together a search team to search the residence without a search warrant pursuant to section 122 and 123 of the Tonga Police Act.
9. When the police arrived at the residence, the police officers from the Tactical Response Group (TRG) first went into the compound to secure the area. At the back of the compound there was a trailer where the First Accused lived. There was another trailer which was occupied by the Fourth Accused Viliami Na'a and his girlfriend. Next to the two trailers was a shed with a pool table where the police found some of the Accused persons and other male persons playing pool and sitting around the area. There was also an area near the compound where several vehicles were parked.
10. Officer Tevita 'Akau'ola from the first group went inside the First Accused's trailer and found him inside the trailer holding a test tube. The police took the First Accused outside and gathered everyone who was found inside the compound and made them sit or lie down beside the area where the pool table was situated. After everyone had been accounted for and detained, Officer Malolo Vi then informed the First Accused that the police were there to conduct a search without a warrant for illicit drugs pursuant to section 122 and 123 of the Tonga Police Act. The police then commenced the search of the two trailers and those present at the compound.
11. Inside the First Accused's trailer, the police found an external hard drive on top of a table inside. The external was opened and it contained 12 packets of methamphetamine and 2 packs of cannabis. This gives rise to Counts 1 and 2 of the indictment.

12. When the Accused persons were individually searched by the police, Officer Kalosi Tapueluelu pulled the third Accused to a sitting position to search him. He heard the sound of a can dropping and Officer Fifita looked over and saw a can of Eclipse mint candy fall from the Accused's chest to the ground. The can was opened and it contained 9 packets of methamphetamine. This gives rise to Count 3 of the indictment.
13. During the search, the Fourth Accused person had just returned from the shop and was standing outside the compound and trying to make his way into the compound. When he was stopped by the Police he told them that he lives inside the compound. He was then taken inside and detained with the rest of the Accused persons. The Police searched the room where the Fourth Accused and his girlfriend lived and found 1 packet of cannabis inside a black bag and 1 test tube used for smoking methamphetamine. This gives rise to Count 5 of the indictment.
14. Before entering the First Accused's compound, the TRG team was divided into two groups with one team entering the compound through the front gate and the second team entering through a back road. Officer Fifita, Officer Hakalo, Officer Televave and Officer Pohiva went around the back road. They parked the vehicle and entered the compound by stepping over the fence. Officer Fifita went and stood beside a pig sty inside the compound while the others spread out and stood watching the first team enter through the front gate. Officer Fifita then saw the TRG van enter the front gate and he noticed someone running between two vehicles parked inside the compound. He then heard someone shout 'he is running!' and then another shout 'stop! Police!'. He shouted at the other officers to run to the back entrance and when they ran back he saw the Fifth Accused running towards the back entrance and then changed directions and ran back towards the shed where the other Accused persons were being held.
15. Officer Fifita saw Officer 'Aho run over and grab the Fifth Accused and lay him on the ground with the others. He said the person he had previously seen run across the two vehicles parked in the compound was 'tall and slim'. They later found 14 grams of methamphetamine between the two vehicles where he had seen someone they suspect was the Fifth Accused run from. This gives rise to Count 8 of the indictment.
16. The following exhibits were tendered by the Prosecution into evidence:
  - a. Exhibit 1 – Scientific Analyst Certificate;
  - b. Exhibit 2 – Diary of Action (entry number 5);
  - c. Exhibit 3 – Diary of Action (entry number 44);

- d. Exhibit 4 – Sketch map of scene of the crime;
- e. Exhibit 5 – Photos of crime scene;
- f. Exhibit 6 – Report to the Acting Police Commissioner about the search without a warrant;
- g. Exhibit 7 – Record of interview of Viliami Na'a;
- h. Exhibit 8 – Drugs Movement Diary;
- i. Exhibit 9 – Record of interview of 'Isitolo Sakopo;
- j. Exhibit 10A – Scientific Analysis 424;
- k. Exhibit 10B – Scientific Analysis 425.

### DEFENCE EVIDENCE

17. The First Accused, Pangi Puloka, elected to give evidence and called two witnesses to give evidence on his behalf.
18. Mr Puloka stated that on the day in question, he was playing pool with his friends at his home. He stated that a police raid had first occurred at his home in December 2018 and 6 people had been arrested for possession of illicit drugs. After that incident, he said that he told all his friends that no one was allowed to bring any more illicit drugs to his house.
19. Mr Puloka also said that he was playing a game of pool with another person named Kae Tau'aika. He lost the game to Kae and he went back inside his caravan to lie down. At that time, the Second Accused, Faka'osi Katoa, had just arrived and he hurried over to play against Kae. Mr Katoa rushed into the caravan and put his things on top of the table inside the caravan before going outside to play against Kae.
20. About five minutes later, the police arrived and he heard the yelling 'Police with guns, no one move!' Then an officer came inside the caravan and pulled him out. He was then handcuffed and made to lie on the ground. He was told not to move or he will be shot.
21. Mr. Puloka also stated that after about 15 – 20 minutes of the police being there, he was made to sit up and Officer Vi then informed him of the reason they were there and that they were going to conduct a search without a warrant.
22. He was then taken to the caravan to watch while the police conducted a search of the caravan and after a while one of the Officers turned and asked him who the black external hard drive belonged

- to. The police had opened the hard drive and found methamphetamine and cannabis inside. He told the police that it belonged to the Second Accused, Faka'osi Katoa.
23. In cross-examination, Mr. Puloka accepted that he and his family lived in the compounds and that his family lived in the main house while he stayed inside the caravan. He stated that his friends are allowed to visit him and to enter the caravan whenever they liked but denied that the reason he allowed them to his house was to deal drugs.
24. The second witness called by the First Accused was Kae Vailasi Tau'aika. On the night of the search he was playing pool with the First Accused. He said that the First Accused lost the game and went back to his caravan. The Second Accused showed up and asked who had lost and he told him that Pangi had lost the game. He saw the Second Accused go inside the First Accused's caravan and put his stuff on top of the table. He said that amongst the things he saw with the Second Accused was a black external hard drive.
25. Mr Tau'aika also stated that when the police raided them he was standing next to the Fifth Accused, 'Isitolo Sakopo, and they were both made to lie down in that area while they were searched.
26. In cross-examination by the Second Accused, Mr. Tau'aika maintained that he had seen the Second Accused walk over holding the stuff in his hands including the external hard drive.
27. The third witness called by the First Accused was Ma'ulupekotofa Soakimi. He was also present at the First Accused's house on the night of the search. He said that there were many of them at the house that night but that at around 11pm he had to go back home because his sister needed the vehicle. He said that he could not remember who all were playing but that he does recall Kae playing with the First Accused and a short time later he saw the Second Accused arrive and play against Kae.
28. Mr Soakimi also stated that he saw the Second Accused walk over and enter the First Accused's caravan and put his stuff on top of a table before coming out to play pool. At that time, the witness was standing next to the First Accused's caravan watching them play pool. He recalls only seeing the Second Accused holding keys and a black box and he put them together on the table.
29. Mr Soakimi also stated that when the police arrived, he was already sitting inside his vehicle and was about to leave. However, he was pulled out of the vehicle and taken to the area where the rest of the Accused persons were made to lie down.

30. The Fourth Accused, Viliami Na'a, elected to give evidence. He stated that on the night in question he was playing pool with his friends. He stated that he and his girlfriend lived in one of the caravans at the compound. He saw that there were many of them at the house that night and so he decided to go to the shop to get some food. After about 15 minutes he walked back and saw people walk back and forth inside the compound. He then realized it was a search when he heard the police shouting.
31. He walked over to the gate and he was chased away by one of the officers. He told the officer that he is one of the occupants as he wanted to go inside to check on his girlfriend because she was pregnant. He said another officer arrived and pulled him inside and threw him to the ground and searched him. The officer then pulled him back up and took him to where the others were laying on the ground. Another officer then came with a rope and tied his hands.
32. Mr Na'a was then taken inside the caravan where he and his girlfriend lived in and he sat in the corner with another police officer while Officer Fifita searched one side of the room and Officer Pohiva searched the other side. Officer Pohiva asked him who the tattoo equipment on top of a table belonged to and he told the officer that they were his. After that the Officer took out a pack of cannabis and asked him who it belonged to and he told the officer that he did not know and that it must belong to the officer as he is the person who had picked it up.
33. In cross-examination Mr Na'a denied that any of the illicit drugs belonged to them and stated that the illicit drugs belonged to the police who had come with them.
34. The Fifth Accused 'Isitolo Sakopo elected to give evidence. He was also present when the police arrived to conduct the search. He said that when the police arrived he was sitting on a chair close to the back entrance where the second TRG team had entered. He said that Officer 'Aho had entered from the back and had come over and grabbed him and Kae and made them lie down on the ground. He was then searched and the police found nothing on him that night.
35. In cross-examination, Mr. Sakopo denied being the person the police had seen running between the two cars where illicit drugs had been found. He said that according to Officer 'Aho's statement he had arrested him where he was found and made to sit down.
36. The Second and Third Accused elected to remain silent and they did not call any witnesses.

## B. SUBMISSIONS BY DEFENCE

### FIRST ACCUSED – PANGI PULOKA

37. Counsel for the First Accused made several submissions on behalf of his client and submitted that the Crown has failed to prove their case against the First Accused beyond a reasonable doubt.
38. Firstly, counsel submitted that the Police had no license to use weapons or guns when they conducted the search. Counsel quoted sections 100, 103 and 105 of the Tonga Police Act. Those sections deal with reasonable force and the offence of possessing tactical equipment without authorisation. I said at the outset that I do not accept the submission that the Police had no authorisation to use guns or tactical equipment. This submission is misconceived as the sections in my view only apply to persons other than the police. The officers who used weapons during the search were officers from the Tactical Response Group and would obviously already been authorized to use tactical equipment. Counsel's submission is that the police failed to bring the authorization in writing. That is an unreasonable submission as it would be silly to expect that the police would need to take a written authorization every single time they conducted a search to show the Accused persons they have authority to use guns or weapons.
39. Secondly, counsel submitted that the Crown has not proven all the elements of possession of illicit drugs beyond a reasonable doubt. This is because according to the evidence, the external hard drive where the illicit drugs were found belonged to the Second Accused. The Officers who had searched the area where the First Accused had been seated found nothing there. The only illicit drugs found in the caravan were the drugs found inside the external hard drive. Both witnesses for the Defence had stated that they had both seen the Second Accused arrive and they saw him holding things in his hand including a 'black box'. Both witnesses also stated that they saw the Second Accused go inside the caravan and put his things on top of the table before rushing out to play pool with Kae. Counsel submitted that in those circumstances it is clear that the First Accused had nothing to do with the external drive where the drugs were found.
40. Thirdly, counsel submitted that the search without a warrant was unlawful. He quoted the relevant sections in the Tonga Police Act but did not explore this issue further other than to state that Officer Vi has not given this court a case example of where the information from an informant was used and the case was successful because of that information.



## **SECOND ACCUSED – FAKA’OSI KATO A**

41. The Second Accused submitted that the issues outlined by counsel for the First Accused are the same issues with his case and made no further submissions on them. He only stated that the evidence against him is only circumstantial evidence and no one had seen him in possession of the illicit drugs.

## **THIRD ACCUSED – SIONE SONGO’IMOLI**

42. The Third Accused stated that the evidence against him is unreliable. This is because the two officers who had searched him cannot remember what he had worn that night. Additionally, he submitted that the police lied in relation to the type of weapon they had used during the search. Officer ‘Aho had stated that they had used glock 19 guns which was inconsistent to the evidence of Officer Fifita who had stated that they had used M4 guns. As such, he submits that this inconsistency in the evidence of the police means that the evidence against him is unreliable and should not be accepted.

## **FOURTH ACCUSED – VILIAMI NA’A**

43. The Fourth Accused submitted that the Police had planted the illicit drugs to incriminate them so that their operation would be successful. This is because the police had targeted them from the beginning and when they could not find any illicit drugs on them they then planted the drugs. Additionally, there was inconsistency in the evidence of Crown witnesses 6 and 7. Both of them claimed to have found the illicit drugs he is being charged with and their evidence is therefore unreliable (raises doubt) and should not be used as evidence against him.

44. Moreover, the particulars of the indictment read “you had possession of illicit drugs” but no drugs were found on his person.

45. Lastly, the Accused submitted that the search was unlawful because the police had used unreasonable force when they unlawfully forced themselves into the compound. He submitted that he should not be convicted because of the unreasonable way the police conducted their search.

## **FIFTH ACCUSED - ‘ISITOLO SAKOPO**

46. The Fifth Accused submitted that the search was unlawful because the Police had forced their way in and had caused bodily injury and had threatened them with guns and had sworn at them. They had also used handcuffs to detain them.

47. Secondly, he submitted that the evidence against him is insufficient because there was no direct evidence to prove the charge against him. He said that Officer 'Aho had stated that he had arrested him where he found him and that he had not been running. Officer Fifita could not be certain that he was the person running because it was dark. Therefore, the evidence against him is based only on guesses by the Police.
48. Additionally, he stated the witness Kae Tau'aika had said in his evidence that he (Kae) was standing next to him (Fifth Accused) when the police detained them and that Kae had not seen him running anywhere.

### C. CLOSING SUBMISSIONS BY THE CROWN

49. Mr Finau for the Crown first addressed the issue relating to the lawfulness of the search. He quoted the relevant sections from the Tonga Police Act which authorizes the police to carry out searches without a warrant (sections 122 and 123 of the Tonga Police Act). He said that the first Crown witness, Officer Tapueluelu, had stated that he had received reliable information from an informant that the police have used before and in which the police had successfully seized illicit drugs. Officer Tapueluelu had driven to the First Accused's house to determine whether the information was correct. When he arrived at the residence at Hofoa he saw that there were many vehicles parked inside the compound.
50. Additionally, the First Accused himself had given evidence and stated that the police had previously raided his house in 2018 and had successfully seized drugs. There was therefore a known history of drugs being present in the compound. Mr Finau submitted that the police therefore had reasonable grounds to search the premises without a warrant.
51. Secondly, Mr Finau submitted that section 123 (2) of the Act authorizes the police to enter any place or building. The evidence is that the TRG are a part of the Tonga Police and were therefore authorised to enter the compound. The witnesses had stated that the reason the TRG team is required to accompany the Drugs Taskforce is to ensure the safety of the officers in the Taskforce. This is due to the nature of drug offending where police have frequently found weapons.
52. Also, the evidence is that there were many people at the residence and the police were therefore required to first gather everyone present at the residence to make sure that everyone was accounted

for before they began the search. Mr Finau submitted that the police needed to clear the area first for the safety of the officers.

53. In reply to submissions that the police had used force and threatened the Accused persons', Mr Finau submitted that the police had used reasonable force to detain the Accused persons and were authorized to use restrictive equipment such as handcuffs to detain them. Officer Vi had stated in evidence that when they enter the police force, they are given a set of handcuffs which clearly shows that they are allowed to use such equipment.
54. Lastly, Mr Finau for the Crown submitted that after the search was conducted, a report had been submitted to the Acting Police Commissioner in compliance with sections 122 (6) and 123 (5) of the Tonga Police Act. Counsel submitted that the police had therefore complied with the requirements of a search without a warrant.
55. In relation to the issue of possession, Mr Finau outlined the evidence that was relevant to each Accused person.
56. In relation to the First Accused, counsel submitted that the evidence is that the external hard drive that contained illicit drugs was found inside the First Accused's caravan. The witnesses Kae and Ma'ulupekotofa both stated that they saw the Second Accused arrive and put the external on top of the table while the First Accused was inside the caravan. He therefore knew or should have known the contents of the hard drive because he allows other people to use his caravan. Mr Finau submitted that a reasonable inference can therefore be made that Mr Puloka knew about the contents of the hard drive and he had control over it and its contents.
57. Mr Finau agreed that the case against the First Accused was only circumstantial but he submitted that the circumstantial evidence in this case is strong evidence which the court can draw a reasonable inference that the Accused is guilty of possession of illicit drugs. He submits that illicit drugs were found in different areas of the compound and on other Accused persons who are his friends. As such, counsel submitted that there would be no way the First Accused would not have known about the illicit drugs inside the external hard drive. Counsel submitted that the Crown has proven the charge of possession against the First Accused and he should be found guilty for both Counts 1 and 2;

58. In relation to the Second Accused, the evidence is that when the external hard drive was found the First and Second Accused persons had argued over who it actually belonged to. The First Accused had stated that the Second Accused had just arrived and put it on the table. This is corroborated by the evidence of Ma'ulupekotofa and Kae who both saw the Accused putting the external hard drive on the table. The Second Accused had told the police that everything on the table belonged to him except the hard drive. Counsel submitted that the Crown has proven the charge against the Second Accused and he should be convicted as charged on Counts 1 and 2;
59. In relation to the Third Accused, Mr. Finau submitted that Officer Tapueluelu and Officer Fifita both gave evidence that they had heard and seen something drop from the Accused when he was made to sit up. They saw a can of Eclipse mint fall from his chest onto the ground and when it was opened they found 9 packs of methamphetamine. The Crown submits that the evidence is sufficient to prove beyond reasonable doubt that the Third Accused had custody and control and therefore possession of an illicit drug.
60. In relation to the Fourth Accused, Mr Finau emphasised that Officer Fifita and Officer Pohiva had searched the caravan and the search was made in the presence of the Fourth Accused. The packet of cannabis was found in full view of the Accused. Counsel submitted that even though there were inconsistencies in the evidence of the officers as to who actually found the illicit drugs, the point is that a bag was found in the room containing a packet of cannabis. The bag was found together with tattoo equipment which the Fourth Accused said belonged to him. As such, the evidence was sufficient to prove that the Fourth Accused had custody and control of an illicit drug and therefore possession of it.
61. Lastly, in relation to the Fifth Accused, Officer Fifita, had given evidence that when they entered the compound through the back entrance, he had stood beside the pig sty and saw a tall slim person running between two cars parked in the area where other vehicles were parked. Officer 'Aho stated that he was the one who had detained the Fifth Accused and, in his opinion, the Accused seemed to have just run back and was trying to join the other Accused persons.
62. They later found 14 grams of methamphetamine between the two cars where Officer Fifita had seen someone running from. Counsel submitted that the amount of methamphetamine found there indicated that someone had thrown them there to get rid of them when the police arrived. Mr Finau submitted that it was the Fifth Accused that Officer Fifita had seen running between

the two cars and a reliable inference can be made that he was the person who had thrown the 14 grams of methamphetamine later found there by the police.

63. In relation to the inconsistencies of some of the evidence by the Crown witnesses, counsel submits that it is human nature for police to forget some of the details but this does not necessarily mean that they are lying. It would be suspicious if all their evidence was exactly the same

#### D. DISCUSSION

64. This was understandably a long trial given that there are five accused's persons who are charged as co-accused's. From the evidence before the Court and the submissions by both the Defence and the Prosecution, the main issues in dispute are as follows:

- a. Legality of the search without a warrant;
- b. Possession of Illicit Drugs;

65. There was no challenge to the chain of evidence nor the Scientific analyst certificate and I will not make any further discussions on that.

#### Was the search without a warrant to the First Accused's residence lawful?

66. The gist of the submissions from all five Accused Persons' is that the search was unlawful because:

- a. The police used unreasonable force and threatened them during the search. They assaulted them and held guns to their heads and swore at them;
- b. The police did not provide any documents to prove that they had authorisation to carry and use guns;
- c. There were no reasonable grounds to make the search without a warrant;

67. Officer Malolo Vi gave evidence that he made the call to conduct the search without a warrant because the nature of the information received required the police to act quickly. He said that the police had authority to conduct a search without a warrant pursuant to section 122 and 123 of the Tonga Police Act.

68. Section 122 (1) of the Tonga Police Act provides (as relevant) as follows:

- a. "122. Search of persons without a warrant  
(1) This section applies if a police officer is satisfied, on reasonable grounds,
  - (a) that a person has any of the objects mentioned in subsection (2) in his possession, and;

- (b) it would be impracticable, unreasonable or not in the interests of justice if the officer was required to apply for a warrant in order to search the person for the objects.”

Subsection (2) (b) lists “an illicit drug” as an object for the purposes of subsection (1).

69. Section 123 (1) (a) of the same Act provides as follows:

“123. Search of places, vehicles, vessels and aircrafts without a warrant.

(1) This section applies if a police officer is satisfied, on reasonable grounds, that:

- a. A serious offence has been committed, is being committed or is about to be committed in any place, premises, vehicle, vessel or aircraft and;
- b. it would be impracticable, unreasonable or not in the interests of justice if the offender was required to apply for a warrant in order to conduct a search in relation to the offence.

70. From these provisions of the Tonga Police Act where searches are to be made without a warrant, the critical requirement is that the police officer must be satisfied on reasonable grounds of two things before he can carry out a search without a warrant. Firstly, that a serious offence has been committed, is being committed or is about to be committed. Secondly, that action be taken right away without a search warrant.

71. In *Rex v Posoni* [2020] TOSC 71 at paragraph 32, His Honour Justice Niu stated that “the reasonableness of the belief that a serious offence has been committed, is being committed or is about to be committed is not determined by the fact that the offence is later found to have been committed or is being committed or is about to be committed because that is subsequent to the decision to make the search without a warrant. Rather, the reasonableness of the belief is determined on the reliability of the information received by the officer alone. Where a police officer has made a search without a warrant, and has seized an object or substance, he has the burden and obligation of proving and satisfying the Court that he had such reasonable grounds or cause for the search he made without a warrant. Such proof is not satisfied by simply saying to the Court that he had reasonable grounds or cause to do so. He must satisfy the Court what the grounds or cause were, that they existed and that they were reasonable”.

72. In this case, Officer Tapueluelu gave evidence of receiving information from an informant that the police have used in other drug cases. The information given to him was that there were many people playing pool at the First Accused’s house and that they were dealing in drugs. The

informant told him that Viliami Na'a and 'Isitolo Sakopo were there and they had drugs on them. He was also told that when Pangi (First Accused) goes to sleep, the drugs would be given to either 'Isitolo Sakopo or Viliami Na'a. The informant also said that everyone inside the compound had in their possession illicit drugs.

73. Officer Tapueluelu then drove to the First Accused's residence to confirm that the information given to him was true. He saw that there were many people at the compound and many vehicles parked there. He believed that the information was reliable and he accordingly acted on it and he went and conveyed it to Officer Vi who put together a search team to carry out a search without a warrant.
74. I accept Officer Tapueluelu's evidence and I accept that he was satisfied on reasonable grounds that a serious offence was being committed.
75. I accept that in the circumstances the police were required to act quickly to catch the Accused persons while they were all there. The reliable information was that there were many people there who all had illicit drugs in their possession and it was therefore necessary for the police to act quickly.
76. In relation to the allegations of police using force and threats when they first arrived at the residence, I accept that in the circumstances, there would have been some force required in order to gather all 10 to 11 people who were inside the compound. When conducting a drug raid, especially with the amount of people present, it is highly unlikely that the Accused persons would have listened if the police had first announced their presence and had asked them politely to take a seat while they searched the compound. There were 10 to 11 grown men inside the compound and the idea of the police calmly strolling in and asking them politely to stay where they were, is an entertaining one. Had the police not used reasonable force to gather them to one area I believe many would have been able to run and escape.
77. Officer Halatoa Taufu had then completed the requirements of a search without a warrant as required by section 123 (5) for a report of the search to the Commissioner of Police. The report in this case was sent to the Acting Commissioner of Police because the Police Commissioner was out of the country. (Exhibit number 6)
78. There were also claims that police caused bodily injury. However, there was no proof of these allegations. I accept that the police may have sworn at them in their attempt to quickly detain them and gather them in one area before the search was conducted. The nature of such raids would

require some reasonable force on the part of the police to successfully detain everyone. Nevertheless, I do not consider that this was a case of where the police egregiously abused the power of a search and I am therefore satisfied that the search carried out without a warrant in this case was lawful.

## HAS THE CROWN PROVED THAT THE ACCUSED PERSONS WERE IN POSSESSION OF AN ILLICIT DRUG?

79. 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”.*

80. 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 ER 356, 392 (HL). Explaining that further, Lord Wilberforce said (at 393):

*“By [the modes and events] I mean relating to the 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”*

81. That approach was upheld by Lord Scarman in *R v Boyesen* [1982] 2 All ER 161, 163 (HL). Similarly in *R v Lewis* (1988) Cr App R 270 (CA), it was again held that the question to be answered was whether on the facts the accused was proved to have or ought to have imputed to him the intention to possess or the knowledge that he did possess what was in fact a prohibited substance.



It was not necessary to be satisfied that the accused had actual knowledge that he had the drugs in question under his control before he could be convicted.

82. In the case of *R v Cox* [1990] 2 NZLR 275, Hardie Boys J clearly explains the two elements of 'possession'. The first is the physical element and it is actual physical custody or control. The second is the mental element or the element of mens rea which is a combination of knowledge and intention: knowledge in the sense of an awareness by the accused that substance in his possession (often inferred or presumed) and the intention to exercise possession.

#### FIRST ACCUSED – PANGI PULOKA

83. The Crowns case against the First Accused is based on circumstantial evidence. As has been noted in various cases in the Kingdom, 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 (*R v Azevelo* [2009] TOLR 14; [2009] TLR 140 (18 March 2009); *R v Nisifolo* [2009] TOLR 1 [2009]; TLR 27 (9 January 2009).

84. 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. Speculating in a case amounts to no more than guessing or making up theories without good evidence to support them, neither the prosecution, the defence or I, should do that.

85. After considering the law with regard to circumstantial evidence and possession of illicit drugs, I have no doubt that the First Accused had knowledge that the external hard drive contained illicit drugs and he had some control over it. I form this view based on the circumstantial evidence in this case. One particular aspect that drew my attention was an inconsistency in the evidence of the First Accused and the witness he called to give evidence for him, Kae Tau'aika. In answers to questions put to him by his counsel, the First Accused claims to have never set eyes on the external hard drive. He stated that the only time he has ever seen the hard drive was when the police asked who it belonged to.

86. However, the first witness called by the Defence stated in his evidence that he is acquainted with Mr Katoa and he is familiar with the external hard drive because Mr Katoa 'brings it over every day'. Obviously either the First Accused or his witness is lying. If Mr Faka'osi takes the same

external hard drive to the First Accused's compound every day as stated by his witness, then there can be no way that the First Accused has not seen it before.

87. Additionally, I take into consideration the fact that Mr Faka'osi walked straight into the caravan and in the presence of the First Accused, put the external drive on top of the table. In my view, this suggests that Mr. Faka'osi was no stranger to the caravan and there was an understanding between himself and the First Accused. Where there is an inconsistency in the evidence of the First Accused and his witness, Kae Tau'aika, I prefer the evidence of Mr Tau'aika because there was no reason for him to lie as he had nothing to hide. The Accused however, had every reason to distance himself from the hard drive because he knew fully well what was contained inside.
88. Moreover, on his own admission, Mr Puloka stated that his home already had a history of drugs being seized from his residence. He stated in evidence that the police had raided his house in 2018 and in that search, 6 people had been found with illicit drugs. He also stated that after that particular raid in 2018, he had warned his friends that no one was to bring any more illicit drugs to his house. However, that is inconsistent with what the police actually found at his residence that night. Cannabis was found inside the Fourth Accused's quarters. Methamphetamine was found in a can alleged to have dropped from the Third Accused. An extensive amount of methamphetamine was found between two vehicles parked inside the compound. Drugs were found on Ma'ulupekotofa who has already pleaded guilty. Methamphetamine and cannabis was found inside an external drive on top of a table inside his caravan. The circumstantial evidence, when taken together, allows me to make a reasonable inference that the First Accused did have knowledge that his friends were in possession of illicit drugs that night and he did have some control over the illicit drugs found inside the external hard drive.
89. The Crown has proven the two charges against the First Accused beyond a reasonable doubt and he is accordingly convicted of Counts 1 and 2 of the indictment.

## SECOND ACCUSED – FAKA'OSI KATOA

90. The evidence against the First Accused is the same evidence against Second Accused. The evidence is that when the external drive was opened and the police found illicit drugs inside, the First Accused was asked who the external hard drive belonged to. The First Accused told the police that it belonged to the Second Accused. This is consistent with the evidence of both witnesses called for the First Accused. Mr Kae Tau'aika stated that he saw the Second Accused carrying the external hard drive into the First Accused's caravan and put it on the table. The second

witness, Ma'ulupekotofa Soakimi, stated that he was standing next to the caravan and he saw the Second Accused walk into the caravan and put the external hard drive on top of the table before rushing out to play pool against Kae.

91. The Accused did not have much of a defence except only to say that the charges against him are not true and that there was no direct evidence to convict him. This is contrary to the evidence I have heard from the police and from the two witnesses called by the First Accused.
92. The Crown has proven the charges against the Second Accused beyond a reasonable doubt and he is accordingly convicted of Counts 1 and 2 of the indictment.

### **THIRD ACCUSED – SIONE SONGO'IMOLI**

93. The evidence against the Third Accused is direct evidence from Officer Tapueluelu and Officer Fifita. After everyone in the compound had been detained and made to lie on the ground, Officer Tapueluelu pulled the Third Accused up to commence searching him. The officer heard something drop from the Third Accused and Officer Fifita looked over and saw a can on the Third Accused's chest. He picked the can up and saw that it was a can of Eclipse Mint. When it was opened they saw that the can contained illicit drugs.
94. From the Third Accused's questions in cross-examination, his case is that it was not him and that this was a case of mistaken identity. However, both officers confirm that it was him they had seen that night. Moreover, Mr Ma'ulupekotofa, who was called by the First Accused stated in his evidence that the Third Accused, Sione Songo'imoli, had been one of the persons in the compound that night.
95. I therefore have no doubt that the Third Accused was in possession of illicit drugs and that this is not a case of mistaken identity.
96. The Crown has proven the charge against the Third Accused beyond a reasonable doubt and he is accordingly convicted of Count 3 of the indictment.

### **FOURTH ACCUSED – VILIAMI NA'A**

97. The Fourth Accused denies possession of the pack of cannabis found inside a black bag in his caravan. He suggested in his cross-examination of Officer Fifita and Officer Pohiva that the drugs had been planted by them to incriminate him. Both officers adamantly denied planting the drugs.

98. The suggestion put forward by the Fourth Accused is a possibility. However, it is an unreasonable possibility that does not create a reasonable doubt. There was no evidence to suggest to me that the drugs were planted by the Officers to incriminate the Fourth Accused. The evidence is that after the police had searched everyone who was at the compound, they then dispersed to search the two caravans. The Fourth Accused was then taken into the caravan where he stayed with his girlfriend.
99. Officers Fifita and Pohiva then searched the chairs and did not find anything. They continued to search a small table inside the room and found tattooing equipment. The drawer was opened and a small black bag was found inside. Officer Fifita held up the bag and asked the Accused who it belonged to and the Accused told him that he did not know. Inside the bag was a pack of cannabis. The Accused told the police that only the tattoo tools belonged to him but he did not know anything about the pack of cannabis.
100. The Accused accepts that he lived with his girlfriend inside that second caravan. He accepted that the items on the table belonged to him. The only thing he does not accept is ownership of the pack of cannabis found inside the black bag in the drawer. I have no doubt that the Accused was in possession of the pack of cannabis and his denial is his attempt to distance himself from it.
101. The Crown therefore has proven the charge against the Fourth Accused beyond any reasonable doubt and he is accordingly convicted of Count 5 of the indictment.

#### FIFTH ACCUSED - 'ISITOLO SAKOPO

102. The case against the Fifth Accused is that Officer Fifita had seen someone running between two vehicles where the police later found 14 grams of methamphetamine.
103. Officer Fifita stated in his evidence that he was not able to see the persons face but described the person as someone 'tall and slim'. He later saw Officer 'Aho holding the Fifth Accused and put him down on the ground with the others.
104. Officer 'Aho stated that when he saw the Fifth Accused, it seemed as if he was trying to run back into the shed to join the others. Officer 'Aho then grabbed him and put him on the ground and handcuffed him. This is the gist of the evidence relied upon by the Crown to convict the Fifth Accused.

105. After considering the law with regard to possession and circumstantial evidence, I am not satisfied that the Crown has proven that the Fifth Accused had physical custody and control of the methamphetamine that was found between the two vehicles, nor the required knowledge of the presence of the illicit drugs. While the court is entitled to draw reasonable inferences from the circumstantial evidence, the inference that Crown counsel invites the court to draw in this case cannot, in my opinion, support the charges to the required standard of proof beyond a reasonable doubt.
106. In this case, Officer Fifita saw someone running between two vehicles parked inside the compound. He did not see this person's face but says the person was tall and slim. Shortly after seeing this person, he saw Officer 'Aho holding the Fifth Accused and put him on the ground.
107. Officer 'Aho stated in his evidence that he had grabbed the Fifth Accused and put him on the ground. He said that it looked like the Accused was trying to get back into the shed to join the others.
108. On this night, there were around 10 -11 people in the compound. When the police entered the compound, they had to act quickly to gather everyone in one area. The TRG divided into two groups, one group entered from the main front gate, another through the back. This was to ensure that no one escaped. Understandably, having been caught by surprise, the occupants in the compound would have tried to escape and would have been running around looking for an exit.
109. The Crown relies only on the evidence of the police that someone was seen running between the two vehicles and shortly thereafter the Fifth Accused was caught and looked to be trying to join the others. An inference can be made that he had been the person who had been running between the two vehicles. But is that enough to prove beyond a reasonable doubt that he had custody and control over the illicit drugs? No one saw him hold the illicit drugs, no one saw him throw the drugs. Ma'ulupekotofa was also found sitting inside one of the vehicles parked at the compound. It is therefore possible that he had thrown the drugs when he realized the police were there. Whoever had thrown the drugs between the two vehicles, the Court cannot be satisfied to the criminal standard that the Fifth Accused had physical custody and control of the 14 grams of methamphetamine found in the area, or that he had the required knowledge.

110. As such, the Crown has failed to prove the charge against the Fifth Accused beyond a reasonable doubt and he is acquitted.

NUKU'ALOFA: 08 February 2021

