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IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY CR 252 of 2020

BETWEEN:

R E X

-Prosecution

AND:

LATU SELU

-Accused

VERDICT

BEFORE : JUSTICE LANGI

Counsel : Ms Halaevalu Aleamotu'a for the Crown Prosecution
Mr Siosifa Tu'utafaiva for the Accused

Date of Verdict: 15 February, 2021

A. THE CHARGE AND PRELIMINARY MATTERS

1. The Accused is charged with one count of possession of illicit drug and one count of interference with evidence, both under the Illicit Drugs Control Act:
    a. Count 1: that on or about 10 April 2019 he knowingly and without any lawful excuse possessed a Class A drug, namely methamphetamine;
    b. Count 2: that on or about 10 April 2019, he interfered with evidence;

2. I have reminded myself at the outset that the onus of proof lies on the Prosecution at all times and it is to the standard of proof beyond a reasonable doubt in relation to the charge and every constituent element of the charge.

3. Before I can convict the Accused the Prosecution must prove the following elements beyond a reasonable doubt:

a. That on 10 April 2019;
b. The Accused knowingly and without lawful excuse;
c. Possession of a Class A illicit drug;

4. At the beginning of the trial counsel for the Prosecution asked to tender the Scientific Analyst Certificate on the basis that the Defence failed to reply to the notice under section 36 of the Illicit Drugs Control Act to require the analyst to be called to give evidence.

5. Mr. Tu'utafaiva objected to the Scientific Analyst Certificated being tendered as evidence and submitted that the notice which was received by the Accused was unclear because it was addressed to someone by the name of 'Paletili Afu' and not the Accused. Counsel confirmed with the court that he had received the notice when the Committal papers were given to him but he did not bother to file a reply for the analyst to be called because the name on the notice or cover letter was wrong. Counsel agreed that the papers attached to the cover letter were documents addressed to the Accused in this case.

6. I ruled that the Scientific analyst certificate was admissible. The notice was clearly addressed in the top left side of the cover letter to the Accused. The only mistake in that letter was an administrative error in the insertion of the name Paletili Afu' where the Accused's name should have been. The rest of the letter and the documents attached to it were clearly addressed to the Accused.

B. THE EVIDENCE

7. I heard evidence from 6 witnesses for the Prosecution.

8. The first witness was Police Officer Malolo Vi. He is an experienced Police officer and has worked at the Tonga Police for 13 years. He led a search without a warrant to the residence of Siua Holani at Hala'ovave. He said that at around 1120hrs the Police received information about the Accused and illicit drugs. He then put together a search team to go to Siua Holani's house where the Accused was believed to be living.

9. When they arrived at the house, the Tactical Response Group (TRG) first entered the residence and Officer Vi and the rest of the team followed. The Accused was inside the living room with a woman and two other men. The TRG made all of them lay down on the floor before he informed them that the police were there to conduct a search without a warrant in relation to illicit drugs.

While Officer Vi was still talking, one of the officers shouted that there was something inside the Accused's mouth. Officer Vi pried the Accused's mouth open and managed to take out a small plastic bag containing methamphetamine. He said that this was one of the reasons the police needed to act quickly and search without a warrant was so that drugs would not be destroyed. He asked the Accused what the contents of the bag were and the Accused did not say anything. He then informed the Accused that he is charged with possession of methamphetamine.

10. The police then carried on the search in the living room where they found small straws about an inch in length. Both sides of the straw were closed and he opened one side and found methamphetamine inside. They found a total of 10 straws with drugs inside in the area where the Accused had been sitting and he asked the Accused who the straws belonged to and the Accused said that the straws belonged to him. The confession was recorded in entry number 27 of the Diary of Action and signed by both the Accused and Officer Vi. The police also found a scale and empty packs on top of a table inside the living room. The illicit drugs found were recorded in the Search List. Officer Vi reported the results of the search without a warrant to the Magistrate court.

11. In cross-examination Officer Vi did not remember the person who had given him the reliable information he had received. He could not remember whether the search was done during the week or on the weekend. When it was put to him that it was on a Thursday morning and that a warrant could have been obtained, he stated that at that time the Magistrates would have already been in court. Upon further probing from the Defence counsel, he hesitantly agreed that a warrant could have been obtained if he had wanted to get a warrant. He also agreed that he had not cautioned the Accused before asking who the straws belonged to.

12. The second witness was Officer Litili Televave. He was part of the TRG who accompanied the Taskforce in the search. He stated that the TRG were informed that the target of the search was the Accused Latu Selu. He entered the house with the TRG officers and saw the Accused with three other people inside the house. He was present when one of the officers alerted Officer Vi that there was something inside the Accused's mouth. He and two other officers assisted in holding the Accused's while Officer Vi tried to take out the plastic bag from his mouth. He also found straws containing methamphetamine under the chair where the Accused sat.

13. In cross-examination he agreed that the target of the search was the Accused only.

14. The third witness was Officer Halapua Hakalo. He was part of the search team and was present when the police found straws under the chair and some on the table. He heard Officer Vi ask the occupants inside the house who the straws belonged to and no one spoke up.

15. In cross-examination he said the straws were found behind the chair where the Accused had been seated.

16. The fourth witness was Officer Tevita 'Akau'ola. He has worked as a police officer for over 15 years and has been with the Tactical Response Group for 9 years. On 26 March 2020 he received reliable information from an informer that the Accused was selling drugs from the residence of Siua Holani at Halavave. He believed the information to be reliable because the police had used the same informer on previous occasions which had turned out successful because illicit drugs were found. He relayed the information to Officer Vi who then put together a search team to go to Hala'ovave.

17. He stated that when they turned to go into the driveway of the house, he saw a vehicle reversing and he and Officer Pua stopped the driver but the driver had already swallowed something he had put in his mouth. He said the result of the search was that illicit drugs were found. He had only entered the house while the search was being conducted

18. In cross-examination he stated that on the day of the search he had commenced work at 9am. He said he had used the informer before in the previous year but could not remember the month. However, he had used this same informer towards the middle of the previous year up to the beginning of the current year in approximately 4 or 5 cases. He said that the exact words by the informer were "the target Latu Selu is currently selling illicit drugs namely methamphetamine at Siua Holani's residence at Hala'ovave". The officer agreed that the informer had not told him that the Accused lived at the residence but said that he (the officer) himself knew the Accused lived there. The witness also conceded that the police had not checked whether or not the information they received was correct. They had just received the information and were required to act quickly in case the drugs were destroyed. He said he received the information at around 11am but did not record it. When asked why he did not record it he replied that it was up to him whether or not he wanted to record it.

19. The fifth witness was Officer Tu'amelie Fifita. He was responsible for recording the actions carried out during the search. He had recorded the actions in entries 1 – 49. He said that the signatures in entries 26-27 were the Accused's and Officer Vi's signatures. He said he recorded the Accused's

reply when he was asked what the items were. He had witnessed Officer 'Otuhouma weighing the exhibits. He saw 'Otuhouma cut the straws and transfer the contents into a small plastic bag and weighed it. He was also responsible for recording the exhibits found on the search list.

20. In cross-examination he maintained that it was the Accused's signature in entries 26 and 27.
21. The sixth witness was Officer Minola Pousimi. She is the exhibit keeper at the police Exhibit Room. She had recorded the handover of the exhibits seized from the search. On 7 April 2020 at 1.19pm Detective 'Otuhouma had handed over to her the exhibits. On 4 June 2020 Officer Manumu'a handed the exhibits to Officer Pale for testing. On 9 July 2020 Officer Pale returned the exhibits to the exhibit room. She tendered the Exhibit Register Diary as Exhibit 4.
22. In cross-examination she stated that the 10 pack of 'ice' recorded in the register were put inside one big bag and the recorded weight for all packs was 8.54grams.

C. DEFENCE CLOSING SUBMISSIONS

23. The Accused elected not give evidence or call evidence on his behalf and Mr. Tu'utafaiva proceeded with closing submissions.
24. The first issue submitted by counsel is that the search without a warrant was unlawful because the police had failed to ensure that the requirements of sections 23 and 24 of the Illicit Drugs Act were complied with. Counsel submitted that there was no evidence to justify the immediate exercise of the power to carry out a search without a warrant. This is based on the following evidence:
    a. Officer 'Akau'ola had received this 'reliable information' on a Thursday morning at around 11am. There was ample opportunity for the police to get a search warrant from the Magistrate Court as there is bound to be a Magistrate available to issue a search warrant. Officer Vi had agreed that he could have obtained a search warrant if he had wanted to get one. Most importantly, there is no evidence that there was reliable information to justify the police conducting a search without a warrant and that they were required to act quickly.
    b. The nature of the evidence relied upon by the police is hearsay evidence as it comes from an informer who cannot be called in court to give evidence. As such, counsel submitted that there should be independent evidence to support the reliable information relied upon by the police to justify the urgent requirement for the police to act quickly and carry out a search without a warrant. If no independent evidence is required, this may open the door for the police to ignore the requirement to apply for

a search warrant and abuse the powers given to them under section 24 of the Act. If the Police were only to rely on information that was provided for them by an informer, the rights of certain people will be affected without a reasonable explanation. Counsel submitted that in this case the people did find something, but they should have first had reliable information before they made the decision to search without a warrant. In this case, all that was said was "he is selling drugs".

c. Counsel also submitted that the police did not ascertain whether or not the information they had received was reliable. No one had gone to check our carry out a surveillance of the residence prior to the search. Once they received the information Officer Vi put together a search team. An oral application could have been made for a search warrant. No one resisted the search. 'Akau'ola saw someone reversing and swallowing something. There is a provision in the law for internal concealment so why was that person not arrested? Overall, there is no other supporting evidence to prove that the information was reliable and that the search without a warrant was justified. If the Court rules that the evidence is insufficient for a ruling that the information was reliable then the items seized should not be allowed as evidence in this case.

25. Counsel also submitted that the Crown has failed to provide any physical evidence or any photographs of the items seized during the search. He submits that the items seized should therefore not be allowed into evidence.

26. Mr Tu'utafaiva submitted in the alternative that if the Court were to accept that the search was lawful, then the second issue is that the Court should not accept the evidence of the answers given by the Accused which is recorded in Exhibit 3, specifically entries 26, 27 and 29. Entry 26 reads "Detective Vi asked Latu Selu what is in the straw and he said it is ice'. Entry 27 states "Detective Vi asked who it belongs to and he said it is mine". Entry 29 states "Vi continued to ask Latu what is inside the rest of the 9 straws that were thrown and Latu said that it is ice". Counsel submitted that Officer Vi did not comply with sections 148 and 149 of the Tonga Police Act and that is a serious breach and the answers should therefore not be allowed as evidence.

27. If the Court allows the answers into evidence the Accused's answers in relation to the straws, then the next issue is whether or not he had knowledge and therefore possession of an illicit drug. This is because the straws were not found on him but on the floor and on the table. It is important to note that there were other people inside the house. The person who was looking after the house was also present, so why point at the Accused?

28. In relation to the pack that was taken from the Accused's mouth, counsel submitted that there is insufficient evidence to prove that the substance taken from his mouth is the same substance that was tested by Officer Pale. Firstly, 'Otuhouma is not called to give evidence but entries 43 and 63 of Exhibit 3 records 'Otuhouma as weighing the exhibits as 01 pack of ice that was taken from Latu Selu's mouth and weighed 0.89grams. This was recorded and labelled as Exhibit 1. It is not clear where this labelling had been done as there is confusion in the different exhibit numbers recorded in the Investigation Diary. There is therefore doubt that the exhibit tested was the same one taken from his mouth.

29. In relation to the scientific analyst certificate which has been accepted as evidence in this case, counsel submitted that the court should take judicial notice of the fact that the Crown had conceded that Officer Pale is not an expert in testing the substances but is only an expert in operating the machine. If the court were to accept the certificate then we would be accepting the opinion of a machine.

30. Lastly, in relation to the interference charge contrary to section 37 (d) of the Illicit Drugs Control Act, counsel submitted that this section is intended for evidence that has already been seized or already in the control of the police and this is made clearer when read together with section 37 (a) of the Act. Counsel submitted that it was open to the police to let the Accused swallow the item and they can later retrieve it. But at the time he put the items into his mouth it was not considered as evidence.

D. CROWN'S CLOSING SUBMISSIONS

31. Mr. Samani for the Crown first replied to the submissions on the second charge of interference with evidence. He submitted that the Defence counsel's interpretation of the section is wrong and the section does not apply only when one is in custody. Mr. Samani submitted that when the Accused tried to swallow the bag when Officer Vi came over he was in fact interfering with the work of the police.

32. In relation to Defence submission that the Accused had not been cautioned, Mr. Samani submitted that there was no requirement for a caution because he was charged when the plastic pack was taken out of his mouth. This is supported by entry number 14 in the Dairy of Action which states that he was arrested and charged with an offence.

33. In reply to the submission that there was no proof that the information received was reliable, Mr.Samani submitted that the evidence is that the police had used this informer in approximately 4 cases and those cases had turned out successful. Counsel submitted that the test is a subjective test on the officer and what his thoughts were in relation to the information he received and why he relied on that information. Officer 'Akau'ola had stated that the reason he relied on the information was because he had used this informer before. That was the reason Officer Vi made the decision to conduct a search without a warrant.

34. Mr. Samani submitted that the search was lawful because the police believed that they needed to act quickly. He said that Officer 'Akau'ola's evidence was that the nature of such information relating to drugs required the police to act quickly in case the drugs were destroyed.

35. In reply to Defence submissions in relation to sections 148 and 149 of the Tonga Police Act when the Accused was questioned about the straws, counsel conceded that the police did not follow the requirements of those two sections but submitted that section 22 of the Evidence Act states that it is at the court's discretion to refuse the confession.

36. Overall, Mr. Samani submitted that the Crown has proved the charges beyond a reasonable doubt an the Accused should be convicted.

E. DISCUSSION

37. Having heard the evidence and closing submissions from both the Defence and Prosecution, the issues for me to rule on are as follows:

    a. Legality of the search;
    b. Possession of illicit drugs;
    c. Admissibility of confession statement;
    d. Interpretation of 'interference with evidence';
    e. Reliability of the Trunarc Analyser reading;

LEGALITY OF THE SEARCH WITHOUT A WARRANT

38. The first issue in this case is whether or not the search carried out by the police at Siua Holani's residence on 10 April 2020 was lawful or not.

39. Firstly, the protection of citizens from arbitrary searches is entrenched into the supreme law of our country in section 16 of our Constitution which states:

(16) Premises cannot be searched without warrant

It shall not be lawful for anyone to enter forcibly the houses or premises of another or to search for anything or to take anything the property of another except according to law: And should any person lose any property and believe it to be concealed in any place whether house or premises it shall be lawful for him to make an affidavit before a magistrate that he believes it to be concealed in that place and he shall describe particularly the property so concealed and the place in which he believes it to be concealed and the magistrate shall issue a search warrant to the police to search for the property according to the affidavit so made.

40. In this case, the relevant legislation relied upon by the police to conduct a search without a warrant is found in section 24 of the Illicit Drugs Control Act. That section states:

"24. Search and seizure without warrant in emergencies

(1) A police officer may exercise any of the powers in section 23 without a warrant, if the grounds for obtaining a warrant under that section exist..."

41. The grounds for obtaining a warrant under section 23 are that "*there are reasonable grounds to suspect that there is in or on any place an illicit drug*", evidence or property relating to an offence under the Act. The critical requirement here is that there must be **'reasonable grounds'** to suspect that there is in or on any place an illicit drug. In other words, the police must show that there was 'probable cause', the standard of proof that must be shown, in which a cautious person would find reasonable grounds for suspicion. This places a burden of proof on the police so that investigations are not conducted in an authoritarian or oppressive manner. Proof that there were reasonable grounds to conduct a search without a warrant is not satisfied simply because illicit drugs were found as that is subsequent to the decision to search without a warrant.

42. In this case, I am not satisfied that the police had 'reasonable grounds' to make the call to conduct a search without a warrant. Simply saying that an informant had said that the Accused was selling illicit drugs is not enough to give the police a reasonable ground to make the call to conduct a warrantless search. Neither is saying that they had used this informer in previous cases where illicit drugs were found. No evidence was submitted to support that statement. The police did not first check to see whether the information was true. No one had gone to carry out a surveillance of the area or the house.

43. Additionally, the call was received at around 11am during working hours. Officer Vi and Officer 'Akau'ola conceded that this was a working day and the Magistrate Court was open. However, the excuse given for not getting a warrant was because the Magistrates were in court. There was no evidence that the police had checked to see whether a Magistrate was available. The police had simply made the call to conduct the search based on a phone call stating that the Accused was selling drugs.

44. I must say that I was not at all impressed with the conduct and demeanour of Officer 'Akau'ola when he gave evidence and I did not find him to be a credible witness. In cross-examination he was asked whether he had recorded the information given to him in the action diary. He said no and was asked why he had not recorded it. He replied that it was up to him whether he wanted to record it or not. He was evasive and defensive which I found quite unprofessional for an experienced officer who has been with the Tonga Police for 15 years.

45. Officer Vi's evidence also did not help the Crown's case. In cross-examination, he could not give a reasonable explanation as to why the police had failed to check whether the information given to them was correct before making the call to conduct a warrantless search. At one point he stated that the search was lawful because illicit drugs were found. This is wrong and the police need to understand that just because illicit drugs were found does not make the search without a warrant lawful as that is subsequent to the decision to search without a warrant. Officer Vi also conceded in cross-examination that a warrant could have been readily obtained. It is therefore puzzling why he did not obtain one if he knew that one could be have been obtained.

46. Additionally, a search warrant specifies the name of accused persons and the area that is to be searched. The Police cannot search other properties owned by the Accused unless they had lawful reasons to do so. By being specific in what can be searched, the conditions of the warrant protect both the rights of the individual and the integrity of the investigation.

47. A warrantless search on the other hand, give the police much wider powers as to the areas they can search and, in my view, a morestricter approach should be taken to searches conducted without a warrant. There needs to be an appropriate balance between the need for police agencies to investigate crime and the protection of individual rights. Unfortunately, police in Tonga are now frequently using warrantless powers too readily, for example, by misapplying the "*reasonable grounds to believe*" threshold where that is required before a particular search may be conducted. Police need to understand the exceptional nature of warrantless searches and use them only in

exceptional cases. Indeed, the heading of section 24 of the Illicit Drugs Control Act is "search and seizures without warrant **in emergencies**" clearly tells us that the circumstances must be deemed an 'emergency'. The underlying rationale for having warrantless powers is to allow enforcement officers to respond to urgent situations.

48. In this case, I do not believe that the circumstances of this case can be deemed an emergency to justify a warrantless search. As already stated, the information was received at 11am on a working day when the Magistrate Court was open. Lord Chief Justice Paulsen (as he was then) in the case of R *v Tomasi* CR 70/2019 – 17 July 2019 and Justice Cato in R *v Puloka* CR 50/2019 – 29 August 2019, both held that the police had failed to prove that the police had reasonable grounds to make the searches without a warrant and excluded the production of the substances found in the search as evidence and acquitted the two accused's in those two cases. Similarly, in R *v Pisima'ake* [2020] TOSC 22, Justice Niu held the search without a warrant was unlawful for the same reasons given by those two judges, that is, the police had failed to justify that they had reasonable grounds for conducting a warrantless search.

49. The recent cases I refer to above where the searches without warrants were ruled unlawful should have put police on alert and action should have been made to ensure that the police comply with the directions given in those cases. However, it seems as if the police are still taking these exceptional powers to search without a warrant very lightly and which has resulted in the courts refusing crucial evidence. This is rather disappointing as the work the police carry out, especially the Tactical Response Group and the Drugs Enforcement Taskforce, is of vital importance for the protection of our community and the fight against this war on drugs that the country is currently facing. It involves a lot of hard work and long hours and is understandably dangerous and tiring to those involved.

50. For the reasons outlined above, I rule that the search without a warrant in this case was unlawful.

51. Turning to the question of whether evidence that was illegally obtained should be excluded as evidence, no submissions were made on that point by both counsels. However, I find direction from the case of R *v Kitekei'aho* (Unreported, Supreme Court, CR 36/2015, 27 July 2017) where Justice Cato stated at [24]:

"…I raised with counsel the approach of the High Court of Australia in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54 where the Court sanctioned a balanced approach to such issues. The Court in considering whether illegally obtained evidence should be admitted had to balance the

public interest in maintaining the integrity of search and seizure procedures and ensuring that those whose task it is to enforce the law act lawfully, against the public interest that those who commit criminal offences should be brought to justice" ...

52. The factors averted to by Stephen and Aickin JJ in *Bunning* were:

    a. No deliberate disregard of the law should be involved;

    b. Whether the evidence could have just easily been lawfully obtained;

    c. The cogency of the evidence and whether the illegality could be said to affect its cogency;

    d. The importance of the evidence in the context of the case;

    e. If vital evidence, was it of perishable or evanescent nature so that if there were any delay in securing it, it would have ceased to exist.

    f. The seriousness of the offending.

53. In applying the above factors to this case, I find that there was a deliberate disregard of the law and a search warrant could have easily been obtained. Whilst I accept that the evidence is important and the possession of a Class A drug is a serious offence, I do not believe that this overrides the fact that the police in this case deliberately ignored the law and proceeded to carry out a warrantless search without reasonable grounds to do so. For these reasons, I consider the evidence of the finding of methamphetamine should be excluded and the charges against the Accused is therefore not proven.

54. Having excluded the evidence of the finding of illicit drugs, I do not need to address the alternative submissions by the Defence. However, for completeness, I turn now to the second count of interference with evidence contrary to section 37 (b) of the Illicit Drugs Act. Mr. Tu'utaiva for the Accused submitted that this section only applies to evidence that has already been collected by the Police. He said that Officer Vi had agreed that the Accused had not been cautioned when they took the item out of his mouth. I do not accept this interpretation by counsel of section 37 (b). In my view, this section would also apply to circumstances where the police are carrying out an investigation. In this case, the Accused interfered with the investigation by trying to swallow evidence and it was clear that the Accused was trying to destroy evidence when he put the item in his mouth and tried to swallow it. If the search was ruled lawful, I would have convicted the

Accused of this charge. However, the search without a warrant was unlawful and consequently this charge must also fail.

55. Accordingly, the Accused is acquitted on both counts.

E. M. L Langi

NUKU'ALOFA: 15 February 2021 **J U D G E**