

*Sum + A*

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

CR 213 of 2020

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BETWEEN: R E X  
- Prosecution  
AND: 'AMUSIA MATENI  
- Accused

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VERDICT

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BEFORE : JUSTICE LANGI  
Counsel : Mr. Joe Fifita for the Crown Prosecution  
The Accused In Person  
Date of Verdict: 23 February, 2021

A. THE CHARGE AND PRELIMINARY MATTERS

1. The Accused is charged with offences against the Illicit Drugs Control Act 2003:
  - a. Count 1: that on or about 17 March 2019 at Ngele'ia, he knowingly and without any lawful excuse possessed a Class A drug, namely 8.08 grams of methamphetamine;
  - b. Count 2: that on or about 17 March 2019 at Ngele'ia, he unlawfully interfered with evidence with the intention of interfering with the course of justice, when he destroyed several packets of methamphetamine by throwing it into a puddle of water.
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 for possession of an illicit drug the prosecution must prove the following elements beyond a reasonable doubt:
  - a. That on or about 17 March 2019;

- b. The Accused knowingly possessed;
  - c. A Class A drug methamphetamine;
  - d. Without lawful excuse;
4. Crown counsel also informed the Court that the Scientific Analyst Certificate had been served on the Accused in compliance with section 36 (2) of the Illicit Drugs Control Act. To date the Accused has not given written notice under section 36 (3) of the Act that he requires the Analyst to be called. No challenge was made by the Accused person and the Scientific Analyst Certificate was therefore tendered as Exhibit 1.

## **B. THE EVIDENCE**

5. The Crown called 6 witnesses.
6. On or about 17 March 2019, at approximately 6pm, Officer 'Ahohako was returning to his house at Ngele'ia to pick his work bag where he had his police identification and other things he needed for work. On the way to his house, he saw a rental car in the middle of the road blocking his road. He got out of his vehicle and called out to owner of house at the corner of the road, Lopeti Hurrel, whether it was his car on the road. Lopeti said no and Officer 'Ahohako returned to his vehicle. He then saw the Accused coming to the car and he walked over to him and asked whether it was his car. The Accused said yes and told him that the car was out of petrol. Officer 'Ahohako then offered to help the Accused push the vehicle to the side of the road. The Accused stood in the front driver's side using one hand to manoeuvre the steering wheel and the other hand to push. Officer 'Ahohako then stood behind him and pushed from the right passenger side. While they were pushing the car, Officer 'Ahohako saw a bundle of cash and packs of white powder sticking out from the right pocket of the Accused's shorts. He immediately suspected that the white packets were illicit drugs. However, because he had no identification on him, he did not arrest the Accused but proceeded to go to his house to get his bag which contained his police identification card. He then called the Nuku'alofa Police station for backup.
7. Officer 'Ahohako then walked back to the area where the Accused was last seen. However, on the way there he met the Accused on the road walking towards him. The Accused was talking on his phone. Officer 'Ahohako then asked the Accused where he was going and the Accused told him that he was going to meet up with some guys who were coming to pick him up. The Officer took out his police badge and told that Accused that he was a police officer and that he is arresting the Accused in relation to drugs. The Accused then turned and threw his phone at Officer 'Ahohako and both

men wrestled with each other. They eventually fell to the ground and continued wrestling in puddles of water that had been collected from the rain the previous day. While they were wrestling, the Accused held off the Officer with one hand and with his other hand he took out packets of methamphetamine from the pocket of his trousers and he tore the packets with his mouth and dumped the contents into the puddles of water.

8. Officer 'Ahohako tried to grab the packets from the Accused and managed to grab a few packets from the puddle of water and throw them onto the road. By this time, both men were tired and worn out from fighting, and the Accused got up to leave. Officer 'Ahohako gathered the packets of suspected drugs and saw someone named Toni Tu'uta standing from a neighboring house. He called out to Toni to help him catch the Accused because he has drugs on him. Toni then grabbed the Accused and they both managed to detain him and the officer handcuffed him.
9. Officer 'Ahohako then left Toni to watch the Accused while he went back to the area they had wrestled to collect the packets of suspected drugs on the road. He also took the bundle of cash found on the Accused together with a pipe used for smoking drugs.
10. The police from the Drugs Enforcement Team arrived and took over the matter. Officer 'Ahohako handed over the packets of suspected drugs and the money to Officer Kalosi Tapueluelu and he went back to his house to change his wet clothes. As he was changing he took out some items that were inside the pocket of his shorts and among those items were four packets of methamphetamine. He quickly drove back to where the DET police were and handed over the four packets as part of all the exhibits collected from the Accused. He said that during the struggle he had thrown some packets onto the road and had put some into his pockets and had overlooked to empty out his pockets before going home.
11. The second witness was Toni Tu'uta. He had lived at Lopeti Hurrel's house which is situated in front of the road where the Accused's car had run out of petrol. On the day of the offending, he saw the Accused and Officer 'Ahohako wrestling with each other. He saw the Accused keep putting his hand into his pockets and at first, he thought the Accused was grabbing a weapon to use on the officer. However, he then saw the Accused biting the things he was taking out of his pockets and dumping the contents into the water. He realized then that it was not a knife or weapon but white powder inside the packets. He then heard the officer calling out for him to help because the Accused was in possession of ice.

12. He said that as soon as he heard the words 'ice' he immediately jumped into action because he dislikes illicit drugs. He tackled the Accused and pinned him down. Officer 'Ahohako then put handcuffs on the Accused and asked him to watch the Accused while he went to collect the packets of methamphetamine.
13. When Officer 'Ahohako left, the Accused took out a bundle of cash from his pockets and offered the cash to him and said "Here brother, you take this and I'll leave". He told the Accused to leave his money and give it to the police. The Accused also said to him "You know this is our only means of living to feed the family, but today you guys win". He replied and said to the Accused "Brother, there are other ways of earning a living". Then Officer 'Ahohako arrived and took the money from the Accused.
14. The third witness called by the Crown is Officer Kalosi Tapueluelu. He is now with the Vava'u Police but prior to that he had worked with the Drugs Enforcement Team. On the day of the offending, he and Officer Leveni and Officer Vi were called to the scene. They arrived and saw that the Accused was already handcuffed and was sitting inside a car. Officer 'Ahohako handed over 18 packs of suspected drugs, cash and a test tube. Officer 'Ahohako then left and a short time later he returned and handed over another 4 packs of suspected drugs and told them that the four packs were also from the packs found in the area where they had been wrestling with the Accused.
15. They returned back to Nuku'alofa Police station and they were stopped by a vehicle and a woman called out to them that they had found another pack of suspected drugs in the area where the Accused and the officer had been fighting. A young boy got out of the vehicle and came and gave them the pack of methamphetamine. The total packets they had therefore came to 23 packs.
16. He took photographs of the exhibits and tendered the photo booklet as Exhibit 3. He also weighed the exhibits inside the packs and recorded a weight of 14.06 grams. On 1 April 2019 he handed over the exhibits to the exhibit keeper WPC Pousima. This handover was recorded in the Exhibits Movement Diary which he tendered into evidence as Exhibit 4;
17. In cross-examination, he denied saying that the exhibits were wet and that there was nothing inside the packets. He stated that the exhibits handed over to him from Officer 'Ahohako are the same ones he photographed.
18. The fourth witness called by the Crown is Officer Minola Pousima. She is the exhibit keeper at the Central Police station. She said that on 1 April 2019 she received from Officer Tapueluelu exhibits

from LAMU OPERATION. This handover was recorded in the Exhibits Register Diary and signed by both her and Officer Tapueluelu. She kept the exhibits locked in the exhibit room. On 17 May 2019 she handed over the exhibits to Officer Tu'itavuki to be weighed and photographed again. After Officer Tu'itavuki took photos and weighed exhibits again, she took them back to the exhibit room. They were then uplifted by Officer Pale on 20 June 2019 to be taken to NZ for testing.

19. The fifth witness is Officer Patelesio Tu'itavuki. He is with the Police Forensic Unit. ON 17 May 2019 he uplifted the exhibits from LAMU OPERATION from the exhibit room so that he can weigh them again. A new procedure within the unit required them to put brown paper on the scale and then put the exhibits on top. They would then deduct the weight of the brown paper so that the scale can record only the weight of the packets of suspected drugs. In this particular case, he forgot to deduct the weight of the brown paper and so had recorded the total weight of the exhibits as 16.42 grams including the weight of the brown paper.
20. In cross-examination he stated that no fingerprints had been taken from the packets of suspected drugs because by the time he weighed them it was already too late to take prints.
21. The sixth witness is Officer Leniti Pale. He has been a police officer for 18 years and is currently in charge of the Police Forensic Unit which deals with criminal records, fingerprints, crime scenes and analyzing of illicit drugs. On 20<sup>th</sup> June 2020 he uplifted exhibits labelled LAMU OPERATION from the exhibit room. The exhibits contained 23 packets containing suspected illicit drugs. He took the items to New Zealand to be tested by the ESR laboratory. He flew to New Zealand on 21 June 2020 and was escorted to the ESR laboratory on arrival. He handed over the exhibits to Hannah Paddington and they both signed the handover documents tendered as Exhibit number 7.
22. He later received the results of the tests via email. The report was prepared by Stewart Edwards and stated that a total of 23 packets of suspected drugs were received in a package labeled LAMU OPR. One of the packets were opened and a total of 943 milligrams was taken and tested. The results of the test were that the substance was positive for methamphetamine. The rest of the packets were not tested.
23. Officer Pale explained that from experience, the reasons why the rest of the packets would not be tested is because exhibits found in the same location and of the same nature and color is assumed to be the same substance. Therefore, a positive test for one packet would mean the rest of the packets are methamphetamine. He stated that this is the procedure used by the ESR which saves time on having to run tests especially in circumstances where a lot of exhibits are seized.

24. In cross-examination, he confirmed that only one packet was opened and tested. He also confirmed that no fingerprint had been taken from the packets. He also stated that he did not know whether the illicit drugs were from the Accused but all he knew is that he picked up exhibits labelled LAMU OPERATION and took those exhibits to New Zealand for testing.

### C. ACCUSED'S SUBMISSIONS

25. At the close of the Crown's case, I explained to the Accused that he did not have a duty to prove to me that he is innocent and that it was the duty of the Prosecution to prove he was guilty beyond a reasonable doubt. The Accused understood and elected to give sworn evidence.

26. The Accused stated that on the day he was arrested, he was on his way to his cousin's house to Ma'ufanga to ask for some boys to help him rebuild his house which had been destroyed by a cyclone. He drove through Ngele'ia to take a short cut and his car ran out of petrol in the middle of the road close to Siaso Hurrel's house. He got out of the car and tried to push it to the side of the road. He then noticed a man wearing a shirt and tupenu get out of his van and walk up to help him push his car to the side of the road. After that the man left in his vehicle and he called someone from his home to pick him up. He waited and then decided to walk to Pahu because it was close by. On the way to the main road he met the same person who had helped him push his car. The person asked him where he was going and he said that he was going to meet someone who was coming to pick him. All of a sudden, the person who had helped him attacked him and pulled his hand. He tried to free himself because he could not understand why he was being attacked. He said they both fell down as Officer 'Ahoako tried to tackle him. He saw the other person holding something in his hand and later saw that it was a pair of handcuffs. While they were wrestling he heard 'Ahoako shout out that he is a police officer and for someone to help him. When he realized that the person was a police officer he stopped fighting back and stood up and walked over to the other side of the fence. While he was standing there three men ran over and tackled him to the ground. Officer 'Ahoako then came and took out two bundles of money from his pockets. One bundle had rubber band around it and the other was inside a plastic bag.

27. He was then taken to the car and he dozed off to sleep. He was later awoken by the officers who told him to get out so that they could go and count the money and packets of drugs. When they went to the vehicle he saw empty packs laid out on the seat of the car. He said that they counted the packs and there was a total of 23 packs. He was then told to go back to his car and he went and sat in the front seat. One of the officers told him to go to the back. When he went to the back he saw an officer

open the front passenger door and throw in a test tube onto the front seat. His car had to be towed because it would not start. When they were about 3 meters from Lopeti Hurrel's house a minibus vehicle stopped them and a woman shouted out from the van that they had found another pack of white powder on the road. He saw the pack was full of white stuff but he was not sure what was inside. They then left and went to the police station.

28. In cross-examination, he said that the money on him was to pay for people to fix his house at Lapaha which had been damaged by cyclone Gita. He said that he had a total of \$2150 on him and that the money was from savings that he and his wife had collected over time to fix their house. He also denied that possession of any illicit drugs and denied ever telling Toni Tu'uta that this was his source of income. He denied trying to destroy the drugs and stated that the only thing he had on him was the money.

#### **D. DEFENCE SUBMISSIONS**

29. In closing submissions, the Accused submitted that I should not convict him of the charges for the following reasons:
- a. Firstly, Officer 'Ahohako and the witness Toni Tu'uta are acquainted and it is therefore possible that they have invented this story together to incriminate him;
  - b. Secondly, the woman who had later come with another pack of methamphetamine was not called to give evidence. It is possible that she did not wish to come and lie under oath;
  - c. The packs that were taken from the scene were empty and wet and there was nothing inside them when they were laid out in the car. He does not know who they belong to;
  - d. He had a total of \$2150 on him and only \$1160 dollars is recorded so the rest of the money is missing.
  - e. There were many people who stood and watched them and they should have been called to give evidence. However, Officer 'Ahohako has only brought Toni Tu'uta to give evidence because they know each other and have planned to incriminate him;
  - f. The plastic packs they had counted does not belong to him and he does not know where the police got them from or whether they were rubbish they picked from the road;
  - g. There is no law that says that there is a limit to the amount of money people can take around;
  - h. The person who had attacked him had intended to take the money from him and now in court only \$1160 is with the police and the rest is missing;

- i. The exhibits should have been brought to this trial as this is not a trial about pictures.

#### **E. CROWNS SUBMISSIONS**

30. The Crown submitted that I should convict the accused because they have proven all the elements of the charge beyond a reasonable doubt.
31. In relation to the first charge of possession of a Class A drug, the Crown submits the following evidence is sufficient to prove the element of possession:
  - a. Officer 'Ahohako saw 2-3 packs of white powder sticking out from the right back pocket of the Accused's shorts;
  - b. Officer 'Ahohako also saw some of the packs wrapped with money;
  - c. The fact that the Accused resisted the arrest and wrestled with the officer for approximately 10 minutes;
  - d. The fact that the Accused kept digging into his pockets and taking out the plastics and tearing them with his mouth before dumping the packs in the water. The packets were all later retrieved from the water and from the road;
  - e. Toni Tu'uta saw the Accused trying to hold off Officer 'Ahohako with one hand while he used his other hand to take the packs and tear it with his mouth;
  - f. The Accused tried to bribe Toni Tu'uta to take the money and allow him to go;
  - g. The Accused told Toni Tu'uta that this was his means of living and of looking after his family;
  - h. Officer Kalosi Tapueluelu stated that some of the packets looked wrinkled and looked to have been chewed;
32. The Crown submits the following evidence proves the element of wilfully and without lawful justification:
  - a. Direct evidence from Officer 'Ahohako and Toni Tu'uta that the Accused tried to hold off Officer 'Ahohako while he tried to rip the packets with his teeth and dump the contents in the water;
  - b. The Accused assaulting the Officer and trying to resist arrest. If he had nothing to hide, then he would not have tried to resist arrest;
  - c. The Accused attempting to bribe Toni Tu'uta with money so that Toni can let him go;
  - d. The Accused saying to Toni Tu'uta 'this is how I earn a living to look after my family'
33. The Crown submits the following evidence proves the drugs are Class A illicit drugs:

- a. Report from the ESR – confirmed that a total of 23 packs of white crystallized powder were received and that only one packet was opened and contents tested positive for methamphetamine;
- b. The chain of evidence has not been broken from the time the exhibits were seized up to when they were taken by Officer Pale to New Zealand;
- c. The evidence of Tu'itavuki explaining the differences in weight when the drugs were first weighed by Officer Tapueluelu and then later weighed by himself. The first weight of 14.06 recorded by Officer Tapueluelu was the weight of the illicit drugs together with the plastic packs. The second recorded weight of 16.42 grams was the weight of the illicit drugs and the plastic packs and the brown paper shown in Exhibit number 3.
- d. The evidence of Officer Pale stating that he has previously weighed the empty plastic pack on its own and it weights 0.26 grams. He then multiplied the 0.26grams by 23 (for 23 packs of illicit drugs taken for testing) which comes to 5.98grams. This was then deducted from 14.06grams leaving a total of 8.08grams.

34. In relation to the legality of the work carried out on the Accused, Officer 'Ahohako had given evidence that the authority can be found in section 115 of the Tonga Police Act and section 13 of the Illicit Drugs Control Act. Section 115 deals with arresting without a warrant and section 13 deals with the power to conduct bodily search.

35. In relation to the charge of interference, the Crown submits that the following evidence proves this charge beyond a reasonable doubt:

- a. Officer 'Ahohako's evidence that some of the packs were torn open by the Accused's mouth and dumped into the water puddles;
- b. The Accused holding off the officer with one hand and with his other hand he tore the packs with his teeth and threw them into the water;
- c. The witness Toni Tu'uta had seen the Accused take out the packets of white powder from his trouser pocket and tear them with his mouth before throwing them into the water;
- d. The Crown also referred to the case of *R v Tu'ivakano* where the court discussed the interpretation of section 65 of the Criminal Offences Act dealing with 'interference with the course of justice'. Lord Chief Justice Whitten set out acts that can be deemed as attempting to interfere with the course of justice:
  - i. That has a tendency to interfere with the course of justice; and

- ii. With intent to achieve that result; and
- iii. At any time when proceedings of some kind have been instituted or are imminent or an investigation is in progress which might bring about such proceedings, or if the defendant believes that there may be an investigation which could possibly result in judicial or other legal proceedings (even though the possibility of instituting that prosecution or disciplinary proceeding has not been considered by the police or the relevant law enforcement agency).
- iv. Acts which have a tendency to interfere with the course of justice, include those which:
  - 1. Frustrate or deflect police from prosecuting a criminal offence or instituting proceedings;
  - 2. Destroy, prevent, inhibit or interfere with evidence of the true facts adduced, or
  - 3. Otherwise mislead a court (or a tribunal) or impair its capacity to do justice in the actual circumstances of the case.

## **F. DISCUSSION**

36. In this case, the issues for me to rule on are:

- a. Possession (custody and control) of an illicit drug;
- b. Chain of custody;
- c. Interference with evidence;

37. I find Officer 'Ahohako was a reliable witness and there was nothing in his evidence to suggest to me that he was lying or making this all up. From his years of experience as a police officer, he saw packets of white powder and money and immediately suspected that a serious crime was being committed or was about to be committed. I find that he had lawful reasons to arrest the Accused and try to detain him. I accept his evidence in total.

38. I also found Toni Tu'uta a reliable and truthful witness. There was nothing in his evidence to suggest to me that he was lying under oath. I accept his evidence in total and I do not believe for a second that he and Officer 'Ahohako had plotted to lie and incriminate the Accused;

39. Unfortunately for the Accused, I do not accept his evidence and the preposterous story that the money on him was to fix a house that was supposedly damaged by cyclone Gita in 2017. His weak denials of being in possession of the packs of methamphetamine in the face of strong reliable

evidence only made it worse for him. Toni Tu'uta and the lady who later gave the police another packet of white powder she had found at the scene were independent persons and had no reasons to plot against the Accused.

40. The evidence against the Accused is overwhelming and his attempts to deny the charges against him were weak and simply unbelievable.

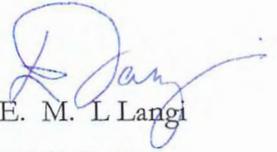
41. On the evidence I have heard I find beyond a reasonable doubt that the Accused was in possession of illicit drugs.

42. I also find beyond a reasonable doubt that the Accused did interfere with evidence.

43. Accordingly, the Accused is convicted of both counts on his indictment.

NUKU'ALOFA: 24 February 2021



  
E. M. L. Langi  
JUDGE