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

CR 90/2020

REX

-v-

'EPUEFI LAIMANI

VERDICT

BEFORE: THE HONOURABLE COOPER J
Counsel: Mr. Samani for the Prosecution
Mrs. Mailangi for the Accused
Date of trial: 10th – 11th March 2021
Date of submissions: 1st April 2021
Date of verdict: 6th April 2021

The charges

1. Count 1, possession of 5.15 g Methamphetamine contrary to section 4 (a) (iii) Illicit Drugs Control Act.
2. Count 2, possession of 3.59 g Cannabis contrary to section 4 (a) (i) Illicit Drugs Control Act.
3. Count 3, Offering to Bribe a member of Tonga Police, contrary to section 16 (1) Tonga police Act offering to bribe officer Fifita – relating to alleged offer to bribe him \$50.
4. Count 4, Offering to Bribe a member of Tonga Police, contrary to section 16 (1) Tonga police Act offering to bribe officer Fifita \$3000.
5. The elements of the charges, which the Prosecution is required to prove beyond reasonable doubt, are:

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Counts 1 & 2

- (a) On or about 10th October 2018;
- (b) The accused possessed
- (c) Methamphetamine;
- (d) On or about 10th October 2018
- (e) The accused possessed
- (f) Cannabis

Counts 3 & 4

- a) On or about 10th October 2018;
- b) Offered to give to a member of Tongan police
- c) Money
- d) As an inducement to do or refrain from doing an act
- e) In execution of their duty.

Exhibits

- 6. The following exhibits were tendered into evidence:
 - (a) Photographs of items seized in search of defendant's car on 10.10.2018; photographed on 17.10.2018 "Uafa 'Amelika Operation"; Exhibit 1.
 - (b) Extract copy of Exhibit Register Diary for drugs seized by Detective Fifita in "Uafa 'Amelika Operation"; Exhibit 2.
 - (c) Extract copy of Drugs Movement Diary "Uafa 'Amelika Opr"; Exhibit 3 .
 - (d) Investigation diary; Exhibit 4 (translation 4b).
 - (e) Exhibits for Laboratory examination; Exhibit 5.

- (f) Drugs analysis results - Amphetamine; Exhibit 6.
 - (g) Drugs analysis results - Cannabis; Exhibit 7.
7. From the outset the defence accepted that the copies of photographs, exhibit 1, accurately reflected what Detective Fifita had taken from car of defendant on 10.10.2018.

Issues

8. On Mr Laimani's behalf the defence raised the following issues, namely, whether:
- (a) the police search of the defendant's vehicle was lawful;
 - (b) continuity had been maintained between the time the alleged drugs were taken from the defendant's car to when they were received and tested at the laboratory;
and
 - (c) the drugs were 'planted' by the police.

Crown witnesses

Detective Fifita

9. Detective Fifita gave the following evidence.
10. At approximately 2 p.m., on 10 October 2018, he was in plain clothes, being driven East along Vuna Road in an unmarked Police car. He was sitting in the rear passenger side seat. Officer Pohiva was driving. Officer O'otuhuoma was in the front passenger side seat.
11. They passed a vehicle parked opposite the Tanoa Hotel. He recognised the defendant seated in the vehicle. He knew the defendant from a previous drugs search conducted that year; 2018.

12. As they drove past, the Defendant ducked down out of sight. Detective Fifita was suspicious. He therefore asked Officer Pohiva to turn their car around. The police vehicle then drove in behind the Defendant's car to block him in.
13. Detective Fifita then got out and went to the driver's side door of the Defendant's vehicle. The Defendant was the sole occupant. When asked what he was doing, the Defendant said: "*Officer Fifita, I am just catching the air.*" The Defendant then produced a \$50 note and handed it to Detective Fifita who responded: "*I cannot take the money.*" The Defendant's hands then started to tremble.
14. Detective Fifita then told the Defendant to step out of the vehicle. Instead, the Defendant reached under the steering wheel to a compartment from which he produced an amount of cash including \$100 and \$50 notes. He grabbed the officer's hand and tried to push the notes into it, whilst saying "*Please bro, please bro*". Detective Fifita replied: "*You know I am a police officer; I will not take the money*".
15. The defendant then reached into his right pants pocket, took out a can and threw it towards his feet inside the car. Detective Fifita opened the car door and seized the can. Officer Pohiva joined him at the side of the car and assisted in taking the defendant out of the vehicle. Detective Fifita then asked the defendant what was in the can. The defendant said that he did not know to whom the can belonged.
16. The officers then opened it in the defendant's presence and found packets of what appeared to be cannabis and methamphetamines inside. Mr Laimani said that they "*belonged to a group of friends who had used the car the night before*".
17. Detective Fifita then told him that he would be taken to Nu'ukalofa police station and charged with possession of illicit drugs. On two occasions en route, the Defendant asked the officers to stop at a BSP ATM so that he could give them \$3,000 each. He was taken straight to the police station.
18. When they arrived at the Police station, the senior officer, Tapueluelu, was informed of the arrest and shown the can containing the suspected drugs from the car. A total of \$390 in cash was also recovered from the Defendant's car.¹

¹ 1 x \$100; 4 x \$50, 4 x \$20 and \$10.

19. The police investigation diary recorded that Officer Tapueluelu cautioned and arrested the Defendant at 3:05 p.m. and that the suspected drugs were weighed totalling 3.59 g of cannabis and 5.15 g of methamphetamine.
20. On 14 October 2018, when Police sought to conduct an interview with him, he exercised his right to silence and declined to answer any questions.
21. By 17 October 2018, the exhibits had been photographed and were then handed over and recorded in the Movement Register Diary.² All drugs seized were referred to as “serial number 89/18 or 92/18” as well as “C/R Number 1046 (Ice) / 1047 (Cannabis)”. They were then secured in locked storage within Central Police Station.
22. During cross-examination, Detective Fifita said, in summary:
 - (a) He did not prepare his statement until 29 October 2018 because he was delayed by many other police operations. He acknowledged the importance of recording offences in a timely way, but he only forgot small details.
 - (b) He had not recorded the date of the stop and search of the defendant’s vehicle in his statement but had discussed the case with his colleagues who were with him.
 - (c) The defendant’s ducking movement was not that of someone turning to talk to another person. He had been 5 to 6 metres away, on the seaward side of Vuna Road, closest to the defendant. It was an overcast day but he saw the defendant clearly. There were another three vehicles parked close to defendant’s.
 - (d) He denied a suggestion that the defendant was talking to his girlfriend and repeated the defendant’s initial statement that he was “just catching the air.” There was, however, someone in one of the adjacent cars who did drive off within five minutes of the officers attending. Those three vehicles had been a line. Each had one person inside. He had not mentioned that in his statement because his focus was on the defendant.
 - (e) He confirmed that the defendant threw towards his feet, not under the seat.

² Exhibit 3.

- (f) He confirmed that the defendant twice offered a bribe in the car even though no bank card was recovered from the defendant. The bribes were also not recorded in the Investigation Diary, although Detective Fifita did include them in his statement. He also reported the bribes to his supervising officer which was why the defendant was also charged with that offence.
- (g) He conceded that the drugs had not been properly stored initially because of delays with other pressing cases but that they had always been locked away.

Officer Pousima

- 23. Officer Minola Pousima explained the procedure for filling out the Exhibit Register Diary and went through the entries she made on 10 October 2018. She explained that when an exhibit arrives, it first goes into the station or “Investigation diary”.³ It is then checked to ensure that it matches the description and each officer signs off the process in the other’s register book. The drugs are then placed in the exhibit room. She confirmed that on 19 October 2019 the weight of methamphetamines in this case was recorded as 4.70 grams, which included the bags they were in. The reference ‘89/18’ meant that the exhibit was the 89th drugs seizure for that particular register. ‘92/18’ was also a reference placed on exhibit bags. She confirmed that she signed off for the hand-over of the exhibits.
- 24. During cross-examination, Officer Pousima confirmed that:
 - (a) some parts of the Exhibit Register Diary had been completed by Officer Manua while she completed the rest;
 - (b) Detective Fifita was the Investigating Officer who handed over the exhibits;
 - (c) Column 9 in the register contains the signature of the officer handing over the exhibits;
 - (d) Column 10 is used for the signature of the receiving officer;
 - (e) the envelope marked “19.10.2018; exhibit 92/18 drugs suspect ‘Epuefi Mr. Laimani” contained “CRB 1046/18 ICE and 1047/18 Cannabis”; and

³ Exhibit 4.

(f) after weighing it, the cannabis was handed over to Officer Pale.

Acting Inspector Pale

25. Acting Inspector Pale gave evidence that on 20 June 2019 he travelled to New Zealand with the methamphetamine as recorded in the Exhibit Register Diary.⁴ On 11 February 2020, he handed the cannabis to Officer Mosima for testing, which was also recorded in the same register. He produced the cannabis exhibit in court. I opened the packet and saw that the drugs were exactly the same packages as those in the photograph, exhibit 1. Two bags were divided into three smaller deals and two single deal bags.
26. The full continuity of movement from officer to officer was endorsed on that exhibit bag tracing its movements between 11 and 13 February 2020, from the police station to the laboratory and back again. Each movement event was signed for.
27. During cross-examination, Acting Inspector Pale confirmed that, at all times, other than those recorded in the registers or exhibit packaging endorsements, the drug exhibits were kept in locked storage and that he kept the key.

Officer Malafu

28. Officer Malafu works in the forensics department at Central Police Station. She gave evidence that she analysed exhibit CRB 1047/2018 on 13 January 2020 and found that it tested positive for THC⁵ and was therefore cannabis. She confirmed the Certificate of Analysis and examination form.
29. During cross-examination, Officer Malafu explained that the exhibit had the CRB number on it.

Agreed facts

30. The parties agreed on the following facts:

⁴ Exhibit 2.

⁵ Tetrahydrocannabinol.

- (a) Exhibit 1 was a photograph of items seized from the Defendant's car on 10 October 2018;
- (b) all exhibits were true records; and
- (c) the weight of the methamphetamine was 5.15 g on 10 October 2018 and 4.70 g on 8 November 2018.

Defendant

- 31. The defendant did not give or call evidence.

Amendments to the indictment

- 32. There were amendments to the indictment.
- 33. After Officer Fifita's evidence, and as a result of a simple clerical error, the prosecution applied to amend the indictment to change the date in all counts to 10 October 2018. No objection was raised. Leave was granted.
- 34. At the conclusion of the evidence, it was noticed that count 4 was bad for duplicity as it referred to offering to bribe two separate police officers. The Prosecution applied to amend by removing Officer Pohiva's name. Again, no objection was taken and leave was granted.

Consideration

- 35. On 19th March 2021 I received the written submissions of Miss Mailangi who focussed her submissions on both lawfulness of search and whether there was a break in the continuity of possession.
- 36. Prosecution submitted fully reasoned submissions. At the hearing on 1st April both parties were asked whether they wished to amplify any points, but neither needed to.

Was the Defendant in possession of the drugs?

37. I first consider whether the element of possession has been made out? I refer myself of *R v Tau anors* [2005] Tonga LR 418 when Chief Justice Ford noted “a person has possession of something when he had knowledge of its presence and has some control over it...”
38. I accept Officer Fifita’s evidence relating to the can and that it came from the defendant’s pocket and Mr. Laimani threw it towards his feet in an attempt to distance himself from the item in the event of the search the officer was plainly about to undertake.
39. I draw a clear inference from this that he knew he was in possession of an illegal item and, because it was in his pocket, he would have known what the tin contained.
40. I therefore find he had control over the item and knowledge of it; so was in possession of the drugs in the can.

Was the search lawful?

41. Question as to lawfulness of search can be answered this way: Officer Fifita had earlier in 2018 arrested the defendant at a residential address, where he was sole occupant and a quantity of Methamphetamine had been recovered.
42. On 10th October 2018 as he drove past the defendant in his car, the officer saw the defendant turn and duck down so as not to be seen.
43. The officer and colleagues were in an unmarked police car in plain clothes.
44. The defendant had therefore not spotted that police were approaching his location until he saw, and no doubt recognised, Officer Fifita just a few meters from him; but too late.
45. In those circumstances trying to hide himself from a passing police officer, with this his recent history, would create in any officer’s mind a reasonable suspicion that in that car was something that related to a drugs offence under the Illicit Drugs Control Act 2016.

46. Under s. 12 (1) (c) of that Act an officer is empowered to make a search of the vehicle in such circumstances just as this officer did.
47. I find the search was lawful.

Was there a break in the continuity of possession?

Methamphetamine

48. The Methamphetamine is plainly the same drug that was seized from the car of the defendant as was tested. I state that for this reason:
49. It was entered into drugs movement diary on 10.10.2018 and comprised of 14 packets.
50. Photographed on 17.10.2018 and marked "Uafu 'Amelika Operation": one large snap bag with 5 smaller (dealer) snap bags of drugs in; one large snap bag with 8 smaller (dealer) snap bags of drugs in; one large snap bag with a larger amount of drugs in than the other bags.
51. The clear evidence is that this exhibit was taken by Acting Inspector Pale on 20th June 2019 to test laboratory in New Zealand.
52. The drugs analysis report, exhibit 6, stated the analyst had received item 92/18. This was the same reference as in Exhibit Register Diary dated 19.10.2018.
53. Also the report made reference to "Uafa Amelika Operation" and itemised the bags as drugs as exactly the same configuration of packets as I have set out in paragraph 48.
54. I am satisfied so I am sure that these are one and the same as seized from the defendant on 10.10.2018.
55. Those items were dip tested and found to be methamphetamine .
56. That there is a slight discrepancy in weight between the two weightings does not change my view especially given the continued reference to "Uafa Amelika Operation" that accompanied those drugs from start to finish.

57. The packet arrangement (one larger and then one divided into five, one divided into 8) are identical throughout and seemingly unique.
58. With the argument relating to continuity of both the methamphetamine and cannabis I bear in mind the principle in *R v Pohahau* [2004] TOLawRp 60 that the identity and integrity of the exhibit must be proved to have been maintained throughout the investigative process, which I do.
59. Defence in their submissions direct my attention to *R v Satini* [2020] TOSC 84, but this is simply a re-affirmation of basic principles as to proving the elements of the offence and an item's evidential integrity; which I find for the reasons I set out here.

Cannabis

60. After its being seized the suspected drug was taken to Officer Malafu on 11.2.20120 and tested and proved to be cannabis.
61. The packaged exhibit Officer Malafu had tested was in Acting Inspector Pale's possession and produced at court . I could see that its contents were exactly as the photograph; exhibit 1.
62. It was also labelled CRB 1047/2018 "Uafa Amelika Operation"; as it had been consistently through the records of 10.10.2018 and right throughout, until reaching the officer who tested it and proved the substance.
63. I have no doubt this was what Officer Fifita seized on 10.10.2018 from the defendant's car and was the drug as particularised in count 2.

Were the drugs planted by the police?

64. This argument having been raised at trial I now also consider.
65. The defence contended that the drugs were planted by the police and offering to bribe the officer on two occasions was made up.
66. I note that no motive was put to Officer Fifita why he might plant evidence or concoct any of this.

67. He completely rejected that suggestion in evidence and remained firm on the point.
68. His evidence was credible and detailed and demonstrated to me the image of a drug dealer, serving up for customers class A drugs outside the Tanoa hotel on the day in question.
69. He had not seen the police in their unmarked car and was caught red handed.
70. He made a desperate play to extricate himself with trying to bribe them and the lamentable attempt to dissociate himself from the drugs by throwing them towards his feet where he sat in his car.
71. He exercised his right to silence in police interview and did not give evidence so there is no evidential basis before me to consider any allegation of police 'fit-up' as it was completely rejected by the officer.
72. I take no notice of the earlier occasion in 2018 when Mr. Laimani was found in possession of methamphetamine.
73. I judge this case on the evidence before me and consider each count separately.
74. I ask myself if the prosecution have proved their case so I am sure in respect of each count and the elements they must establish ?

Offering a bribe to a member of Tongan Police Officer

75. I am directed by defence to consider whether (i) I am satisfied to the requisite standard the evidence of Officer Fifita and (ii) to exercise special care as there is no supporting evidence.
76. *R v Kitekei'aho* [2017] TOSC 19 at para 28 does not impose any rule that there needs to be supporting evidence. Nor is there any such rule in law.
77. In fact, in this case there was supporting evidence in the form of the money that was found in the car, including a \$50 note; being exactly the amount the officer stated the first offer of a bribe was.

78. The defence argue that Officer Pohiva should have been called; but they could have required him as a witness, but did not.
79. In any event, I find the evidence of Officer Fifita honest and cogent so as to leave me in no doubt on the two allegations.

Result

80. For those reasons, I am satisfied beyond reasonable doubt that on 10 October 2018, the Defendant:
- (a) was in unlawful possession of methamphetamine and cannabis; and
 - (b) offered bribes to Officer Fifita.
81. I therefore find him guilty, and he is convicted, of all four counts.
82. Sentence adjourned until Monday 3rd May 2021 at 0900 hrs. defendant to return to court tomorrow, 7th April at 0900 hrs to be directed to probation office for compilation of a Pre-Sentence Report.
83. Pre-Sentence Report and prosecution submissions on sentence to be submitted hard and e-copy by 29th April 2021 1600 hrs.
84. Bailed in same terms as before save for the further order that Mr Laimani is to comply with probation in the undertaking of their report.

NUKU'ALOFA

6 April 2021



N. J. Cooper
JUDGE