

*Sean + P. A.*

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

CR 99/2020

REX  
-v-  
Salesi FA'AOA

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VERDICT

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BEFORE: THE HONOURABLE COOPER J  
Counsel: ✓ Mrs Lui for the Prosecution  
Defendant in person  
Date of trial: 22 March 2021  
Date of submissions: 24 March 2021  
Date of verdict: 24 March 2021

**The charges**

1. Count 1 possession of illegal drugs contrary to section 4 (a) Illicit Drugs Control Act; in that on 27<sup>th</sup> December 2018 had in his possession 1.08 grams methamphetamine.
2. Count 2 possession of illegal drugs contrary to section 4 (a) Illicit Drugs Control Act in that on 27<sup>th</sup> December 2018 had in his possession 4.84 g cannabis.
3. The elements of the charges, which the Prosecution is required to prove beyond reasonable doubt, are:

**Counts 1 & 2**

- (a) On or about 27<sup>th</sup> December 2018;
- (b) The accused possessed
- (c) Methamphetamine

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*[Signature]*

- (d) On or about 27<sup>th</sup> December 2018
  - (e) The accused possessed
  - (f) Cannabis.
4. The following exhibits were tendered in evidence:
- I. Exhibit 1 - Photographs booklet including seized drugs, defendant's car, drugs weighed in packets and police station colour testing procedure of the suspected methamphetamine.
  - II. Exhibit 2 - record of interview; Exhibit 2 b Charge form.
  - III. Exhibit 3 - Drug movement register (with translated copy).
  - IV. Exhibit 4 - Exhibit register (with translated copy).
  - V. Exhibit 5 - front sheet of SER drugs analysis report.
  - VI. Exhibit 6 - drugs analysis report.
  - VII. Exhibit 7 – service of analysis reports agreed under s.36(2) Illicit Drugs Control Act as amended.
5. Trial started at 1139 hrs as the defendant had been delayed attending court.

**Officer Fifita**

- 6. On 27<sup>th</sup> December 2018 he was in plain clothes on night shift duty. He saw the defendant about 1500 hrs at his residence in Longolongo as the officer made his way to work. Then saw him again, standing talking to another male. He was next to a black car which had no licence plate but tinted windows. He drove past him then slowed as he recognised him.
- 7. Later that same day he saw defendant again outside the police station. Defendant was walking from a house and was looking at police station he did this as he walked towards Friends café.

8. Officer Fifita told Officer 'Otuhouma to get officers Televave and 'Ahohako to attend, which they did.
9. Two of them followed the defendant through Digicel square towards the Reload bar and then to his vehicle where officer Fifita stopped him and spoke to him.
10. Asked why he had been looking at Police Station the defendant replied that he had some exhibits to pick up from Officer Leveni.
11. Officers Leveni and Vi then arrived at veranda of Friends Café.
12. Officer Fifita spoke to Leveni and then told the defendant he would be searched. The defendant replied that he did not consent to this. But he was told by the officer that they had the authority to do so. They found nothing except his car keys.
13. They then told him they would search his car, to which the defendant again said that he did not consent. They forcibly removed his car keys from him and opened the vehicle. The defendant was standing by the front passenger side door.
14. He identified photos 1 and 2 in Exhibit 1 as the images of the seven packets of suspected cannabis found inside a glasses case that was between the front driver and passenger seats. The officer produced the photographs in exhibit 1.
15. Officer Vi then informed Fifita that the defendant's car would be driven to the police station. This was because a crowd had started to gather around them outside Friends café.
16. At the police station when the car was searched Officer Ahohako recovered a small blue 'Blitz' box from inside the car and inside the four dealer bags of suspected methamphetamine were recovered.
17. Bagged suspected methamphetamine weighed 1.08 g and bagged, suspected cannabis 4.89 g. A colour indicative test of the suspected methamphetamine showed a positive result.
18. The police interview which this officer conducted on 2.1.2019 was put into evidence.

### **Cross examination**

19. Asked what he had done wrong to justify the search the officer replied : “You did nothing wrong or bad, you kept looking at the police station.”
20. I asked some questions to assist with my understanding of the evidence, the officer answered :
  - The operation was named “Copra<sup>1</sup>” because the defendant is associated with a drug gang in New Zealand called “King Copra”. That being information the defendant gave to the officer.
  - He believed the defendant had a Copra tattooed on his chest which he saw when he changed his singlet for a white one while in custody. He had no photo of the white singlet and had not mentioned this in his statement.

### **Re-examination**

21. The officer explained that Mr. Fa’aoa looked at the police station as if he was about to commit a crime. That when he talked to accused he could barely keep still and he was also suspicious when the officer said he would search him but the defendant declined to be searched. It was also suspicious that his car did not have a number plate.

### **Officer ‘Otuhouma**

22. Her evidence commenced at 1408 hrs. She had the defendant under observation and saw him walk towards the police station, he looked inside and walked away. There were no officers around that she saw. Defendant returned to where he had just been.

### **Cross Examination**

23. There was none.

### **Officer Ahohako**

24. He gave his evidence at 1418 hrs. After 11 pm on day in question he had come into town Officer Fifita having informed him there was information concerning illicit drugs.

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<sup>1</sup> All parties appeared to understand “Copra” to mean “Cobra”.

He saw a car, but no one there. He met up with Officer Fifita who directed his attention to the defendant about 20 meters away in the Digicel square.

25. Told to follow the defendant as he was not known to the defendant as a police officer. Kept him under surveillance and followed him going back to his car. It was at this time that all the officers then emerged to effect the stop and search; Vi, Leveni, Pohiva, 'Otuhouma, Fifita and Televave; Officer Vi informing the defendant that the search they intended was lawful.
26. The seven bags of cannabis were found in the car and the defendant arrested and brought to police station. There the Blitz mint packet was found by this officer and the four methamphetamine packets inside.
27. The Blitz packet came from the driver's door compartment.
28. The officer identified in the Exhibit Movement Diary (exhibit 3) his signature for the handover of the exhibits to Officer Leveni on 6.2.2019.

#### **Cross examination**

29. The defendant had no questions. When I asked for assistance to clarify issues the officer explained :
  - There had not been a crowd around the car.
  - He could not remember seeing a white T shirt, but there were some clothes the defendant had in the back of his car.
30. 1455 hrs – the rest of the Crown's case was agreed and went before the court by way of agreement; exhibits 4, 5 6 and 7. The latter being service of the drug analysis certificates S. 36(2) Illicit Drugs Control Act.
31. The evidence proved the continuity between the items the police had allegedly seized and the analysis proving they were the drugs as alleged in the respective counts.
32. The Crown closed their case at 1505 hrs and the defendant chose not to give evidence or call any witnesses.

## Discussion

### The Search

33. The first issue is whether the search of Mr. Fa'aoa's car was lawful?
34. Starting point is police power under Illicit Drugs Control Act as amended 2020.
35. Section 12 powers are :

“This section applies if a police officer has reasonable cause to suspect that there is in or on any vehicle or craft —

- (a) an illicit, controlled chemical or controlled equipment;
- (b) evidence relating to an illicit drug, controlled chemical or controlled equipment; or
- (c) any other evidence relating to any offence under this Act.

The police officer may —

- (d) stop and detain any vehicle or craft for the purpose of searching it or any occupants or goods;”

36. What supported the police contention they had this power?
37. Officer Fifita in evidence provides the prosecution answer to this question, “what did I do wrong to make you search me?” asked in cross-examination by the defendant himself :

“You did not do anything wrong or bad, just kept looking at the police station.”

38. Later in re-examination he expanded on the point saying :

“...kept looking at the police station as if before going to commit a crime; that and other reasons: when talking to the accused he could barely stand still, he rejected being searched...his car had no licence plate.”

39. The officer did not establish a reasonable ground for believing an offence under the illicit Drugs Control Act would be committed.

40. We know that he had targeted the defendant because of his view he was involved in illegal drugs that day, so he contacted Officer Ahohako and told him to come to town because of “illicit drugs.”
41. We know that Fifita was familiar with the defendant; because he had told Officer Ahohako to follow Mr Fa’aoa as he “does not know I am police officer.” The clear implication being that Officer Fifita and Mr. Fa’aoa were known to one another.
42. We know that Mr. Fa’aoa has a chequered past and was at one time associated with drugs gangs in New Zealand because he said as much in his police interview.
43. This police operation was named “Copra”, as in ‘Cobra’, apparently because this was that drugs gang’s name and this defendant had a Cobra tattooed on his chest.
44. The preponderance of the evidence drives me to the view that Officer Fifita knew about this defendant’s background and had him marked as a drugs user or dealer before the day in question.
45. That Officer Fifita on seeing him that day decided he would search him.
46. But the officer failed to provide credible grounds for believing *any* offence could be reasonably suspected; and failed to even mention a belief in a drugs offence being suspected; which is the necessary hurdle to cross for a search without a warrant to be lawfully conducted.
47. Not only that, but having searched Mr. Fa’aoa and found nothing, they took his car keys by force and searched his car.
48. The Crown’s case is that at the search at the road side they found the cannabis and the search later at the police station they found the methamphetamine in his car.
49. To unpack that chronology : Mr. Fa’aoa had (i) done nothing wrong, (ii) he had merely looked at the police station; (iii) he was searched and found to have nothing unlawful on him.
50. I find none of the three steps said to found a suspicion needed to trigger a search of his vehicle without a warrant under the relevant section gave rise to a reasonable belief in anything criminal at all; far less a drugs offence.

51. I therefore find that the search of Mr. Fa'aoa's car was unlawful.

**Should the evidence from the unlawful search be excluded?**

52. Just because a search is unlawful does not necessarily mean the evidence should be necessarily excluded.

53. There is a long established line of case law that guides on this point. *Bunning v Cross* (1978) 141 CLR 54 has been the starting point followed by Judges of this Kingdom over the last twenty years.

54. It provides a framework for assessing this question with these considerations :

- a. no deliberate disregard of the law should be involved;
- b. whether the evidence could have just as 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.

55. This case concerns possession of Class A drugs and so is plainly serious. The evidence in question is vital to the case; in fact central. The items are perishable in the sense that they represent an illegal commodity that would be consumed no doubt in short order and would need to be swiftly seized to avoid disappearing.

56. Because these drugs were allegedly in a car and that vehicle would have left the scene; it stands to reason that there was no time to waste and there may have been no time to obtain a warrant.

57. Against these points I need to consider these last two issues :

- I. whether there was a deliberate disregard for the law ?
- II. the cogency of the evidence and whether the illegality could be said to effect its cogency.

58. For the reasons set out in paragraphs 49-51 above I find there was not just a disregard for the law, but a deliberate disregard.

59. I turn to the cogency of the evidence :

#### **Cannabis**

60. I find nothing about the discovery of the cannabis to have effected the cogency of that piece of evidence. Not least because the defendant accepted he had knowledge and control of it, since he knew it was in the car he had just been driving, so had possession.

61. Balancing the disregard for the law the officer showed against the other factors, especially the admitted possession of the cannabis by the defendant, I am persuaded to rule it admissible, in this particular case.

#### **Methamphetamine**

62. This was discovered after the car had been driven to the police station by Officer Vi.

63. Officer Fifita stated the search had taken place at the police station because a crowd had gathered around the vehicle at the road side.

64. Officer Ahohako stated there was not a crowd. I therefore wonder why the car was taken to the police station at all?

65. From the start the defendant disputed that he ever had the methamphetamine in the car.

66. I also note that, on the prosecution case, he had been to the police station moments earlier, and wanted to speak to an officer about exhibits, a matter that I shall return to. It does not appear to me anyone involved in Class A drug use or supply would be advertising his presence to the police at such a time if that was really what he was about.

67. I therefore conclude that not only the cogency of this piece of evidence is compromised but that the illegality of the search has affected its cogency.

68. This case turns on is very particular facts. Balancing the competing arguments, I conclude because there was a real, and flagrant disregard for the law in the conduct of

the search of the vehicle, along with the consequential damage to the cogency of that piece of evidence; I rule the finding of the methamphetamine is excluded.

69. There being no evidence upon which to found count 1, I acquit Mr. Fa'aoa of that count.
70. The evidence of the cannabis I have ruled as admissible I turn to the case in relation to count 2.

### **Cannabis**

71. The prosecution case was that the defendant had gone to the entrance of the Nuku'alofa police station and was looking around inside, but left.
72. That he told Officer Fifita he had exhibits he wanted to pick up from Officer Leveni (sic).
73. In police interview the defendant stated (in answer to question 15) that he had found the drugs in his car after he had his car windows tinted that day and was going into town "...to go to the police station to inform and report it to police, but I did not report the Cannabis for I was afraid I might be arrested."
74. Therefore he raises the defence that his possession of the drugs was lawful; since he was taking it to the police station to hand in.
75. Therefore the burden is on him to prove this and he must do so on the balance of probabilities.
76. He plainly went to the police station, then appears to have changed his mind. I can see no reason someone connected to unlawful drug possession would want to alert police to his presence and therefore the drug possession unless he wanted the police to discover the drugs.
77. Therefore I conclude on the balance of probabilities that he did want to alert the police to the drugs. I accept that he was afraid he might be arrested and that is why he dithered and walked away again.

78. I conclude on the balance of probabilities what he said in interview was true; therefore his possession was lawful; so he did not commit an offence under section 4 of Illicit Drugs Control Act; and I acquit him of that allegation.
79. Thus I find him not guilty of both Count 1 and Count 2.

NUKU'ALOFA  
24 March 2021



N. J. Cooper  
**JUDGE**

The seal of the Supreme Court of Tonga is circular, featuring a central emblem surrounded by a laurel wreath. The words "SUPREME COURT TONGA" are inscribed around the perimeter of the seal. To the right of the seal is a handwritten signature in blue ink, which appears to be "N. J. Cooper". Below the signature, the name "N. J. Cooper" and the title "JUDGE" are printed in a blue, sans-serif font.