

*Sean & Ple.*

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

CR 312 of 2020

**REX**  
**-v-**  
**SALESI FA'AOA**

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**REASONS FOR VERDICT**

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BEFORE: LORD CHIEF JUSTICE WHITTEN QC  
Appearances: Mr F. Samani for the prosecution  
Accused in person  
Date of trial: 11, 12, 15, 18 March 2021  
Date of ex tempore verdict: 18 March 2021  
Date of published reasons for verdict: 29 March 2021

1. At the conclusion of the evidence and submissions at the trial of this matter, I delivered an ex tempore verdict. This is the transcript of my reasons for verdict, edited as to form, not substance.
2. The accused, Salesi Fa'aoa, stands charge with one count of possession of 0.3g of methamphetamine and possession of 26 rounds of .22 calibre ammunition without a licence.
3. The trial of this matter had a checkered start. It was listed to commence on 11 March 2021. However, due to the accused not properly engaging Mr. Corbett of counsel to appear at the trial, Mr Corbett was granted leave to withdraw from the case. There were also other nonappearances or late appearances by the accused. The trial was adjourned to 12 March, then to the 15<sup>th</sup>.
4. On 15 March 2021, the accused changed his plea in respect of count 2, the ammunition charge, to guilty. For reasons which will come clear later in this decision, the explanation by the accused for his change of plea is important. He admitted that the ammunition was in his possession when he was charged for both these matters but that the ammunition did not belong to him. The accused ran a car wash business. He said that the ammunition belonged to a customer

who brought his car to have it cleaned. The accused said that he took the ammunition out of the customer's car and kept it in his own car while he waited for the customer to return to pick up the ammunition. To date, the customer had not done so.

5. The accused confirmed his not guilty plea on the methamphetamine count. Directions for sentencing on ammunition plea were deferred to await the outcome of the trial on the methamphetamine count.
6. The trial was again stood over to the 18<sup>th</sup> to allow the accused further time to engage counsel. On that date, the trial proper commenced. The accused appeared without legal representation.
7. He confirmed that he had earlier received, and was familiar with, the information document for self-represented defendants on the criminal trial process. I also reiterated the basic procedure to be followed during the trial and the accused's rights to remain silent, to cross-examine Crown witnesses and to give and/or call evidence in his defence, as he saw fit.
8. The Crown applied for and was granted leave to amend the indictment. The weight of the methamphetamine alleged was reduced from .38g to .3g.
9. The Prosecution opened the case by stating the elements of the methamphetamine charge as being that (a) the Accused; (b) on or about 18 June 2020; (c) knowingly possessed (meaning that he had knowledge or control of); (d) 0.3g of methamphetamine.
10. It transpired during the course of the trial that the only element which was in fact in issue was the element of knowledge.
11. That the substances seized by the police and which became the subject of count 1 was methamphetamine was evidenced by an analyst's certificate dated 21 September 2020. The certificate was served on the accused pursuant to s.36 of the *Illicit Drugs Control Act*. He did not provide any written notice that he required the analyst to appear at the trial and therefore, pursuant to the said provision, the contents of the analyst's report was received as prima facie evidence that the substance was methamphetamine. The actual report is in Tongan. I was not

provided with an English translation. However, I was able to identify reference to the TruNarc analyzer which has recently been introduced to the Police drug detection arsenal in Tonga. I could also discern from the Tonga report that two samples were tested weighing .15g each, making a total of .3g of methamphetamine as alleged in the amended indictment. The accused did not object to receipt of the report and it was tendered and marked exhibit P1.

12. The Crown called evidence from three police officers: Malolo Vi, 'Apisai Fihaki and Tu'amelie Fifita. I will not recite their evidence verbatim. A useful summary was set out in the Crown's written opening and in closing submissions. It suffices to summarize the evidence of all three officers as follows.
13. On 18 June 2020, in the evening, Officer Malolo Vi, who was in charge of the operation that day, received reliable information from one of his informants that the accused, who was referred to by name by the informant, was selling drugs from his vehicle on Vuna Road in Ma'ufanga.
14. When asked about the reliability of the source and the information, Officer Vi explained that he had worked with the informant for two years and that over more than 20 operations in which drugs were apprehended, the informant's information was never wrong. Section 12(1) of the *Illicit Drugs Control Act* provides that if a police officer has reasonable cause to suspect that there is in or on any vehicle or craft relevantly (a) an illicit drug, controlled chemical or controlled equipment under subsection 2, the police officer may stop and detain that vehicle for the purpose of searching it or any occupants or goods. Officer Vi also explained that the information received was 'time sensitive' in that had he not acted on it immediately there was every likelihood that any drugs which might have been detected could be disposed of or otherwise 'done away with' by the accused.
15. I am satisfied that the information relied upon by Officer Vi constituted reasonable cause to suspect that there were illicit drugs in the defendant's vehicle and that therefore the search was lawful. In any event, other than to ask Officer Vi why the police had stopped his vehicle and searched it, the accused did not raise any issue as to the lawfulness of the subsequent search during the trial.

16. Officer Vi also mentioned that he was familiar with the accused's vehicle, which he described as being black with registration number C232914, because he'd been part of police operations in the past in which the accused's vehicle had been stopped and searched on more than a couple of occasions. I did not regard that evidence as relevant to the substantive charge here; only that the Officer was familiar with the accused's vehicle.
17. Officer Vi briefed other officers in his operational group on the information received. They divided up into three groups in three vehicles and went out in search of the accused and his vehicle. The officers travelled along Vuna Road. Officer Vi identified the accused's vehicle driving towards them. Calls were made to the other vehicles and the accused's vehicle was stopped. The vehicle was then searched by Officers Fihaki and Fifita whilst Officer Vi stood with the accused and the other passenger in the vehicle by the name of Samisoni Tupou watched on. The search took place for a short time before it began to rain. As a result, Officer Vi directed the officers to take the vehicle, the accused and Samisoni, to Central Police Station where the search was continued under cover.
18. During the course of the searches, Officer Fihaki found the ammunition, the subject of Count 2, in the front passenger glove compartment of the vehicle. Officer Vi asked the accused whether the ammunition belonged to him. The accused replied that it was for a nail gun.
19. I pause at this juncture to recall what I said at the outset about what the accused had said to the court on 15 March when he changed his plea to guilty on the ammunition count. He did not say to the police at the time the ammunition was detected anything to do with the explanation he gave to the court on 15 March. Conversely, on 15 March, he did not say to the court anything to do with the ammunition being for a nail gun.
20. During the course of the search, a number of other items were found. It is convenient to refer to them by reference to a document tendered into evidence as exhibit P3 entitled "Search List". Apart from the rounds of ammunition, one silver weighing scale, one silver piece of paper containing one empty packet, one pack containing two packs of 'ice' or methamphetamine, one smashed test tube,

one pack containing empty packs, one test tube, another pack of containing empty packs and \$153 in cash were all recorded as having been found in the accused's vehicle. The search list was signed by the accused.

21. Item number 4 in the list was the two packs of what was suspected to be methamphetamine which constitutes count 1 on the indictment.
22. The evidence of the police officers involved in the search about how and where the methamphetamine was found is best depicted in photograph #2 of four photographs constituting exhibit P2. That photograph shows the ceiling lining of the vehicle where it abuts the top edge of the windscreen. In the background of the photograph can be seen the driver's side part of the ceiling lining which had been slightly pulled down or detached from the ceiling structure. In the centerground is depicted the light assembly from the ceiling hanging down. In the foreground of the photograph, the passenger side edge of the ceiling lining was depicted as also having been pulled down and detached from the ceiling similar to that shown on the driver's side.
23. Officer Fifita explained that he was the one who searched the lining of the ceiling and noticed that when he pulled on it, it was loose, meaning it was not firmly attached to the ceiling substrate above. When he pulled down on the lining on the driver's side, he found what he referred to as 'dealer's packets' inside the cavity. He described them as appearing as to have some residues of methamphetamine but that they had 'been used'. On the other side, that is, the passenger's side of the vehicle, Officer Fifita conducted the same investigation by pulling down on the lining on the ceiling and a packet fell out of the cavity above on to the passenger seat below. It was a large packet which contained two smaller packets. Each smaller packet contained what was later tested to be methamphetamine, the subject of count 1.
24. Officer Vi asked the accused whether the pack belonged to him. The accused said 'no' and that he did not know anything about it. Officer Fifita gave evidence that, at this point of the search, the accused said that he knew nothing about it and to ask Samisoni. Officer Fifita asked Samisoni who said that the pack belonged to the accused because it was his vehicle.

25. The accused was afforded the opportunity to cross-examine each of the officers. He only asked questions of Officer Vi. In doing so, the accused appeared to complain that the police had 'picked on him' by searching his vehicle on a number of occasions. When he asked Officer Vi why the police had stopped him on this occasion, the accused was reminded that Officer Vi had received reliable information that the accused was selling drugs from his vehicle among Vuna Road. The accused did not respond to that whether by way of putting the negative to Officer Vi or at all. Otherwise, the accused did not ask Officer Vi any questions which sought to challenge his evidence about the instant charge.
26. The accused elected not to cross-examine Officers Fihaki or Fifita.
27. Upon the close of the prosecution case, the accused was reminded about the options available to him as to whether he wished to remain silent, give any evidence, call any evidence from other witnesses or make any unsworn statement from the Bar table. He elected to give evidence under oath. He said he 'wanted to give his side of the story'.
28. The accused gave the following evidence, in summary:
  - (a) He spoke to Samisoni Tupou when the two of them were released from prison in about November last year. Samisoni said that he had admitted to the police that the drugs were his. When I asked the accused whether he intended to call Samisoni to give evidence, the accused said that he couldn't get hold of him and that the last time he spoke with him was around Christmas last year. When asked about his attempts to contact Samisoni, the accused said that Samisoni did not have a phone and that he, the accused, had not gone around to Samisoni's house. He attributed that to having car problems. He also said that he had not told the Prosecution prior to the trial about what was effectively his defence.
  - (b) The accused and Samisoni had been due to appear in the Magistrate's Court last year where he believed that Samisoni was going to admit to the methamphetamines as being his. According to the accused, one or other of them missed their court appearance and, as a result, the accused and Samisoni did not appear in that court together.

- (c) The accused spoke to Samisoni subsequently who said that the Magistrate had dismissed the charge as against him.
- (d) Upon further questioning from the Bench, the Accused sought to explain that in the morning of the day in question, Samisoni had borrowed the accused's car. He said he believed that Samisoni took it to go shopping with his wife and children and to move food for his little market. At that point in time, the accused had known Samisoni for a few months.
- (e) Samisoni returned the car between 7pm and 8pm. Samisoni then wanted to go to a bar. The accused dropped Samisoni at the bar. He then returned to Longolongo where he cleaned his car inside and out.
- (f) When asked by the Prosecutor, the accused admitted that the scales found in the car were his. He endeavoured to explained that he used the scales as part of running a market stall where he sold American clothes and jewellery. However, he later conceded that the scales were not used for either of those activities and that he did not sell jewellery by weight.
- (g) The accused knew that the driver's side ceiling lining was loose because he said that the whole front of the car had been smashed, which resulted in it having to be replaced but that it had not been sealed properly which resulted in leaks when it rained. He said he did not know anything about the empty packets found in the ceiling on the driver's side. He then went on to say that he did not see the police find any empty packs during the search. However, he never put that to any of the police officers during the trial. He denied the suggestion that the empty packets also belonged to Samisoni.
- (h) Samisoni did not say anything to him about bringing drugs into the accused's car that day. He said there was nothing wrong with the passenger side lining to the car on that day and that the police had pulled down the whole ceiling. That of course is not consistent with what was depicted in photograph 2.
- (i) Samisoni had also used the car two days before the night in question.

- (j) The accused had been a user of methamphetamines but stopped because of his heart condition.
29. During cross-examination, the accused elaborated on the ammunition. In relation to the explanation given to the court on 15 March and what he told police on the day of the search, the accused said:
- (a) the customer had brought his car to the accused and his brother at their car wash about three months before the police search;
  - (b) when he and his brother cleaned the customer's car, they put the ammunition together with the other items that belonged to the customer out beside the vehicle;
  - (c) the customer was sitting by under a tree whilst the car was being cleaned;
  - (d) the ammunition was not put back in the car after it was cleaned;
  - (e) one of the accused brother's children, a 3-year-old, was later found playing with the ammunition.
30. At the conclusion of the accused' evidence, around 12:50pm, and at the accused's request, the matter was stood down until 3 p.m. to allow the accused to get Samisoni to give evidence.
31. At 3:30pm, the trial resumed. The accused confirmed that Samisoni was not to be called. In what was effectively the accused's closing submissions, he said that this whole matter was unfair on him because he was expected to stand in court with Samisoni. He also said that he expected to have a lawyer. When he was asked if anything would have been different in the trial if he had a lawyer, the accused said 'no'.
32. In her closing submissions, Mrs Eliesa recited the evidence of the three police officers. She drew attention to the fact that the accused admitted that the vehicle was his and that the weighing scales that were found in the vehicle were also his. She submitted that he had said in cross-examination that he had agreed that the scale was used to weighing drugs. My note of his evidence was that he said that

they could be used for weighing drugs, but they could also be used for weighing other things and he then stated to the Prosecutor, after I had asked him whether he used the scales to weigh jewellery he said he sold, that he sold gold from time to time. He did not explicitly say that that was what the scales were for.

33. The Prosecution submitted that the evidence was sufficient to demonstrate that the items found by police in the vehicle on the day in question, and in particular, the methamphetamine, belonged to the accused.
34. It was submitted that I should reject the accused's claims that Samisoni owned the drugs because he was not called here to make good the accused's claims.
35. In my view, the Prosecutor's submissions are all to be accepted but for reasons upon which I will now expand.
36. Firstly, I have no hesitation in accepting the evidence of the three police officers.
37. However, none of their evidence, save for the hearsay evidence that Samisoni pointed the finger, as it were, at the Accused owning the drugs in question, amounted to direct evidence of the real element in issue which is the accused's knowledge of the presence of the drugs in the ceiling of his vehicle.
38. In the *R v Tupou* [2020] TOSC 91, at paragraph 38, it was noted that in *R v Tau & ors* [2005] TLR 418, then Chief Justice Ford considered the meaning of the word "possession" in a drugs trial. He said there was no special statutory meaning of the word 'possession' and he adopted a passage from the 2005 edition of Archbold (para 26.61) which stated:

*"A person has possession of something when he has knowledge of its presence and some control over it; but he would not have possession unless he either knew, or the circumstances were such that he had the opportunity, whether he availed himself of it or not, to learn or to discover, in a general way, what the items were."*

39. His Honor went on to state that the question that he answered in each case is whether on the facts the accused was proved to have or ought to have imputed to him or her the intention to possess or the knowledge that he or she did possess what was in fact the substance.

40. In this case the Crown invites the court to draw a reasonable inference from the evidence of the presence of the methamphetamine in the accused's vehicle and his control over the vehicle to arrive at a conclusion that the accused either had actual or knowledge of the presence of the methamphetamine in his vehicle.
41. Against that, the accused has given evidence that Samisoni Tupou admitted to owning the drugs in question. That is self-evidently and not reliable evidence. It is hearsay and a statement of self-interest. Despite the asserted previous conversations with Samisoni, and ample opportunity to have Samisoni come to court and give that evidence directly, the accused failed to do so. I do not accept his explanation for that failure.
42. For reasons mentioned during the trial, the Crown decided to enter a *nolle prosequi* in respect of the same possession charge against Samisoni. If it was true that Samisoni owned the drugs in question, then any question as to why he was not willing to come to court and give evidence as the accused claimed was never answered. There was no suggestion by the accused that Samisoni had changed his position or that there was some other reason why he physically could not give that evidence.
43. Whilst the legal onus in this case remained at all times on the Crown to prove the elements of the offence beyond reasonable doubt, the fact that the accused sought to deflect responsibility for this crime on Samisoni cast an evidentiary burden on him. He has failed to discharge that burden.
44. Because of the other inconsistencies in the accused's evidence, particularly in relation to the weighing scales, the circumstances surrounding the ammunition count and his failure to have challenged any of the police officer's evidence, I do not accept his assertion that the drugs belonged to Samisoni.
45. Further, in my view, the information received from the informant about which Inspector Vi gave evidence was important in one respect: the informant named the accused as being the one driving around selling drugs that day. That the subsequent search produced not just the methamphetamine the subject of this count but a number of other drug paraphernalia or related items is also telling in relation to the accused's admission to owning the weighing scales. I do not accept

his uncorroborated assertion that they were for anything to do with selling of jewellery or his belated reference to sometimes selling gold. I am satisfied that they were used for selling drugs. Again, the other items such as test tubes and other packets were not contested by the accused nor did he claim that they belonged to Samisoni. I am therefore satisfied that they belonged to the accused. That is, he had possession of those items in the relevant, legal sense.

46. Those findings of primary fact therefore support the view I have reached, beyond any reasonable doubt, that the accused had actual or imputed knowledge that the methamphetamine found up in the passenger side ceiling above the lining belong to him.
47. I therefore find the accused guilty on count 1 and he is convicted of possession of 0.3g of methamphetamines.
48. Submissions on sentence in respect of both counts and a pre-sentence report are to be filed by 23 April 2021.
49. The accused is to attend the probation office within the next 48 hours to arrange his interview for the preparation of his report.
50. Sentencing will take place on 30 April at 9 a.m. in court 1.
51. Bail is extended for the accused to appear again for sentencing on that date.

NUKU'ALOFA  
29 March 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC  
LORD CHIEF JUSTICE