

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

CR 146, 147 & 148 /2020

REX

-v-

Tevita 'ALATINI

Seini TAIONE

Kautai MOALA

RULING AND JUDGMENT

BEFORE: THE HONOURABLE COOPER J
Counsel: Mr F. Samani for the Prosecution
Ms. A. Kafoa for the first accused
Ms. S. Ebrahim for the second and third accused.
Date of trial: 6th April 2021
Date of submissions: 30th April 2021
Date of verdict: 5th May 2021

The charges

1. Count 1, Tevita 'Alatini, possession of 0.063 g Methamphetamine contrary to section 4 (a) Illicit Drugs Control Act.
2. Count 2, Count 1, Tevita 'Alatini, possession of 0.234 g Methamphetamine contrary to section 4 (a) Illicit Drugs Control Act.
3. Count 3, Count 1, Anaseini Taione possession of 0.01 g Methamphetamine contrary to section 4 (a) Illicit Drugs Control Act.

4. Count 4, Tevita 'Alatini, Anaseini Taione and Kautai Moala possession of 19.49 g Methamphetamine contrary to section 4 (a) Illicit Drugs Control Act.

Counts 1, 2 3 and 4

- (a) On or about 3rd September 2019;
- (b) The accused possessed
- (c) Methamphetamine;

Exhibits

5. The following exhibits were tendered into evidence:
 - a) Google satellite maps, which had a scale; Exhibit 1.
 - b) Photographs of the search of Tevita 'Alatini, and pertaining to search and seizure of drugs and paraphernalia at the Fau tree; Exhibit 2.
 - c) Police Diary of Action/ English Translation of same; Exhibit 3 .
 - d) Exhibit Register Diary/ English Translation of same; Exhibit 4.
 - e) Drugs Movement Dairy / English Translation of same; Exhibit 5.
 - f) Tonga Police Force , Exhibits for Laboratory Examination; Exhibit 6.
 - g) NZ Police Schedule of Drugs received at their laboratory; Exhibit 7.
 - h) Tonga Police Laboratory Examination handover document; Exhibit 8.
 - i) ESR Drug analysis results; Exhibit 9.
6. All documents were prima facie agreed; save exhibit 3. The latter was agreed in the sense that the translation, alone, was accepted to be true.
7. As for the argument as to the admissibility of Exhibit 3 I shall return in due course.

Issues

8. On Mr Tevita 'Alatini'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) he was not in possession of the drugs in count 1 and 2 and 4.

9. On Miss Taione's behalf the defence argued :

- a) search was unlawful
- b) the continuity was disputed
- c) she was not in possession of the drugs in counts 3 or 4.

10. On Kautai Moala's behalf it was submitted that

- a) Search was unlawful,
- b) The continuity was disputed
- c) the piggery where the drugs were discovered was not his so he was not in possession of the drugs in count 4;
- d) even if the land was his he was not so in possession.

Crown witnesses

Officer Leveni

11. He was one of the officers in the three teams who went to the location to effect a search without warrant on 3rd September 2019.

12. The search took place at 1000 hrs that day. It came about on account officers receiving information from a source.
13. One officer who received such information was Leveni. The source in question had provided information in the past to him that led to 6 police operations; including this one. In fact each report from that source had been successful.
14. The information came just before 1000 hrs on 3rd September 2019 and it was acted upon immediately with the assembled police arriving at the scene at about 1030 hrs.
15. The officer marked up the Google satellite images, Exhibit 1; page 5 showing his deployment at scene as well as his colleagues in three teams arriving from North and South of the road that abounds both the piggery and Mr Moala's property. The piggery to the West of the road, his residence to the East. The area where the Fau tree in question is was identified and also the hut in the piggery. Officer Leveni was in neither group but approached cross country from the West with his team.
16. He joined the search of the Fau tree. He found a packet of test tubes as seen in the photograph; exhibit 2 page 6.
17. On a branch of the Fau tree he found 10 packets of suspected Methamphetamine.
18. Also found a further packet of suspected Methamphetamine. Both packets consisted of a leaf, tied with a stem of some variety, inside the former the 10 dealer snap bags, the latter cling film wrapped newspaper with inside a larger snap bag of suspected Methamphetamine.
19. These three finds he photographed and copies are in exhibit 2 pages 5 – 17.
20. He also took photographs of the measuring undertaken ; distance Fau tree to Piggery.
21. Hut in piggery to Fau tree 12-13 meters as measured by this officer with Inspector Vi.

Cross Examination on behalf Mr. Alatini

22. The officer stated :
 - It was a working day and a magistrate would have been working

- When he stated that the information from his source was successful that relates to the discovery of drugs, not outcome of trials. He did not know what the outcome of the relevant trials was.
- Asked about Mr 'Alatini, he said that he did not then have knowledge of his whereabouts or where he was arrested.
- He confirmed that the police dogs were used after the officers had completed their search.

Cross Examination on behalf Mr. Miss Taione and Mr. Moala

- It was his practice to photograph an incident. He identified those photographs he had taken but did not know who had taken the others in the bundle.
- The address opposite the Fau trees he did not know to whom it belonged. Mr and Mrs Talu lived close by.
- The distance from the Fau tree to the target's residence was not measured.

Re-examination

23. The search of the Fau trees was as a result of the information received.

Officer Punaivaha

24. When he arrived at the scene he ran to the area of the piggery. In doing so he passed a male of the ground in hand cuffs.
25. He stopped as no other officer was immediately present to look after that person who stated in answer to the question that he was Mr. 'Alatini. The officer identified himself.
26. He found in Mr. 'Alatini's pocket 1 packet that contained 2 plastic snap bags that contained Methamphetamine like substance.
27. He also noticed that where Mr. 'Alatini had formerly been lying on the ground there was a further packet containing white substance.
28. Officer Uluheua was present during the search.

29. He noted that from the road one can just walk into the piggery. There had been a car parked there. He did not know who handcuffed Mr. 'Alatini.
30. The packets found on Mr. 'Alatini were visually different to that found on the ground.
31. Page 3 of photograph bundle¹ shows Mr. 'Alatini. The various packets were each identified in the photograph bundle.

Cross-examined on behalf of Mr. 'Alatini

- That in his statement he had recorded that at 0800 hrs he had departed with PC Pekiaki to conduct this drug search, that he had left at 0800. His statement was dated 20th September 2019. At the time he was sure of the time.
- He confirmed the packets were all found as he had said in evidence in chief. He seized the packet from Mr 'Alatini's pocket.
- The packet from the ground he told the officer contained salt. But did not answer the question when asked to whom it belonged.
- The packet on the ground was only found after the officer stood him upright and was not seen when Mr.'Alatini was lying on the floor.
- He had not timed how long between finding the packets in his pocket and then standing Mr. 'Alatini up. The first photograph in the bundle shows the money² that was also found on Mr. 'Alatini

Cross-examination on behalf of Miss Taione and Mr. Moala

- The officer confirmed the dogs came in a police vehicle. He had not seen the target person at the scene.
- He could not confirm if the Tactical Response Team were under the Fau tree as he was a fair distance away.

There was no re-examination

Officer Vi

¹ Exhibit 2

² \$50 x 2; \$10 x 2, \$5 x 4

32. He was at the police station when around 0900 on 3rd September 2019 he received reliable information about the selling of drugs in the residential area of Ngele'ia.
33. He was informed that Officer Leveni had also been given the same information. In the Officer's mind he acted on the information he was given and was not influenced that Officer Leveni had received the same information.
34. This informant had provided Officer Vi with information that led to 20 drugs operations.
35. There was a briefing at the Longolongo police station and after they divided into groups. This officer then joined the team who approached the target area from the West on foot. He was with Officer Leveni but could not recall which other officers were with them. They were in plain clothes. Only the Tactical Response were in uniform.
36. Another group drove directly to the residential area which is directly opposite the piggery.
37. Another group of officers came from the East and targeted the residential address.
38. The tactical response team had stopped all people when they arrived.
39. The piggery itself was an on-going concern and had pigs in at the time.
40. This officer witnessed Mr. Moala sign off the entry in the Diary of Action that the search had been of his house and the piggery.
41. He noted that Mr. Moala had arrived at the scene in a vehicle with Mr. Vaipulu.
42. Mr. Asaeli Teulilo was stopped at the scene as was Mr. Kiko Euta each were found to have suspected Methamphetamine on their person. The former had arrived at the scene in his own car which he drove to the front of the piggery.
43. Mr. Moala also drove to the front.
44. At the time of the arrival of Mr. Teulilo the Tactical Response Team were hidden from view as they were amongst the trees.

45. Officer Vi had seen Mr. Teulilo's car approach from a distance and recognised it from a previous drugs operation.
46. He could not recall the order the vehicles arrived in.
47. He confirmed he was the other officer to take the photographs and identified which those were in the bundle.
48. He showed Mr. 'Alatini the substance recovered from the ground and he replied it was salt.

Cross-examined on behalf of Mr. 'Alatini

- In answer the officer stated that he received his information separately to Officer Leveni, but about 0900 hrs that day.
- He confirmed that this was within the working hours that the Magistrates' Court operated.
- That they had carried out a briefing before departing.
- That what he found on Mr. 'Alatini he believed to be Methamphetamine.
- He had asked about who they belonged to, though he did not think the other answered that but only stated that he believed in was salt.
- Seizures were handed to the Officer in charge of keeping the exhibits.

Cross-examination on behalf of Miss Taione and Mr. Moala

- This Officer explained that when Mr. Moala arrived he was told about the operation.
- That Mr. Moala had confirmed the piggery was his.
- Nothing was found on Mr. Moala.
- The search of the hut in the piggery came about as a result of the information he had received.
- It also gave rise to why he had searched the Fau tree area.

Re-examination

49. The drugs were shown to Mr. Moala and he denied knowledge and looked surprised.

Officer Fifita

50. He went to the hut in the piggery and seized from the ground a test tube that was between Harry and the woman lying on the ground. It appeared to contain Methamphetamine

Cross-examination on behalf of Miss Taione

- The officer stated that yes, the test tube was found between these two people.
- He had not measured the distance between the test tube and Miss Tiaone.
- He was not aware of the passports seized.
- The black bag with scales inside was found outside the hut, hanging from an olive tree . He did not see the rest of its contents.

Officer Pohiva was tended by the Crown.

Cross-examined on behalf of Mr. 'Alatini

- He stated the scales were a black plastic set and there was also drugs paraphernalia inside that black bag.

Cross-examination on behalf of Miss Taione and Mr. Moala

- The Officer stated that he had not passed anything to Officer Leveni.
- Nor was he aware of the passports that were seized.

Officer 'Uluheua

51. The Diary of Action³ had been completed by her in part. Of the 94 entries the first 55 were hers. Those covered the search and seizure. Thereafter the Diary dealt more with weighing of the suspected drugs and the administrative aftermath of the operation.

³ Exhibit 3

52. She confirmed that she had started recording from the start of the operation and had kept her record contemporaneously, timing her entries and recording what she saw and was reported to her by the officers as they undertook the operation.
53. It was at this point that Counsel for the defence for the first time indicated their objection to the document being before the court as an exhibit.
54. For reasons I will turn to later, I ruled that document admissible as an exhibit.

Cross-examined on behalf of Mr. 'Alatini

55. The officer recorded entry 13, the search and arrest of Mr. 'Alatini while present and as Officer Punaivaha was reporting by way of ~~commentary~~.
56. There were other times that Officer Punaivaha came to her and reported what had happened and she timed and recorded these precisely.
57. This process was repeated by her and the officers searching and making arrests.
58. Regarding Mr 'Alatini on the ground; he was there when she arrived.
59. As she was there the packets from his pocket were then seized.

Cross-examination on behalf of Miss Taione and Mr. Moala

- Entry 9 was made at 1050 hrs.
- She had approached the piggery from the side of the road closest the residence of Mr. Moala.
- She was not involved in the search as she was occupied with the dairy.
- The briefing session was recorded in her notes too.

Officer Televave

60. It was his job to collect the exhibits handed to him which he recorded in the Exhibits Register Diary⁴.

⁴ Exhibit 4

61. Then to prepare them for the storing at the Exhibits' room; principally by weighing them.
62. He received the money and the three packets of Methamphetamine from Mr. 'Alatini; reference 153/19.
63. Item 155/19 was the test tube and the residue from inside; the latter weighed 0.30 g.
64. 157/19, the suspected drugs found from the Fau tree he weighed. He confirmed the passports came from the search of the Moala's home, though he could not say where exactly.
65. As part of the handover he signed the Drug Movement Diary⁵; that entry confirmed the proper handover to the next in the chain of continuity and safe keeping; the officer at the police station.
66. That hand over took place the next day. Up until then the exhibits were kept in a cabinet drawer in the Longolongo police station. Other urgent duties had kept him from immediately taking them to the Exhibit Room.

Cross-examined on behalf of Mr. 'Alatini

- He conceded that in entry 64 the weightings had been recorded inaccurately in part. The second "05 pack ice" should read 2.69 g.
- Likewise from the Fau tree the 10 packs should record the weight 5.30 g; the large pack 14.19 g.
- The cabinet the exhibits were stored in before their being taken to the Exhibits Room. It was his and he alone used it.
- The empty packet from Mr 'Alatini, the one that contained the two with small amounts suspected Methamphetamine he did not know the weight of.

Cross-examination on behalf of Miss Taione and Mr. Moala

- The suspected Methamphetamine from between Mr. Vaimani and Miss Taione weighed 0.30 g.

⁵ Exhibit 5.

- That 0.30 g was the residue decanted from the test tube.

Re-examination

67. All the material from the test tube had been weighed by him.
68. 155/19 from Exhibit Register and item 62 from the Diary of Action one and the same item.

Officer Pousima

69. The evidence of Pousima was not contested and did not need to be called.

Officer Pale

70. He took the suspected drugs to the laboratory in New Zealand and delivered them there himself having been handed them on day he left, by the Exhibit Keeper.
71. The movement of the exhibits was recorded. He showed how in the “reason” column; Drugs Movement Register, 5th column from right, this was recorded by him.
72. That record was maintained in that exhibit throughout.
73. Before being taken to New Zealand the exhibits were prepared, that is to say weighed and placed in paper exhibit bags and labelled.
74. That was done in the presence of the exhibit officer and photographed. Though those photographs were not in evidence
75. They were entered into the diary by the officer in the exhibit office.
76. The Tonga Police Force, Exhibits for Laboratory Examination recorded at page 2 Operation Drone; this operation.
77. Exhibit 7 had been prepared by the New Zealand police; it was the handover from the ESR laboratory after testing.

Cross-examined on behalf of Mr. ‘Alatini

- All the suspected drugs relating to Mr ‘Alatini had been weighed together; that was the practice and it included the packaged weight.

- The packaging had no clear finger prints; New Zealand laboratory had not been asked to test for fingerprints.
- They could have been so asked but the Tongan equipment was sufficient.

Cross-examination on behalf of Miss Taione and Mr. Moala

- The weight of 19.36 g included the packaged weight of the suspected drugs from the Fau tree area.

Re-examination

78. The officer accepted that when different people weigh drugs on different sets of scales the weights could show small variation. Those would only be fractions

Close prosecution case

79. The prosecution closed their case.
80. There followed submissions of no case to answer relating to all defendants; count 4 of the indictment.
81. The defence mounted their argument on the second limb of *R v Galbraith* 73 Cr. App R 124, CA. The submission before me was that the second limb of *R v Galbraith* applied; there was some evidence but it was vague because of inconsistencies with other evidence.
82. The plain inference was that all those arrested with Methamphetamine or close by must have been congregated in the piggery as there was meth dealing going on from the supply at the Fau tree.
83. Therefore they all knew of the existence of the pool of drugs being supplied from.
84. The question for me was who had control of it ?
85. At arriving at this analysis of the facts I have considered *R v Conway*; *R v Burke* [1994] Crim. L.R. 826 "...mere knowledge is not enough."; *R v Searle* [1971] Crim. L.R. 592 control and so possession could be inferred from any member of a group who had a right to draw from a pool of illicit drugs at will.

86. At the close of the Crown's case there is nothing before me that can demonstrated that either Mr. 'Alatini or Miss Taione had control over the drugs in the Fau tree area; count 4.
87. The bag with the scales found close to where Mr. 'Alatini was arrested had not been demonstrated to be connected with him, as opposed to anyone else at the scene, in any way.
88. There were no forensic links between the scales, him ; nor to Miss Taione.
89. Likewise there were no links shown between either the first two defendants or the stash at the Fau tree. They were not stopped particularly close by so as to be able to demonstrate a control over those drugs; there were no observations of them to show they were those that were selling or handing over the drugs on another's behalf, or at all.
90. No telephone messages, no calls, no observation, no forensic link of any kind was demonstrated.
91. With respect to the third defendant, that is a very different story.
92. It was his land the piggery. It was an on-going concern where he would be expected to take a real interest in who what happening on his property and adjacent.
93. The piggery was opposite his home so that it would be clear to anyone there that people were coming and going; people not concerned with the piggery, so who had no reason to be there at all; save that overwhelming inference that there was this supplying of drugs going on in the trees, very close to the piggery.
94. It is perfectly possible and reasonable in these circumstances, based on the evidence at this stage to reject all the realistic possibilities consistent with innocence.
95. Therefore in respect of Mr. 'Alatini or Miss Taione I find there is insufficient evidence against either of them for the case to proceed against either of them on count 4; so I formally acquit them both on that count.
96. On the other hand there is no reason for the case against Mr. Moala on count 4 to be withdrawn and I rule that it shall proceed.

Defence case

97. Neither Mr. 'Alatini or Miss Taione gave evidence.

Mr. Moala

98. Mr. Moala is 38 years old, he gave evidence of returning to his property that day, he was not sure if this was the morning or afternoon. He was with his friend Amini, who was in the car with him.

99. He was not aware of the police being at his address. He was stopped by an officer whose name he did not know.

100. He was there at the side of the road when Officer Vi approached him. He asked the officer if he had a warrant to authorise him to search. The officer did not and Mr Moala allowed them to continue with their work.

101. He walked with the officer to the piggery and could see many further officers in the area of the Fau tree.

102. He said he saw Officer Pohiva hand something to Officer Vi.

103. Officer Vi asked Mr. Moala what this item was, but Mr. Moala said he did not know.

104. The officer did not mention by name what it was that he had found.

105. He stated the Fau tree area was common ground and anyone can go there to pick coconuts or collect firewood, this was common knowledge and was the case since he had been a child growing up in the area.

Cross-Examination

106. Mr. Moala agreed that the piggery belonged to him and his wife.

107. The hut in the piggery referred to in evidence was the hut for the guards for the piggery.

108. Mr 'Alatini was the guard and was paid \$180 per week. He trusted Mr. 'Alatini and had known him since primary school.

109. He lived at his home with his wife and 5 children then, 6 now.

110. He was acquainted with Mr. Teulilo.
111. As for Mr. Kiki Euata, he was staying with Mr. Moala and lived at his home at this time.
112. When he arrived back to his home with Amini Vaipulu in the car with him, police were there at the entrance.
113. No one told him that Mr. 'Alatini had been arrested for possession of Methamphetamine; saw he was handcuffed and that couldn't have been for no reason something was obviously going on.
114. But he did not have any specific thoughts about what it was that had happened.
115. He had lost his trust in Mr. 'Alatini as a consequence of this. But, the drugs on the Fau tree were not his. It was simply a coincidence that it was right on the edge of his land.

Rulings

Lawfulness of the search

116. Before considering more broadly the police actions and their powers there are two specific points.
117. Firstly that Miss Taione was not searched by a female officer in line with s13 (3) Illicit Drug Control Act, so her search was argued unlawful in that respect.
118. The drugs in count 3 that were attributed to her were not found from a search of her person. They were on the ground, in the test tube near her. Accordingly in seizing that item from the ground near her, the police did not recover it from a search of her and that section can not be said to have been contravened.
119. Secondly in relation to the drugs found at the Fau tree. That ground is said to be common ground where anyone can go. That is Mr. Moala's case and there has been no evidence to rebut that.
120. It would therefore follow that the police would not need a warrant to go there. So in relation to Mr. Moala and count 4, there can not be said to be an unlawful search.

121. In any even, if I am wrong about this latter point, then the following applies :
122. The defence argue that the search was unlawful, that the information came to the police in the morning.
123. A Magistrate could easily have been contacted and that there was no reason why this was not done.
124. Conversely the prosecution submit that the drugs were being sold, the people buying them would be purchasing and then leaving the scene; therefore the evidence of the drugs was being eroded and there was high probability all the would disappear in short order, the evidence of who was purchasing and so who the users were would be lost as the supply of drugs was used up; therefore, in terms of preserving all those aspects of the evidence action had to be taken immediately.
125. Section 24 of the Illicit Drugs Act states :

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 and the officer suspects on reasonable grounds, that —

- (a) it is necessary to do so in order to prevent the concealment, loss or destruction of anything connected with an offence under this Act; and
- (b) the circumstances are of such seriousness and urgency as to require the immediate exercise of the power without the authority of a warrant.

A police officer may, for the purposes of this section, stop any vehicle or craft where the officer suspects on reasonable grounds that anything connected with an offence under this Act is upon or in the vehicle or craft.

A police officer shall report to a Magistrate any action which he has taken under this section.

126. I am mindful that the information came from a credible source, that source had provided information leading to at least 20 seizures of illegal drugs. The information was received shortly before 1000 hrs that day.
127. The officers immediately assembled a team and briefed them and deployed.

128. I am also mindful as to the type of drug in question and the harm that it causes in The Kingdom of Tonga.
129. I also consider the fact that it was being hidden in the bush and the packages were disguised with leaves demonstrates that without swift action all the evidence could have completely been untraceable.
130. It is quite clear, in all the circumstances, that this was an emergency; any delay would lead to the drugs, the users and potential identifying ringleader of this enterprise and understanding its scale all to be lost.
131. I am quite certain, on these facts, that the right step was immediate action and to act as they did.
132. I rule that the search was therefore lawful.

Continuity of exhibits

133. The drugs seized were immediately handed to Officer Televave, as they were found.
134. Their seizures and weighing was recorded by Officer ‘Uluheua in the Dairy of Action.
135. The operation itself was given the name “Drone” and that was recorded in the third Diary entry at 0940 hrs that day.
136. The exhibits were entered in the Exhibit Register Diary on 3rd September 2019. They were handed over by Officer Televave. They were recorded as found, with accompanying seizures of money or paraphernalia.
137. They were described fully and then given the references 153/19 (re Mr. ‘Alatini); 155/19 (re : Miss Taione) and (157/19) (in relation to all three defendants; the Fau tree stash).
138. Those references then can be traced through to what Officer Pale then took to New Zealand for testing in Exhibit 6 the exhibits for laboratory examination sheets.
139. Then through the handover sheets, exhibit 8, when Officer pale handed them to the officer in New Zealand who signed for them.

140. They are clearly identified again by their same references in Exhibit 9, the laboratory result sheets; which also bear the name of the operation: "Drone".
141. That latter document demonstrates that they were both one and the same item and that was Methamphetamine.
142. The continuity is clearly demonstrated and was intact throughout.
143. There was no break in the continuity.

The Diary of Action

144. It was submitted to me that the Diary of Action can not be an exhibit unless it is agreed.
145. I disagree.
146. The Dairy was created as Officer 'Uluheua described. Either she recorded contemporaneously what had taken place or was told what had taken place a very short time after, by the officer concerned and she recorded it there and then.
147. She timed the entries and it became a running log. She gave evidence that her entries were accurate.
148. A contemporaneous record is distinct to a witness statement.
149. The latter is made after the events and preferably soon and when they are fresh in that person's mind. But it is not contemporaneous.
150. A contemporaneous written record is in a category much like a CCTV recording or an audio recording provided they are of what the author perceived and not reports of what others perceived.
151. The rationale being that they are "live" recordings; the moment of action is being preserved.
152. There may be more weight that can be attached to a video recording than a written recording as one is subjective and the other not.
153. That is where cross-examination may be relevant to test that .

154. Thus a police officer's statement is not capable of being an exhibit, but an extract from his note book is.
155. Indeed, any witnesses' contemporaneous record; just as any witnesses' CCTV, video recording or audio recording can potentially become an exhibit.
156. Where the Diary was not a contemporaneous record, it falls under the hearsay exception at section 89 (f) Evidence Act :

“where the statement refers to a fact in issue or a fact relevant to a fact in issue and is contained in any official book, register or record and was made by a public servant in discharge of his official duty or by any other person in performance of a duty enjoined by the law of the country in which such book, register or record is kept.” It may in those circumstances be admitted.

157. The officer recording what she was told by her colleague as part of a search arising from a police operation to break up a drug supply ring and seize the drugs is plainly encompassed in that section.
158. For both these reasons I find that a Diary of Action is capable of being an exhibit that a party in criminal proceedings can adduce, subject to its relevance and its accuracy being attested to.

Discussion

159. Defence submit on behalf of Mr 'Alatini, count 1 and 2, that the Crown are put to strict proof; further that he was not in possession of the drugs attributed to him and the packet of drugs on the ground was not his as well as the continuity issues for all defendants and the lawfulness of the search regarding each defendant.
160. Regarding Miss Taione, count 3, her case was that the drugs were in a test tube, found equidistant between her and Harry. There is nothing to suggest it is hers any more than it could belong to Harry. She was not seen by any witness to be connected to the test tube and there are no forensic links between her and that item.
161. Regarding Mr. Moala, count 4, the case advanced on his behalf is that there are no forensic links between him and the drugs found in the Fau tree, no observations of him linking him to those drugs. The Fau tree is not actually part of his piggery, and that

claim of his has not been rebutted. He gave evidence and denied those drugs were his and remained resolute.

162. I have considered the competing arguments. Each defendant's case must be considered separately.
163. With regard to the information the police acted on, this does not amount to evidence before me as against any defendant and I discount it entirely.
164. Mr 'Alatini was found with the drugs in his rear trouser pocket and a packet under him where he lay on the floor. Having an item in your trouser pocket creates an overwhelming inference the person in question knew about it and was in control of it.
165. In relation to the packet found underneath him, he was asked about this by the Officer and he replied "It is salt". Plainly given that he was already in possession of Methamphetamine in his pocket, then there becomes an overwhelming inference that another packet, that was found underneath him that he claims to know the nature of the contents of was also in his possession; knew about and had control of. That it was underneath him rather than in his pocket I infer from that he had tried to discard it to mitigate his involvement.
166. I therefore find him in possession of all three bags, said to be 0.063 g, so guilty of count 1 and count 2 0.234 g.
167. Miss Taione, count 3, I acquit. I see nothing that drives me to conclude the traces of Methamphetamine in that test tube could be hers rather than Harry's. Because the test tube is an item that would most likely be in the possession of one person alone, I consider that it was not a common pool of drugs to be drawn upon, but one specific person's; and it has not been demonstrated to the required standard to have been Miss Taione's.
168. She has therefore been acquitted of both counts she faced and is therefore discharged from the court and free to leave.
169. Mr. Moala on count 4. The area of the Fau tree is right next to the piggery that Mr. Moala owns and runs. It is his business and at that time was an on-going concern.

170. The guard stationed at the piggery was Mr. 'Alatini. We have already established that he is a user of Methamphetamine. Mr. Moala was driving to the location, in his car, that very day another Methamphetamine user, Mr. Vaipulu.
171. It defies all reason that a business man, whose business is a few feet from his front door, would not know of all the comings and goings that a drug dealing outfit must be creating.
172. The numerous test tubes found, show that users were consuming at the location. that would mean the comings and goings would be those of drug addled users with their associated intoxication; making them all the more obvious.
173. That this was happening at his door step, that he kept a cohort of users around him that it was going on from right next to his business and that business was guarded by a Methamphetamine user create the strongest possible inference that Mr. Moala knew what was going on.
174. That it was adjacent to his land, and in front of his home and no more than 80 m away, that he is the man with a business and money and property as well as brining users to the scene and employing a meths user as security create a strong inference from which I deduce that it was a scheme that was run by him and so demonstrates his control and therefore possession.
175. To ensure that continuation of his drug supply business he drove people to his home and kept them around him in his grounds too no doubt to guarantee an income for himself by drug dealing.
176. I therefore find him guilty of count 4.

Directions for sentence

177. Both Mr 'Alatini and Mr. Moala to attend court, tomorrow 6th May by 0900 hrs to be directed to attend probation for pre-sentence reports to be compiled.
178. Those reports to be served in e and hard copy on all parties by 1600 hrs 28th May 2021.
179. Sentence to take place 2nd June at 0900 hrs.

180. Both defendants are bailed to attend court accordingly with further bail condition that they are to cooperate with probation for the compiling of the reports.

NUKU'ALOFA
5 May 2021

