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IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 21 of 2021

BETWEEN : REX

- **Prosecution**

AND : SIAOSI HELU

- **Accused**

BEFORE HON. JUSTICE NIU

Counsel : Mr F. Samani for the Crown.

Mr. Siasosi Helu, the accused, for himself.

Trial : 12 and 13 July 2021

Submissions : orally in Court on 14 July 2021.

Verdict : 28 July 2021

VERDICT

The Charge and trial

- [1] The accused, Siasosi Helu, is charged that on 5 August 2020 at Nuku'alofa, he knowingly and without lawful excuse, possessed 0.04 gram of methamphetamine, contrary to S.4 (a) (iii) of the Illicit Drugs Control Act.
- [2] He pleads not guilty and he, at his election, has been tried before me without jury. He represented himself at the arraignment and at his trial.

- [3] Upon completion and closing of the case for the Crown, the accused chose to give and he gave sworn evidence and then closed his case.
- [4] Oral submissions were given by both parties in Court in the following day, 14 July 2021.

The defence

- [5] In his submissions, the accused raises the following defences:
- (a) there is no reliable evidence that the weight of the methamphetamine of 0.04 gram with which he is charged is correct;
 - (b) the evidence of the officer who found the methamphetamine on him (the accused) is unreliable because the officer did even remember that he found money on him as well.
 - (c) the evidence of the officer who took the items found on him to the exhibit keeper is unreliable because he said that only the open end of one test tube was broken whereas the officer who had tested the methamphetamine said that when he was given the exhibits, that test tube was completely broken in pieces.
 - (d) the chemical test of the methamphetamine was unreliable because no photographs were produced to show the colour change of the solution which confirmed that the substance tested was methamphetamine.

I will deal with the evidence concerning those.

The weight of the methamphetamine found

- [6] The methamphetamine was found inside a small self-sealing transparent plastic bag commonly called in the trade of illicit drugs as a "pack". The pack was found by constable Soane Tupou when he conducted a routine body search of the accused at the police station before putting him into the cell for being drunk in a public place, namely, the road frontage of a storage container

situated next to a Chinese shop on Tupoulahi Road at Fasi, Nuku'alofa. That was on 5 August 2020.

- [7] The pack was found hidden inside a pair of "tight" pants which the accused wore underneath his pair of shorts, between his legs, together with two short glass test tubes and a half straw. The constable said that he asked the accused what those things were and that the accused said that he did not know. He said that he handed all those items to Officer Tukutau who was in charge of the complaint office where the accused was searched, and that Officer Tukutau wrote down in the cell book the things which he had found on the accused.
- [8] Officer Tukutau contacted Officer Fihaki of the Drug Division right away. Officer Fihaki went over and took all the items found. He said that he accidentally dropped one of the test tubes and its open end tip broke. He said that he kept it locked in his cabinet until the next day when he took them to the forensic division office and had them labelled and had the pack of methamphetamine weighed by Officer Kava. The pack of methamphetamine weighted 0.33 gram.
- [9] Officer Fihaki then handed over all the items to Officer Lolohea of the exhibits room who had them entered in the drug movement register.
- [10] Officer Pousima of the exhibit room handed over the pack of methamphetamine to Officer Pale of the forensic division on 10 September 2020 and received it back from Officer Pale on 2 March 2021.
- [11] Officer Pale said that on 13 January 2021, he had the methamphetamine inside the plastic pack emptied out and weighed and that it came to a weight of 0.04 gram, and that the weight of the empty pack on its own was 0.28 gram. He said that the total he found of both the pack and the methamphetamine was 0.32 gram, whereas Officer Kava had found that that weight was 0.33 gram. He said the slight difference in the two weights could have been due to some air current or the scale being not balanced properly.

[12] The accused has submitted that there is no reliable evidence that the weight of the methamphetamine of 0.04 gram with which he is charged is correct. I do not agree. I find there is reliable evidence that the weight of the methamphetamine inside the pack was 0.04 gram. Officer Pale has given sworn evidence that he emptied out the methamphetamine from the pack and weighed it and it came to 0.04 gram. There is no evidence to say that he did not do that or that the scale he used was wrong. Even if the correct weight was in fact 0.03 gram and not 0.04 gram, he is still guilty of the offence but that lighter weight of the substance may be considered as to his sentence.

[13] I therefore find that that defence of the accused fails.

Search officer cannot recall finding cash

[14] The second defence of the accused is that the evidence of the officer who found the methamphetamine on him is unreliable because he did not remember if he had found any money on him.

[15] It is true that Officer Soane Tupou, who found the pack of methamphetamine (together with the two test tubes and the half straw) in the tight underpants of the accused between his legs, could not remember that he had found a \$50 note and \$2 note in his shorts pocket as well, because these were all handed by him to Officer Tukutau, and that Officer Tukutau had handed them all to Officer Fihaki who had them all labeled and photographed as shown in photographs 7, 8, 9 and 10 of **Exhibit 1**.

[16] I do not find any merit or substance in this ground of defence at all. The important evidence in this trial is that methamphetamine was found on the accused and that it was found in a place on his person which someone else could not have put there without the accused being aware of it. The evidence of Officer Soane Tupou is that the pack, the 2 test tubes and the half-straw were all packed into the tight pants of the accused next to the bare skin of the accused's genitals between his legs. Nobody could have put them there without the accused knowing it.

He therefore had knowledge and control of them. He was in possession of them. He knowingly possessed them. The fact he had \$52 in cash in the pocket of his shorts was and is irrelevant, and the fact that the officer who found these items in the tight underpants as described forgot that he had also found the \$52 in the shorts pocket makes no difference. Despite the cross-examinations of the accused, he maintained that he did find these items between the accused's legs.

- [17] When the accused gave evidence he said that after Officer Soane Tupou had found nothing on him except the \$52 and a telephone and a gas lighter, he was called by the Officer Tukutau and that the officer went over and talked with Officer Tukutau, and that afterwards, he just came back and put his hand into his tight underpants and took out these items. He thereby alleged that the Officer Soane Tupou had gone and got the pack, the 2 test tubes and the half straw from Officer Tukutau and then came and put his hand with all the items in his hand into his tight underpants and then took them out and say he had found them inside the tight underpants.
- [18] That was not put to Officer Soane Tupou in cross-examination and no objection was taken by the Crown counsel in respect of it. It was however put to him by counsel that what he is alleging is that what Officer Soane Tupou did was a very serious offence, namely, the "planting" and "lying" that the items were found in his tight underpants whereas he had them in his hand before he put his hand into his tight underpants. The accused said that he did not know that it was such a serious offence but that that was what the officer did. I do not believe that.
- [19] I asked the accused whether he contacted his father while he was in the police station and he said that he was not allowed to. I asked him if he had been allowed to telephone his father, what would he have told him, and he said that he would have asked him whether it was true that he had rung the police and complained that he had been drunk and rowdy at the Chinese shop. I asked him if there was anything else he would have told his father and he said that

he would have asked him about his (the accused's) wife and children. He said that that was all he would have told him, nothing else.

[20] Those answers to my questions confirmed to me that the evidence which the accused had given about Officer Soane Tupou having the items in his hand before he put his hand into the accused's tight underpants was not true at all. If it was true and that such thing had happened, any drunk person would not forget it, because when he is sober the next day, he would still remember that he had no drug or test tube in his tight underpants and that the officer had had them in his hand and had pretended that he had found them in his underpants instead. He would be sure to protest to be released and to demand to call his father and to tell him what the police had done.

[21] Yet he did nothing, for 5 days, and then after he was released he did nothing about it. He told no one about it, not even the police when he was interviewed.

[22] As I have said, he did not think to tell his father about it, had he been allowed to call him. I just do not believe his evidence at all. I believe and I accept the evidence of Officer Soane Tupou instead. It is consistent with the actions of the accused afterwards instead.

[23] The second defence of the accused also fails.

The broken test tube

[24] The third defence of the accused is that the evidence of Officer Fihaki is unreliable because whereas he said that he broke only a piece off the open end of one test tube, the evidence of Officer Pale was that the whole test tube was broken up into small pieces instead.

[25] Photographs 1 and 2 (of Exhibit 1) show that the test tube was only broken at the open end but that when Officer Pale produced the 4 items in Court as Exhibit 7 the test tube was all broken up into small pieces.

[26] I however fail to see the relevance of the broken test tube. It is clear that for some reason the test tube was broken at some stage after it was photographed on 6 August 2020 and before it was produced by Officer Pale as Exhibit 7 in Court on 12 July 2021. This trial concerns the pack of methamphetamine and it is not contended that that pack was the same pack that was found on the accused and which was tested by Officer Pale.

[27] The third defence of the accused also fails.

No photograph of the chemical test

[28] Finally, the accused submits that the chemical test of the methamphetamine which Officer Pale carried out was unreliable because no photographs were produced to show the colour change of the solution (from clear to purplish blue) to confirm that the substance tested was methamphetamine.

[29] I do not think there is any merit in this ground either. Officer Pale has given evidence as to his qualification and experience in the use of the equipment TruNarc Analyser and of the chemical test of the illicit drug methamphetamine. The accused does not contest that. What he says is that there should be a photograph or photographs of the changing of the clear colourless solution into a blue or purplish colour. No such requirement is required by the law. All that the law requires is that the substance is proved to be methamphetamine. The evidence of Officer Pale is that he tested the substance found that was methamphetamine. I have to accept his evidence because he knows and I do not know. He has shown on oath that his evidence is true. I must accept it, whether or not he produces any photograph to show the colour change of the solution he says he observed.

[30] That defence of the accused also fails.

Crown case proved instead

[31] I have found instead, on the sworn evidence of the 7 witnesses called by the Crown that the Crown has proved beyond reasonable doubt that the accused

did possess knowingly 0.04 gram of methamphetamine at Nuku'alofa on 5 August 2020.

- [32] The accused was drunk. He was rowdy and noisy. He had liquor on his breath. He talked loudly and incoherently (valevalelau). The Chinese shop owner complained to the accused's father because the father is the owner of the allotment on which the shop is situated, and the father called the police. The police came there and the accused was on the road frontage, a public place. He was drunk in a public place. He was properly arrested for being drunk in a public place, together with his friend, Sunia.
- [33] At the police station, they were ordered to be searched and to be put into the cell overnight until the next day when they would sober up. That was the proper routine. The search of their persons was routine and was lawful. In that search the pack of methamphetamine was found in the crutch of the tight underpants of the accused between his legs. The pack and the other items found were given to the drug division officer. That officer kept it locked in his cabinet overnight and then handover it the following day to the exhibit room officer and it was entered in the drug movement register on 6 August 2020.
- [34] On 10 September 2020, the pack was taken by Officer Pale from the exhibit room for testing and he held it in his custody and he carried out the test of the substance in the pack on 13 January 2021 and he found and confirmed that the substance inside the pack was methamphetamine and that it weighed 0.04 gram.
- [35] Officer Pale returned the pack of methamphetamine to Officer Pousima of the exhibit room at 1148 hrs 2 March 2021. It was then produced in Court as Exhibit 9 on 12 July 2021.
- [36] I therefore have no doubt, not even a reasonable doubt, that the accused knowingly possessed 0.04 gram of methamphetamine at Nuku'alofa on 5 August 2020 without lawful excuse, contrary to S.4 9a) (iii) of the Illicit Drugs Control Act.

[37] Furthermore, the accused has failed to discharge the burden of proof which lies on him to prove that he did not have the pack of methamphetamine in his possession, as is required by S.37 B of the Illicit Drugs Control Act, which provides as follows:

“37 B Prosecutions

In any proceedings against any person in respect of an offence against this Act in which it is proved that he had in his possession any illicit drug, controlled chemical or equipment, or utensil, or did any act in relation to any illicit drug, controlled chemical or equipment, or utensil which would have amounted to that offence, the burden of proof shall lie on him.”

[38] That law was enacted and it came into force after this offence was committed on 5 August 2020, but it concerns the trial and the mode of the trial, which has only taken place after the law was enacted. That law is applicable in this case.

[39] The Crown has proved that the accused had in his possession this pack of methamphetamine, namely, inside his tight underpants between his legs. The accused is required by this law that he proves that he did not so have it and he has not so proved it.

Verdict

[40] I therefore find the accused guilty of the charge with which he is charged in his indictment and I convict him accordingly.



Niu J

J U D G E

Nuku'alofa: 28 July 2021