

Sean & fl.

IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 100 of 2020

BETWEEN : REX

- Prosecution

AND : KALAFITONI TOLUTA'U

- Accused

BEFORE HON. JUSTICE NIU

Counsel : Mr F. Samani for the Crown

Mrs. Ane Tavo Mailangi for the accused

Trial : 11 and 14 June 2021

Submissions : by Mrs. Tavo – Mailangi on 29 June 2021

by Samani on 7 July 2021

Verdict : 21 July 2021

VERDICT

Indictment

[1] Initially, the indictment jointly charged the accused with two other persons, namely, Sione Vasi and Sioana Vasi, with possessing, knowingly and without lawful justification, 2.80 grams of methamphetamine at 'Utulau on 28 July 2018 (contrary to S.4 (a) (iii) of the Illicit Drug Control Act).

[2] All three persons pleaded not guilty before Cato J on 23 June 2020 and on 25 June 2020, Cato J transferred the case to be called before me on 10 July 2020. On 10 July 2020, all 3 accused appeared before me, Mr. Tu'utafaiva attending as counsel for Sione and Siosaia Vasi, and Toluta'u appearing for himself. I set the trial down to be held on 29 October – 3 November 2020. At the time, Toluta'u (accused) was serving a prison sentence.

[3] On 29 October 2020, the morning of the trial, the Crown offered no evidence against Sioana Vasi and I dismissed her from the indictment. The accused Sione Vasi then changed his plea and pleaded guilty and I convicted him. The accused, Toluta'u maintained his not guilty plea and asked for time to find a lawyer for himself seeing Mr. Tu'utafaiva would not be appearing for the defence anymore. I adjourned the matter to 12 November 2020.

[4] On 12 November 2020, counsel, Mrs. Tavo Mailangi, appeared for the accused and a trial date 1 – 3 March 2021 was set down, but that fixture was vacated as I had to attend to the Vava'u circuit. It was re-set and the trial was held on 11 and 14 June 2021.

[5] So that the indictment, which has only one count, now states:

“Kalafitoni Toluta'u of `Utulau, on or about 28 July 2018 at `Utulau, you possessed knowingly and without lawful justification a class A illicit drug by possessing 2.80 grams of methamphetamine, contrary to S.4 (a) (iii) of the Illicit Drugs Control Act.”

The evidence

[6] At the commencement of the trial, both counsel agreed and the following evidence were admitted by consent:

(a) **Exhibit 1** - 4 pages comprising the following:

- (i) Search warrant no. 5024 issued 28 July 2018;
- (ii) Consent of Sione Vasi to the search to be carried out;

- (iii) Affidavit of reasonable grounds of police officer in support of issue of search warrant dated 28 July 2018;
- (iv) Form J-5 of affidavit in support of same application dated 28 July 2018 for search warrant.

(b) **Exhibit 2** - 7 pages comprising the following:

Letter dated 6 April 2020 from Attorney General Office to all 3 accused, Sione Vasi, Sioana Vasi and Kalafitoni Toluta'u, attaching a copy of the report from the analyst in ESR in New Zealand that the substance forwarded to them marked Leisa Operation weighed 489 milligrams and that it contained methamphetamine.

The letter required that the 3 accused give notice no later than 21 days before the date of the trial that they wish that the analyst attends the trial.

It was agreed that no notice was given by any accused that the analyst was to attend the trial.

[7] The Crown then proceeded to call and 6 witnesses gave evidence. The accused counsel cross-examined all those witnesses and the accused himself gave evidence and was cross-examined.

The defence

[8] The defence which the accused, as submitted by his counsel, has raised and upon which his submissions have been made is that he did not have possession and he did not possess the methamphetamine found because he did not have any knowledge of it and he did not have it in his possession or control.

The issue

[9] Therefore the only issue to be decided in this case is whether or not the Crown has proved, beyond reasonable doubt, that the accused knowingly possessed the methamphetamine found.

Crown evidence

- [10] The Crown evidence in respect of that were given by two witnesses, namely, Kalosi Tapueluelu and Tevita Pohiva.
- [11] **Kalosi Tapueluelu**, 30 years of age, police constable, said that he was one of some 10 odd police officers who executed a search warrant at a tax allotment of Sione Vasi at 'Utulau at 5:00 am on 28 July 2018. He said it was still dark and that they had torches with them. He said that he and some officers came into the allotment from the rear while some went in from the front, towards a house in the middle of the allotment.
- [12] He said that when he got to the house the police vehicles were there and one person ran from the house towards him and the officers who were with him and that they caught him. He said that that man was 'Alifa. He then went with other officers to a saafa bush nearby and searched there (with their torches). He said he saw a person's head and on shining the torch he saw that the person was a girl and that she was Sione Vasi's wife and that she was sitting and was sweating, and that he then saw the accused, Kalafitoni Toluta'u, lying ^{on} ~~over~~ the ground in hiding beside her.
- [13] He said that he told the other officers to watch the two people while he searched around some more. He said that he found no one else and he then came back to the two he had found and that the accused was still lying on his stomach on the ground. He said that he then got the accused to stand up and that as the accused got up, there was a black school bag on the ground where his chest had laid. He said that he also saw another bag about a meter away from where the accused had laid.
- [14] He said that the bag on which the accused had laid was opened and it contained a screw driver, empty packs, torch batteries, a steel file and a folded black cloth. He said that when the black cloth was unfolded, there were empty packs and a taped up matchbox in it. He said that before the matchbox was opened, the accused said to him that it was not his. He said he then removed the tape and that when the matchbox was opened, there were 5 packs of methamphetamine in it.

- [15] He said that he asked the accused whose it was and that the accused said that he did not know. He said he then charged both the accused and the girl with possessing of the drugs and arrested them.
- [16] **In cross-examination**, he said that it was already 5 am but that it was still dark and that he had a torch himself. He said that the accused was on his stomach and that his elbows were bent and that his hands were under his chest. He said that he ordered him to put his hands out on either side of his head while still lying on his stomach. He denied that the accused was sitting on the ground when he found them and he denied that the bag was found between the accused and the girl.
- [17] He agreed that he had not stated in his statement, which he had written in October 2018, that the accused had said that the matchbox was not his before the matchbox was opened, but he said that that was what the accused had said and that he remembered it well because that was why he became suspicious that there was something in the matchbox.
- [18] He agreed that he did not ask them whose was the bag at the scene but he said that he did ask them at the police station. He said that the other bag found was about the size of the bible and that the bigger bag was the one on which the accused had laid with his chest, which was the bag in which the taped-up matchbox was found.
- [19] **Tevita Pohiva**, 24 years of age, with 4 years in the police force, said that he was the exhibits keeper during the search at the tax allotment. He said that he brought the exhibits to the police station and had them photographed together with a list of them.
- [20] **In cross-examination**, he said that he could not recall what had happened during the search or where the bag was found. He agreed that he had written a statement and he agreed that he had written in it the following:

"I remember well the 28 July 2018 at 0634 hrs or so, we executed a search warrant at 'Utulau concerning drugs, and there were myself, Tapueluelu, Fifita and Televave, we went in a civilian plate vehicle and we arrested

Kalafitoni Toluta'u, (m) and Sioana Vasi (f) who were hiding in the tax allotment, and a search was carried out by Tapueluelu and he found ice (methamphetamine) in a bag that Kalafitoni (m) wore."

But he said that he just could not remember what happened.

[21] **I asked** and he said the two people were hiding in the saafa bush in the dark and that he did not know who found them. He said that he only saw them when they were being led up after they were found. He said that the bag had a string as the strap and that it was on the accused but he could not remember how he was wearing the bag. He said that he could not remember who opened the bag or who took the bag off the accused. He identified the bag as the one on the left in photograph no. 1 (of Exhibit 4) and that its contents were as shown on photo no. 4.

[22] On further question from Crown counsel, he said that the accused was wearing the bag but that he just could not recall how he was wearing it or how he was being led.

Defence evidence

[23] **The accused, Kalafitoni Toluta'u**, 43 years of age, of Hauloto, farmer, said that on 28 July 2018, a Saturday, he went with others to the tax allotment to harvest the kumala of Sione and Sioana's like they had been doing about twice a week and that Sioana was one of them, and he was related (by blood) to her. He said that while they ^{were} pulling out the plants, a motor vehicle came and that someone in the harvesting group called that it was the police.

[24] He said that at that time he had a case before Justice Cato at which he had defaulted to attend. He said that when he heard that it was the police, he ran to get away from them. He said that he ran away towards the land of Nishi next door but he then saw torches shining from men coming in from that side and he decided to just sit down and he did.

[25] He said that they were using garden forks to harvest the kumala and that he just left the fork at the kumala patch and ran, carrying nothing with him.

- [26] He said that the police came and told him that they had a warrant to arrest him. He said that he did not know the name of the policeman but that the policeman told him to sit still. He said that officer Tapueluelu then came and told the other policemen to watch him and Sioana who was behind him (the accused) and that Tapueluelu went into the bush area to the west and that it was dark at the time. He said that Tapueluelu came back and stood between him and Sioana and asked them, "whose bag is this?" He said that he saw that Tapueluelu had a bag with him and that he said to him that he did not know. He said that Tapueluelu then asked Sioana the same thing and that Sioana said that she did not know either. He said that the bag had not been opened then.
- [27] He said that he had not been lying on the ground as Tapueluelu had said. He said that he had been sitting on the ground because the area was dewey and wet.
- [28] He said that Tapueluelu told them to look while he opened the bag and he opened it between Sioana and him (the accused), and that he took out batteries, file, other things and that he took out a matchbox which was taped up and that it was opened and that there were these packs with white substance inside them. He said that he had never seen them before and he had not seen the bag before.
- [29] He said that Tapueluelu asked him whose the packs were and that he told him that he did not know. He said Tapueluelu also asked Sioana and that she told him that she did not know. He said Tapueluelu told them that they were charged with possessing the drug. He said that he did not say anything.
- [30] He said that he had not had the bag on him or that he had "worn" it at any time.
- [31] **In cross-examination**, he said that he had sat and not laid down on the ground because it was wet from the dew. He said that although he would have got dirty from pulling out the the kumala out of the ground, he did not want to get dirty by lying down on the ground. He said that he did not know if the bag belonged to the police and that he had not seen Sioana with it. He said that the bag was not his and that he did not know of it.
- [32] **In re-examination**, he said that even up to the time of this trial he had not known whose bag it was or whose was the drug in it.

- [33] **I asked**, and he said that the kumala patch was Sione and Sioana's, and that they were harvesting them to bring to the market that Saturday morning. He said that it was very dark and that they used torches and that he had one torch himself and that the other 2 people had a torch each. He said that they just pulled the kumala out of the ground and then they would put them into sacks afterwards and take them to Sione's van.
- [34] He said that there were Sioana, 'Alifa Hurrell and himself who were pulling out the plants. He said that he had pulled out 3 plants and did not know how many the other 2 had pulled out. He said he did not know where Sione Vasi was.
- [35] He said that he went to the tax allotment that morning at about 5:20 am on a motor cycle and that it was parked by the kumala patch. He said he did not know how 'Alifa came but that he was already there when he got there. He said that 'Alifa had come with others, that is, Funaki 'Otuhouma and 3 others to plant yams. He said he did not know how they had come but that there was another van there. He said he did not see Sione Vasi. He said that Sioana and their kids came in their van. He said that there was only a shelter, not a house, on the tax allotment.
- [36] He said that the police came in 3 vehicles and that he thought they were police vehicles because they were white in colour.
- [37] He said that his case before Justice Cato was in 2018 and that when Cyclone Gita hit Tonga, he did not go to the Court. He said that he was living in his own home at Hauloto at the time and that he never shifted and lived elsewhere. He said that he was living there with his brother. He said that he was not married then or since. He said that at that time he was growing and maintaining his crops at his uncle's tax allotment and that people knew of it.
- [38] He said that he did see the matchbox being taken out of the big bag where the batteries were also found. He identified the bag in the photographs.

Defence case

- [39] Mrs. Tavo-Mailangi, for the accused, submits that the law was correctly stated by Ford J in **R v Motuliki** [2002] Tonga LR 124 at 126:

“A person is in 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.”

(As stated in **Archbold**, 2001 edition at para. 26.61).

I agree with that statement of the law.

[40] She submits that the Crown has not proved its case against the accused because it has not proved that the accused had knowledge or control of the bag or its contents. She says that there was conflicting evidence between the evidence of the witness, Tapueluelu, and the evidence of the witness, Pohiva. She says that whereas Tapueluelu said that the accused was lying on the bag on the ground, Pohiva said that the accused was wearing the bag instead. She says that those evidence also conflicted with the evidence of the accused himself who said that he was not lying on the back and that the bag was brought by Tapueluelu himself from somewhere he did not know. She says that these conflicting versions render the Crown evidence unreliable and that accordingly, the Crown has not proved its case beyond a reasonable doubt and that the accused be acquitted.

The Crown response

[41] Mr. Samani for the Crown, submits that the evidence of the accused was a fabrication.

[42] He says that the claim of the accused that he was only sitting, not lying down on the ground, because the ground was wet from the dew and that he did not want to get dirty, was not believable because he was already dirty from the work he had been doing and getting dirty was the least of his worries at the time.

[43] As to his claim that he was hiding because there was a bench warrant for his arrest, Mr. Samani says that the accused never put that to any witness of the Crown, in particular, that one of the officers arrested him in pursuance of a bench warrant, irrespective of any drug that was found. He says that the accused has just made up that story.

[44] He also says that it was highly unlikely that these officers were aware that the accused would be at this tax allotment.

[45] He says that the evidence of the accused suggested that Tapueluelu had "planted" the drug in the bag and submits that that suggestion was ridiculous and was only an attempt by him to distance himself from the drug.

Consideration

[46] As I have said, I agree with the statement of the law which Ford J has given in the **Motuliki Case**, as submitted by Mrs. Tavo-Mailangi. I must be satisfied, beyond reasonable doubt, that the accused had knowledge and control of the methamphetamine which was in the bag. I consider that the deciding question is: where was the bag found?

Where was the bag found?

[47] Tapueluelu said that the bag was on the ground where the accused had laid his chest while he was lying on his stomach on the ground in the saafa bush. The accused on the other hand said that Tapueluelu came with the bag from somewhere and then asked him and Sioana whose it was. Whose version is the truth?

[48] The answer to that question is the verdict in this case. If it was where Tapueluelu said it was then the accused is guilty because he had control of it and he must have known its contents, or he at least had had the opportunity to ascertain its content. If the bag was brought by Tapueluelu from somewhere else like the accused has said in his evidence, then I have to acquit the accused.

[49] I have considered all the evidence, and I have come to the conclusion that the bag was found on the ground where the accused had laid his chest in the saafa bush where he and Sioana were hiding. I will give my reasons for that conclusion.

[50] When Tapueluelu was cross-examined by Mrs. Tavo-Mailangi, Mrs. Tavo-Mailangi put to him that the accused was not lying down on the ground but that he was sitting up and Tapueluelu said that the accused was lying down. She then put to him that the bag was not underneath the accused (while lying on the ground) but

that it was in between the accused and Sioana as they were sitting on the ground, and Tapueluelu said that that was not the case.

- [51] I consider that Mrs. Tavo-Mailangi would not have put such a question to the witness, Tapueluelu, if the accused had not told her that that was where the bag was. I have to conclude that the accused had told her, his counsel, that the bag was in between him and Sioana when Tapueluelu found them in the saafa bush, and that he represented to her that that was a fact and that it was the truth.
- [52] I also come to that conclusion because it was not put to Tapueluelu that Tapueluelu had only come back to them from somewhere with the bag. That was a most crucial point, as I have stated above, because it meant conviction or acquittal. I consider that counsel, Mrs. Tavo-Mailangi, would have seen the significance of such a point and would have been sure to have put it to Tapueluelu but she did not. She instead put to him that the bag was in fact in between the accused and Sioana only because that was all the accused had told her.
- [53] It therefore came as a surprise in the accused's evidence that Tapueluelu came with the bag from somewhere. I therefore agree with Mr. Samani that that evidence of the accused is consistent with fabrication by him of that evidence.
- [54] I also consider that it was very odd that Sioana also went and hid as well. If the evidence of the accused was to be believed, that he went and hid because he thought the police were coming for him, because he had not attended for his case in Court, then why would Sioana hide as well? But when Tapueluelu found them hiding close together in the saafa bush and the bag which was with the accused turned out to contain this substantial quantity of methamphetamine, it is clear and it is reasonable to conclude that they were hiding because of that big quantity of methamphetamine in their possession.

Conclusion

- [55] I have therefore found as a fact that the bag containing the methamphetamine was found by Tapueluelu where the accused had laid, as Tapueluelu has stated in his evidence, and that the accused knew its contents and that the accused had control of it.

[56] I am therefore satisfied beyond reasonable doubt that the accused knowingly possessed 2.80 gram of methamphetamine at 'Utulau on 28 July 2018 contrary to S.4 (a) (iii) of the Illicit Drugs Control Act as is charged in his indictment in this trial, and I convict him accordingly.



[Handwritten Signature]
Niu J
J U D G E

Nuku'alofa: 21 July 2021