

[3] He is also further charged under **count 3** that on the same date and place he wilfully obstructed a police officer when he kicked Semisi Tupou as he was performing his duty to arrest him.

[4] Both accused have pleaded not guilty and have elected trial by Judge alone and to represent themselves.

Evidence

[5] The Crown called and 6 police officers gave evidence. The two accused both gave evidence and they called no witness. Every witness of the Crown was cross-examined by each accused except Minola Pousima, the exhibits keeper, who was only cross-examined by the second accused.

Defences raised

[6] The first accused (Teulilo) submitted in his submissions at the end of the evidence that the Crown has not proved the charges against him beyond reasonable doubt and that they should be all dismissed. He said that he had pleaded guilty in his recent case because he was guilty, and that he has pleaded not guilty in this present case because he is not guilty and is innocent. He said that he regularly attends church and religious services and that he now has a new light in his life. He said that if he was to be penalised for these offences, his life would be adversely affected.

[7] The second accused (Tu'ipulotu) submitted in his submissions that the evidence for the Crown was weak and unreliable. He pointed to the following matters:

(a) He said that whereas Malolo Vi said that all the exhibits were found inside the vehicle, officers Leveni and 'Akau'ola said that the empty pack was found outside the vehicle. He said that it appeared that the police then put the empty pack inside the vehicle where it was then photographed.

(b) He said that officer Leveni said that when he arrived, he, the accused (Tu'ipulotu) was laid face down on the road, and that Leveni and others went to the vehicle and called for him

(Tu'ipulotu) to be brought there. He said that he ought to be taken to the vehicle before the police went in there themselves.

- (c) He said that the diary of action which was entered as exhibit was unreliable because it did not record everything that happened and that it only recorded what was ordered to be recorded.
- (d) He said that the evidence of officer 'Akau'ola was unreliable because he said in his evidence that when he knocked on his, Tu'ipulotu's, door of the vehicle, it was not opened for about one minute whereas in his written statement, officer 'Akau'ola said that when he knocked on the door, it was immediately opened.
- (e) He said that the photographs taken by the police were selective whereas there should have been photographs right from the beginning to the end of the search.
- (f) He said that the analysis of the substance found should have been carried out by an expert instead of officer Pale because there should be no doubt that this substance was an illicit drug.

He accordingly submitted that the charge against him be dismissed.

Crown evidence

- [8] **Inspector Malolo Vi**, 38 years old, police officer, said that at about 3:00 pm on 18 September 2020, he received a telephone call from an informer with whom he had worked for 2 years and who had given him reliable information, that the accused Teulilo had drugs with him at Hofoa, near Pangi Puloka's place there. He said he then briefed a team and they went in 3 vehicles. He said he knew Teulilo and his vehicle.
- [9] He said he was in the first vehicle and the other 2 vehicles followed behind his vehicle, the vehicle at the back being a police marked

vehicle with flashing blue light and siren if required. He said they drove down Vuna Road to Sopu and turned into Hofoa road, and that they met Teulilo's van coming towards Vuna Road. He said he wanted to wait and see who was in the vehicle. He said that when the vehicle went past his vehicle, he saw it was Teulilo who was driving and that another person was in the front passenger seat.

- [10] He said he immediately called the other 2 vehicles to stop Teulilo. He said that he then stopped and turned his vehicle around, as did the second vehicle behind him. He said he saw the police marked vehicle with its blue lights flashing stop Teulilo's vehicle by blocking the road. He said he saw Teulilo's vehicle stop and then it backed up toward them instead and then it stopped by the grass on the right side of the Hofoa Road facing Vuna Road.
- [11] He said that he saw one policeman trying to get Teulilo out of his vehicle and that another policeman took out the passenger from the front passenger seat quite easily. He said that when he got out and got there, Tu'ipulotu was already out and that Teulilo was still in the vehicle.
- [12] He said he saw pieces of broken glass and that officer, Semisi Tupou, told him, in the presence of Teulilo, that when he, Semisi Tupou, tried to stop the vehicle, Teulilo smashed the glass against the inside of his window and had left a scratch mark on the (tinted) glass of the window. He pointed out the scratch on photograph 14 and circled it with a pen.
- [13] He pointed out in photograph 1 the police marked vehicle with its roof mounted blue light facing the front of Teulilo's vehicle and also his hand pointing at pieces of methamphetamine which were scattered on the floor of Teulilo's vehicle. He confirmed those pieces of methamphetamine in the close up shots of photographs 2, 3 and 4.
- [14] He said that officer Leveni, whom he had instructed just as they got there to lead the search, asked both accused whose the pieces of methamphetamine were and that they both said nothing, and that

Teulilo then said to Tu'ipulotu to own up to the scattered pieces so that he, Teulilo, would not be implicated. He said that Tu'ipulotu then said that they were his. That was recorded in the diary of action as entries 6 and 7 which Malolo Vi pointed out as follows:

"18 09 20 06 C/Leveni asked Asa Teulilo and Petelo Tu'ipulotu
1521 hrs whose was the methamphetamine and neither of
them said anything.

1524 hrs

18 09 20 07 'Asa says to Petelo to own up for that thing to
prevent him ('Asa) being implicated wrongly and
Petelo then says to let the thing be his."

[15] He said that he told Leveni to collect the pieces of methamphetamine and put them in the pack lying on the floor where the pieces were and that that was done before they took the vehicle from Sopusu to the Longolongo police compound because it began to rain.

[16] He pointed out 2 straws and a methamphetamine smoking pipe in photographs 5, 6 and 7, the 2 straws being shown in photographs 18 and 19 where they were found in the vehicle. He said that in his knowledge and experience in his work, the straws were cut at an angle so that it is used to scoop the meth from the pack and put it through the small hole or opening of the smoking pipe into the pipe before it was lit and smoked. He said the other open end of the straw was usually burnt to close it (to prevent the meth spilling out that end).

[17] He also pointed out in photograph 21, 2 empty packs found in a bag found in the vehicle which Teulilo said was his and also a whole ear bud and a half ear bud also found in the bag. He said that he learnt that the buds were used to clean out the inside of the pipe.

[18] He said that he saw pieces of broken glass and that Semisi Tupou told him, in the presence of both Teulilo and Tu'ipulotu, that Teulilo had smashed the glass on the inside of his, the driver's, window and

that it left a mark on the inside of his, the driver's window and he pointed it out in photograph 14 and circled it with a pen.

[19] **When he was cross-examined by Tu'ipulotu**, he said that he could not remember whether Tu'ipulotu was standing up or lying down, but that he was outside the vehicle. He said he could not recall whether Leveni had got to Tu'ipulotu first or that he did. He said the pack which is shown as lying on the floor of the vehicle in photograph 2 was already there when he first saw it. He said that it was not picked up from outside and put there, but that it was used to put all the pieces of meth on the floor into it.

[20] It was put to him that the methamphetamine pieces and pack found on the floor of the vehicle had been put there by the police and he said no.

[21] **When he was cross-examined by Teulilo**, he said that when he arrived, Tu'ipulotu was already outside of the vehicle, but that he, Teulilo, was still being pulled and forced to get out of the vehicle because he refused to get out of the vehicle. He said that he did not know why there was no photograph of the broken glass, as he was not the one doing the photographing. He said that the scratch on the window was a fresh scratch. He said that the broken pieces of glass were not collected as exhibits as they were not relevant to drug found.

[22] It was put to him that he had put the drug on the floor before they were brought there to see it, and he said no. It was put to him that both Tu'ipulotu and Teulilo were laid face down on the road in front of the vehicle when he (the witness) was pointing to the meth and pack on the floor as shown in photograph 1, and he said that both of them (the 2 accused) were standing right beside him looking at what he was pointing at.

[23] **Semisi Tupou**, 33 years of age with 15 years in the police force said that he was riding on the front left passenger seat of the police marked van and that vehicle was the one travelling at the rear as they turned from Vuna Road on to Hofoa Road. At that moment,

Malolo Vi rang and told them to stop the white van which his vehicle at the front just met as it was Teulilo's vehicle. He said they immediately turned on the siren and the roof flashing blue light and stopped in the middle of the road and blocked the road.

- [24] He said that the white van came past the second police vehicle and then stopped a little distance from them. He said he then got out and stood behind his open left door of their van and called out to the white van that they were police and to turn off the engine and to put their hands out the windows of their van. He said that the windows of the accused's vehicle were down and instead of putting their hands out or turning off their engine, the windows were then wound up and the vehicle began backing away from them.
- [25] He said that he then ran to the vehicle and opened the driver's door while the vehicle was still backing. He said that he heard banging from inside and as he opened the door, broken glass fell out and he saw that it was a test tube that had been broken because he could recognise it from the large pieces of broken glass.
- [26] He said that he tried to turn off the engine by reaching for the ignition key with his left hand but the driver kicked him on his left shoulder and that he then punched the driver on his right hand with his right hand and he was then able to turn off the engine and the vehicle stopped.
- [27] He said his job, as member of the TRG in the team was then finished and he backed off and the drug police took over.
- [28] **In cross-examination by Tu'ipulotu**, he said that he had a pistol in the holster on his belt and that it would be seen from the accused vehicle after he ran from the back of the door of the van. He said the distance between the police van to the accused vehicle was about 10 meters before the accused van began to back off.
- [29] **When cross-examined by Teulilo**, he said that they did have the siren on and the flashing blue lights on. He was asked and he demonstrated how Teulilo kicked him with the side of his right foot.

He said he tried to open the door 3 times and that it then opened the third time. He said it was difficult to reach the ignition key because the door could not be opened wide because there was fence on that side of the road. He pointed out the fence in photograph no.9.

[30] He said that he did not climb into the vehicle and that he was not sure where on Teulilo his punch landed. He said that he was not sure if his punch had caused a cut to Teulilo's eye.

[31] **In re-examination**, he said he was not sure where his punch landed because he was only concentrating on trying to turn off the engine.

[32] **Karsten Leveni**, 33 years old, police sergeant, said that he was with Malolo Vi in the first vehicle and that when the accused vehicle went past them, they turned around and came up behind the accused vehicle, which had already stopped and that they got out and went to the accused vehicle. He said he explained to the two accused that they were going to search them and the vehicle.

[33] He said that he saw Malolo Vi bend down and pick up a white substance which was on the floor of the accused vehicle and that he took the photographs. He said that he scraped up the white substances which were on the floor and put them in an empty pack which Malolo Vi gave him. He said he used an electronic machine called a Trunarc on the white substance and it indicated that the white substance was methamphetamine. He produced the photographs as **Exhibit 1**.

[34] He said a search list was written during the search and that he and Teulilo both signed it. He produced the search list as **Exhibit 2**.

[35] He said that a diary of action was written up while the search proceeded and afterwards. He produced that as **Exhibit 3**.

[36] He said that he took all the exhibits collected to the Central Police Station where officer Kava weighed the pack of methamphetamine and the weight was recorded in entry no. 21 in the diary of action,

as 0.39 gram with the weight of the empty pack included, and deducted the weight of the empty pack of 0.26 gram, leaving the net weight of the meth at 0.13 gram.

[37] He said that the exhibits were handed over to exhibits keeper, WPC Pousima, after Pousima wrote up the exhibits in her register of exhibits and which he himself signed. He produced the relevant page of that register as **Exhibit 4**.

[38] He said that he had asked both accused whose was the meth found on the floor of the van and that they both said that they did not know but that at Longolongo, after the substance was confirmed by the machine to be meth, Tu'ipulotu then said that it was his. He said that the words he used were: "Let me take the blame", but he did not write it down.

[39] **In cross-examination by Tu'ipulotu**, he said that Tu'ipulotu was laid face down on the road on the side of the vehicle and was then stood up less than a meter from the left door of the van and that he explained to both of them what they were doing. It was put to him that they were only stood up after the substance was found on the floor of the vehicle, and he said that that was not true.

[40] **When cross-examined by Teulilo**, he said that he did not remember whether Teulilo was laid on the ground or was standing when he got there. He said that both Tu'ipulotu and Teulilo were both there watching when the search began. He said that the substances were found on the floor of the front passenger seat.

[41] **Tevita 'Akau'ola**, 34 years of age, 13 years in the police force, member of the TRG, said that he was in the second of the 3 vehicles travelling to Hofoa and that Malolo Vi called from the first vehicle (in front of us) to stop Teulilo's vehicle which had just went past them but that it was too late for them to do that and it was the third and last vehicle which stopped Teulilo's vehicle.

[42] He said he saw that the third vehicle had its flashing blue light on and that it stopped in the middle of the road. He said that Teulilo's

vehicle stopped and that Officer Tupou got out of the third vehicle and walked to Teulilo's vehicle but the vehicle started backing away towards them instead and so they themselves backed up their vehicle to it as well to block it and it then stopped.

- [43] He said that he got out and ran to the front left passenger door of the vehicle to open it but it was locked. He said the window glass was up and it was tinted and he could not look inside. He said he knocked and called to open the door and after a minute it was opened. He said he saw Tu'ipulotu was the passenger and Teulilo was the driver. He said he saw Teulilo take out a test tube from his pocket and hit it against the glass window of his door and the test tube broke, then Officer Tupou opened Teulilo's door and tried to grab Teulilo but Teulilo kicked him.
- [44] He said that he took Tu'ipulotu out of the vehicle and that as Tu'ipulotu got out, he saw an empty pack fall from him onto the road. He said that Malolo Vi and Karsten Leveni came over there and that he told them of the empty pack that had fallen off from Tu'ipulotu and that they said OK, and that they then took over from him and he left and directed traffic on the road.
- [45] **When cross-examined by Tu'ipulotu**, it was put to him that in the statement he had written, he had written that when he knocked on the passenger door, it was readily opened (right away) but that in his evidence he had said that the door was not opened for one minute. He said that it was true that he had not written that the door was not opened for one minute but that the truth was that it did take one minute for the door to be opened.
- [46] He said that Tu'ipulotu was still sitting when Malolo Vi and Karsten Leveni came there, and that he was sitting about one meter from the front left passenger door, in line with the door and on the left side of the vehicle.
- [47] **When questioned by Teulilo**, he said that he did see Teulilo take the test tube and hit it on the window. He said he saw it clearly and that it was a test tube. He said that when the driver's door opened,

the policeman tried to take him, Teulilo, out but he resisted. He said he saw Teulilo kick Semisi Tupou on his left arm.

- [48] **I asked** and he said that when he got to the left front passenger door and tried to open it, the vehicle had stopped but that the engine was still running.
- [49] **Minola Pousima**, 30 years of age, said that she was the exhibits keeper, and she had been such for 4 years. She produced a copy of the page of the register she kept of the exhibits as **Exhibit 4**. It showed that the exhibits listed in the search list were entered in the register on 18 September 2020 and that it was signed by Karsten Leveni. It also showed that on 12 January 2021 Inspector Pale took the pack of methamphetamine to be analysed and that he signed for it. It then showed that on 2 March 2021, Inspector Pale returned the pack of methamphetamine to her, and he again signed it.
- [50] **When questioned by Tu'ipulotu**, she said that she was present when the pack of methamphetamine was weighed and was found to be 0.13 gram.
- [51] **Sione Paea**, 27, with 4 years as policeman, said that he was the one writing down the entries in the diary of action, **Exhibit 3**. He said he followed the search all the way and wrote each entry as it happened.
- [52] **When questioned by Tu'ipulotu**, he said that what he wrote was what happened and which he was told to enter in the diary. He said he did not know if a pack had fallen off Teulilo as he was taken out of the vehicle and he was not told of it. He said that he was not told to write what is shown in photograph 5, the pack with the meth pieces in it. He said he did not need to write down what were shown in every photograph.
- [53] **Inspector Pale's analysis** of the methamphetamine was produced by the Crown as **Exhibit 11** without the need for the inspector to attend and do so, because neither of the two accused gave a notice as required by S.36(4) of the Illicit Drugs Control Act.

[54] Crown counsel then closed the prosecution case.

Defence evidence

[55] **Petelo Tu'ipulotu**, aged 32, of Ma'ufanga, computer servicing, said that he repaired computers and laptops at his home which he then sells, and that day, someone called that he wanted to buy a laptop he had repaired and had advertised. He said that he told him he would bring it himself because he wanted the money right away. He said he then rang Teulilo to come and take him to Hofoa where the person was. He said that they went there and took the laptop and that he got the money and they then travelled along Hofoa Road to go to Vuna Road at Sopus.

[56] He said that as they were travelling along, a police van turned down from Vuna Road and came towards them and that suddenly, it swerved towards them and would hit them. He saw Teulilo was surprised and that they tried to back away but that there were vehicle behind them.

[57] He said that may be 1 or 2 minutes there was knocking on his door, and he saw a policeman trying to open the driver's door. He said he opened his door and officer 'Akau'ola grabbed his neck and pushed it against the back rest and then pulled him out and forced him to lie face down and told him not to look up or he would be shot with the gun. He said he asked what was happening and he was told to shut up or he would be shot with the gun. He said he was afraid, and that it was raining lightly.

[58] He said he heard them struggling with Teulilo and that he saw someone holding Teulilo by the neck from the back seat. He said that may be after 2 or 3 minutes, he heard Malolo Vi say to bring them to look at something. He said that he was stood up and led to the van and Malolo Vi picked up an empty pack which was wet as it was raining and asked him what it was. He said that he told him that he did not know. He said that Malolo Vi told him that it had fallen off him and he said to him that it had not. He said that Vi then asked him what were on the floor of the van, and that he replied he

did not see anything and that Vi said to look because it is "blocks". He said that Vi then gave Leveni an empty pack to put the stuff on the floor into it.

[59] He said he saw that Teulilo had a cut on his eyebrow which was bleeding. He said that Teulilo asked him whose the stuff was and that he told him he did not know. He said that Teulilo was angry and that he, Tu'ipulotu, then said that the stuff was his but he said that it was not his.

[60] **In cross-examination by Finau**, he said that the person who bought the laptop was an Indian man who was the manager of fuel depot at Touliki and that he was at the bowser at Hofoa. He said the man paid him \$250 when he gave him the laptop. He said that they then stopped at a Chinese shop in Hofoa and he bought a lot of supply for when he worked late at home, and that he spent all the money except for 52.00 which he had left on the tray between the front seats when the police stopped them.

[61] He said he did not recall if the blue lights on the police van were flashing. He said that he did not know that the police wanted them to stop. He said he saw the policeman get out and ran to them while having his hand on the pistol which was holstered to his side. He said that the policeman did not call out to them at all. He said he did not hear any call because their windows were up and because the vehicle radio was on.

[62] He said that he thought the meth which was on the floor was put there by Malolo Vi himself because he was lying to say that it was already there on the floor.

[63] **'Asaeli Teulilo**, 42 years old, of 'Anana, said that he was busy when Tu'ipulotu rang him, and he offered that another man, Tevita, would take him but that Tu'ipulotu insisted that he came and so he went and took him to Hofoa. He said that they stopped at the bowser there and that Tu'ipulotu went inside and then came out and that Tu'ipulotu told him to stop at the Chinese shop. He said that Tu'ipulotu went to the shop and then he came out and said to go to

Pangi Puloka's place at Hofoa, and he drove there. He said that after that, Tu'ipulotu said to go to Kava's place and he drove there and that after that, they then drove to return via Vuna Road.

- [64] He said that as they were driving along Hofoa Road, a police van turned from Vuna Road onto Hofoa Road and then towards their side of the road towards them. He said he stopped and backed off and then stopped. He said that a policeman then ran from the police van and punched his door and he opened it. He said that the policeman then attacked him and forced his forearm against his neck and pushed him between the two front seats and that the policeman squeezed his throat. He said that another policeman squeezed his neck from behind him and the first policeman then punched him on his face.
- [65] He said that after a little while someone pulled him out of the van and led him to the road and then one asked him what something was. He said it was Vi who asked him what the stuff was and that he asked what stuff, and that Vi said, "Those blocks there." He said he told him he did not know. He said that Tu'ipulotu was asked the same thing and that he said he did not know.
- [66] He said that they then went to Longolongo and that a machine was used as shown in photograph 12 and that the machine indicated that the stuff was ice. He said that Tu'ipulotu was also brought there and shown the machine. He said that he then said to Tu'ipulotu to own up and admit that the stuff was his so that he, Teulilo, would not be implicated. He said that Tu'ipulotu then said, "Let me take the blame for it."
- [67] In **cross-examination**, he said that he did not know anything about the drug and he denied that he broke any test tube or that he kicked Semisi Tupou. He said that it was only Tu'ipulotu who got out at each place they went to. He said that at Pangi Puloka's place, there were many people there, and that he did not know what Tu'ipulotu did there.

[68] He said he did not know it was a police van that stopped them and there was no blue light on it. He said he normally had the air conditioner on with the windows up.

[69] It was put to him that photo 6 showed a pipe for smoking methamphetamine and he said that he did not know what it was or whose it was and that it was not in the van until the police came that day.

[70] He said that he did not know about the 2 straws at all.

[71] He said that the bag was his but that the contents shown in the photograph were not there before and that someone had just put them in there.

[72] He said he did not know about the scratch and what had caused it.

[73] He said he did not hear the policeman call to turn off the engine, and he did not know that it was a police van. He said he did not know where he was backing to and that he just thought the van had come to hit them.

Crown submissions

[74] Mr. Finau for the Crown made very thorough and detailed submissions in reply to the submissions of the two accused.

Points raised by defence

[75] I will deal with each of the 6 points of defence which Tu'ipulotu has raised.

Empty pack

[76] First, is the empty pack found. Tu'ipulotu said that Officers Leveni and 'Akau'ola said that the empty pack was found outside the vehicle. Officer Leveni did not say anything to the effect that the empty pack or any pack was found outside the vehicle. It was Officer 'Akau'ola who said that an empty pack fell off from Tu'ipulotu as he got out of the vehicle and that he told Malolo Vi and Karsten Leveni of it when they arrived and that they said OK.

[77] Tu'ipulotu says that it appears that the police then put the empty pack inside the vehicle where it was then photographed, as is shown in photograph 2.

[78] In his evidence, as stated in paragraph 57 above, Tu'ipulotu stated that as he was stood up and led to the van, he saw Malolo Vi pick up an empty pack which was wet as it was raining and asked him what it was and that he told him that he did not know. He said that Malolo Vi told him that it had fallen off him and that he said that it had not.

[79] He has therefore submitted that that empty pack was then put on the floor of the vehicle by Malolo Vi in order that it was photographed as being found lying on the floor rather than outside of the van, thereby implying that the police were fabricating the evidence shown in the photograph.

[80] I do not agree. There is no evidence at all that there was no empty pack lying anywhere on the floor or at exactly that point where the empty pack is lying as is shown in photograph 2. No witness, not even either accused, said that there was no empty pack lying on the floor at any time. I therefore cannot conclude that the empty pack shown in photograph 2, was subsequently put where it is shown in the photograph by Malolo Vi or Karsten Leveni or by any other police officer.

[81] To me, it is clear and I have no reasonable doubt that the empty pack shown in photograph 2 was lying there on the floor before Tu'ipulotu got off from the vehicle, as brought out by officer 'Akau'ola, and I have no doubt that the pack that fell from him as he got out was a different empty pack from the one lying on the floor of the van.

"Planting" of the drug

[82] Second, is the submission of Tu'ipulotu that the drug (methamphetamine) found in the van could have been "planted" by the police themselves. That was a repeated question or implication

that was put by the two accused to the Crown witnesses. And he makes that point by saying that they, the two accused were both laid face down on the ground or rather on the road, in the area at the front of the vehicle, whilst the police were going into the vehicle by themselves. He even said that he was told not to look up or he would be shot with the gun.

[83] I do not agree with that submission. There was no evidence that the two accused were so laid on the road at the front of their van at all. The evidence of Tevita `Akau`ola was that he sat Tu`ipulotu down about a meter away and to the left of the front left passenger door, not at the front of the van and not lying face down and not told not to look up.

[84] Karsten Leveni stated that when the two accused were out of the van, he explained to them what they, the police, were doing and what they were going to do, and that the search then began. I am sure he would not be doing that if the search was already begun or if there were police officers already entering the van, because if that had happened, the two accused would have objected, and would have rightly claimed that the police had already entered the van without them being present. But they did not raise such objection or make such claim, and I am satisfied that no policeman had entered the van before the search began.

[85] It was claimed by Teulilo in his evidence that a policeman had squeezed his neck from behind him, that is, that that policeman would have had to enter the back seat and grab Teulilo from the back seat, but I do not believe that evidence of his because the only other policeman beside Semisi Tupou, who tried to turn off the van engine, was Tevita `Akau`ola, who was trying to get Tu`ipulotu out of the front left passenger seat. They were the only TRG officers there. The other policemen had to wait until the van was "cleared" by the two TRG officers.

[86] I am satisfied that no policeman or TRG officer had entered the van or had "planted" the methamphetamine that was found in the van.

The diary of action

[87] Third, is the diary of action which was written by the witness Sione Paea. Tu'ipulotu says that that diary is unreliable because it only recorded what Sione Paea was told to record.

[88] A diary of action is not evidence and it is not admissible as evidence unless a particular entry made in it was acknowledged by the accused and that he signed it, in which event only that entry is admitted as evidence. Otherwise, the diary of action is a contemporaneous record that was written at the time an event occurred, and that record may be referred to by a witness to refresh his memory, and then the witness may proceed to speak of his recollection. His recollection which he speaks in Court is his evidence, not what is written in the diary of action.

[89] In accordance with that, I do not take any notice of what was written in the diary of action. I only take notice of what the witness says his recollection is. I therefore agree with Tu'ipulotu, not because Sione Paea only wrote what he was told to write in the diary of action, but because the diary of action is not admissible evidence in this trial.

'Akau'ola's evidence

[90] Fourth, is Tu'ipulotu's submission that Tevita 'Akau'ola's evidence is unreliable because he said in his statement that the door was opened immediately after he knocked on it whereas in Court he said that it took a minute after he knocked for the door to be opened.

[91] I do not agree. 'Akau'ola has stated in Court that what he had told the Court in his evidence was what had happened, and not what he had written in his statement as to the one minute, and I believe him. I believe that the door was not opened immediately. From the evidence of the pieces of methamphetamine scattered on the floor where Tu'ipulotu's feet would have been, it is clear that the pieces of methamphetamine were being scattered either intentionally so that they would not be easily detected, or accidentally, but it is clear that Tu'ipulotu was the one who did it because the empty pack in

which the pieces had been contained, or it was a different empty pack, fell off him as he got out of the van.

- [92] It is clear that Tu'ipulotu did not know of that empty pack otherwise he would have disposed of it in the van, and it proves to me that he was busy doing something and that it took him a minute to do that, as Tevita 'Akau'ola has said in his evidence.

Selective photographing

- [93] Fifth, is Tu'ipulotu's submission that the photographs produced in evidence were selective, that is, they were only of things which the police wanted to be photographed. He says that the police should have started photographing right from the beginning up to the end.

- [94] I am afraid that I and this Court cannot say or direct the police as to how they are to carry out their job. All that I and the Court can do is to see what evidence they bring to the Court and to say whether or not the police has proved its case beyond reasonable doubt, based on the evidence they bring.

Officer Pale's analysis

- [95] Sixth, is Tu'ipulotu's submission that Officer Pale who conducted the analysis of the methamphetamine was not an expert and accordingly his analysis should be disregarded. He submits that the analysis of illicit drugs should be done by an expert because of the seriousness of the offence of possessing illicit drugs. He says that there should be no doubt at all when it comes to analysing any illicit drug.

- [96] I'm afraid that that submission is misconceived; in fact, it cannot be made at all. Section 36 (1) of the Illicit Drugs Control Act, as amended with effect from 8 December 2020, provides as follows:

"36. Analyst certificate

- (1) In any proceedings under this Act, the production of a certificate purporting to be

signed by an analyst shall be prima facie evidence of the facts therein stated.”

[97] Officer Leniti Pale has issued an analyst certificate dated 14 January 2021 stating that he was the analyst of the substance which was seized upon the arrest of the two accused and that he found after his analysis that the substance was methamphetamine.

[98] Section 36 (1) as quoted above says that I must accept that certificate as prima facie evidence that the substance was methamphetamine.

[99] Section 36 (2) provides that the certificate shall only be admissible if a copy of it was served upon the accused together with a notice that the prosecution does not propose to call the analyst as a witness. Both accused admitted in Court on 11 July 2021 that they had both been served with a copy of the certificate and with the said notice.

[100] Neither Teulilo nor Tu'ipulotu gave notice to the prosecution that he wanted the analyst to attend as a witness, as is required by S.36 (4), which provides as follows:

“(4) The accused shall give written notice to the prosecution not more than 30 days after being served with the analyst certificate that he requires the person who made the analysis to be called by the prosecution as a witness and to provide reasonable grounds as to why the analyst is required to be called as a witness.”

[101] Accordingly, the accused cannot now argue that Officer Leniti Pale was not qualified to make the analysis or that the substance has not been proved beyond reasonable doubt to be methamphetamine. Besides, S.36 only provides that the person be an analyst. It does not require that the person be an expert.

Teulilo's submissions

[102] As to Teulilo's submissions, he says that he ought to be believed when he said that he did not break any test tube, or kick Semisi Tupou or know of the pieces of methamphetamine which were scattered on the floor of the van, because he has pleaded not guilty to those charges, unlike the charges against him in his previous case where he pleaded guilty to them. He says that he has so pleaded, in his previous case and now in present case, because he has become a changed person who has seen a new light in his life, having become religious and God fearing.

[103] However, that is not evidence that he did not commit the present 3 offences. I must decide his guilt or innocence on the evidence that have been given during this trial.

The evidence

[104] I must decide both Teulilo's and Tu'ipulotu's charges upon that evidence. That evidence is briefly as follows:

- (a) An informer informed Malolo Vi that Teulilo had drugs with him near Pangi Puloka's place at Hofoa.
- (b) Teulilo said that he and Tu'ipulotu were at Pangi Puloka's place.
- (c) Teulilo and Tu'ipulotu were just leaving Hofoa when Malolo Vi's team were on their way to Hofoa.
- (d) The team met Teulilo and Tu'ipulotu on Hofoa Rd.
- (e) The police van flashed its flashing blue lights and sounded its siren for Teulilo to stop and he stopped.
- (f) Officer Semisi Tupou got out and called to him to turn off his engine and put his hands out.
- (g) Teulilo did not do that. He wound up his window, and so did Tu'ipulotu and Teulilo then backed his van away.

- (h) Semisi Tupou ran up and tried to open the door but Teulilo locked it and kept backing the van away.
- (i) The police van that had gone past Teulilo's van backed up and blocked Teulilo and so Teulilo stopped.
- (j) Tevita 'Akau'ola got to Tu'ipulotu's door but it was locked. He knocked and after 1 minute it was opened.
- (k) Tevita 'Akau'ola saw Teulilo take out a test tube from his pocket and struck it on his window and broke the test tube into pieces.
- (l) Teulilo's door was opened and Semisi Tupou reached for the ignition key to turn off the engine but Teulilo kicked him on his left arm.
- (m) Semisi Tupou punched Teulilo and he was then able to turn off the van's engine.
- (n) No policeman entered the van. Both Tu'ipulotu and Teulilo were taken out and sat on the left side of the van.
- (o) An empty pack fell off Tu'ipulotu on the road as he got off the van.
- (p) Karsten Leveni explained to Teulilo and Tu'ipulotu that the police were going to search them and the van.
- (q) The search then began and pieces of methamphetamine were found scattered on the floor where Tu'ipulotu's feet had been.
- (r) Teulilo told Tu'ipulotu to own up and Tu'ipulotu said that those pieces of meth were his.
- (s) There were 2 empty packs, and 2 earbuds found in a bag in the van. Teulilo said that the bag was his but claimed that he did not put those items in it. The ear buds was for cleaning the test tube.

- (t) There was 2 straws already cut at an angle for use to scoop meth into the test tube found in the van.
- (v) The methamphetamine were analysed and confirmed to be methamphetamine and it weighed 0.13 grams.

[105] Having considered those evidence, and the evidence which the two accused have given, I believe and I accept that both Teulilo and Tu'ipulotu knew about the methamphetamine pieces which were scattered on the floor where Tu'ipulotu's feet were. They both had knowledge of them and they both had control of them. They both had knowledge of them and they both had control of them. They both possessed them.

[106] They both knew that it was a police van that had stopped them and they both heard Semisi Tupou call out to stop the engine and put their hands out. They decided to run away instead. They wound up their windows, and Teulilo backed the van away. They only stopped because the van was blocked from behind as well as from the front.

[107] They then did what they could – they scattered the meth pieces on the floor and smashed one test tube.

[108] I am satisfied that Teulilo was their leader and that Tu'ipulotu had to own up that the meth was his because Teulilo told him to.

Conclusion and verdict

[109] Having therefore considered all the evidence, I am satisfied beyond reasonable doubt that –

- (a) Both Teulilo and Tu'ipulotu jointly and wilfully possessed the 0.13 gram of methamphetamine found in the van without lawful excuse,
- (b) Teulilo smashed the glass pipe or test tube used for smoking methamphetamine with intention that it be not used as evidence against him, and

(c) Teuililo kicked Semisi Tupou in order that Semisi Tupou would not arrest him,

and I find them guilty of the charges with which they are charged in their joint indictment, and I convict them accordingly.

NUKU'ALOFA: 27 August 2021.




Niu J
JUDGE