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

CR 57 of 2021

REX
-v-
KEPILINI POLE'O

REASONS FOR VERDICT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mrs Aleamotu'a for the Prosecution
The Accused in person
Trial: 30, 31 August and 1 September 2021
Verdict: 1 September 2021

The charge

1. By indictment filed 12 April 2021, Sifitanu Afu, and the accused in this proceeding, were charged with a number of drug-related offences resulting from a police operation on 18 December 2020 in which Sifitani's residence at Vaini was searched and the various items, the subject of the charges, were seized. Sifitani has since pleaded guilty to the charges against him together with a number of others and has been sentenced.
2. The accused is charged with destruction of evidence (count 5), possession of illicit drugs (count 6) and possession of utensils (count 7) contrary to ss 37A, 4 and 5A respectively of the *Illicit Drugs Control Act*.
3. On 27 April 2021, the accused pleaded guilty to counts 5 and 7 but not guilty to count 6, possession of 0.41 grams of methamphetamine. This trial concerns that count.
4. During her opening, the Prosecutor tendered the notice to the accused dated 8 March 2021 pursuant to s 36 of the Act and the analyst's certificate identifying the substance seized as being methamphetamine (exhibit P1). Photograph 39 of exhibit P2 (a booklet of photographs) showed the plastic pack of methamphetamine, the subject of count 6, weighing in at 0.41 grams. However, a comparison of the Tongan and English versions of the analyst's certificate showed that the methamphetamine alone weighed 0.13 grams.
5. Accordingly, the Prosecutor sought leave to amend the indictment to that reduced weight and, without objection, leave was granted.

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6. The court heard evidence from five Crown witnesses a number of others who were proposed to call were not required because during the trial the accused accepted evidence from those witnesses concerning the chain of custody of the subject drugs. The following is a summary of the evidence of the Crown witnesses.

Detective Sergeant Litili Televave

7. Detective Televave gave evidence that on the day in question, around 12:30 pm, he received reliable information from an informer that 'ice' or methamphetamine was being sold from Sifitani Afu's residence at Vaini. Even though this was the first information received from that informant, Detective Televave considered the information to be reliable because it was consistent with the result of three previous searches of those premises, all of which resulted in drugs seizures. He also identified from previous experience that the accused and, one, Paletili Afu, also lived in Sifitani's house from time to time.
8. Detective Televave decided to execute a search without warrant at the premises because he considered the nature of the information received was such that police needed to hurry to the premises in case any evidence was sold, destroyed or lost. He also noted that at that time Cyclone Yasa also approached Tonga and that most officers were closed that day. He then assembled a team of officers from the drugs enforcement task force, tactical response group and the dog detector unit.
9. When the officers arrived at that residence, they spoke with Sifitani Afu. He was searched and methamphetamines were found on this person.
10. The photographs in exhibit P2 depicted parts of the house in which police searched a room occupied by the accused and the various contents of that room, including the items the subjects of counts 5 to 7 on the indictment. A sketch map was also referred to by Detective Televave setting out the relative position of the room in the house.
11. When police approached the room in which the accused was found, they could see through a window which had steel mesh on the outside the accused lying on a bed inside the room. They called out to her numerous times that they were police and that she was to open the door. The door remained locked and the accused refused to open it. She said she was afraid of police officers. At one stage, Detective Televave saw the accused turning sideways as if she was trying to hide something in her hands. When she turned around, police kicked the door open. At that point, Detective Televave heard the sound of glass smashing. Photographs 7 and 8 depicted fragments from a glass test tube in the room.
12. When police entered the room, a female officer searched the accused and found cash in her top. The accused was then sat directly outside the open door to the room with a female police officer behind her watching the officers inside the room conducting the search.

13. When asked who normally occupied the room Detective Televave said that Sifitani had told him that the room belonged to Paletili Afu and the accused. At that stage, Paletili had been apprehended outside the house and questioned.
14. The police found empty dealer packs, utensils used for smoking drugs, a large quantity of cash and one pack of suspected methamphetamine the subject of count 6. In exhibit P3, the relevant part of the police search list, item 26 was described as one packet of 'ice' (methamphetamine). Unlike most of the other items in the list, the details of where the packet was found was left blank. Detective Televave explained that, at the time it was found, he was outside the room and that it was Detective Finau who found the packet of methamphetamine.
15. When Detective Televave cautioned and then questioned the accused, he asked her if the utensils found in the room and other items described in the search list belonged to her. She said 'no'. That is to be compared to her subsequent plea of guilty to those charges.
16. The other details of the search of the room in which the accused was found were recorded in the police diary of action which was tendered and marked exhibit P4. Relevantly, the diary of action records the following:
 - (a) Entry 49: Detective Pohiva found one test tube that was covered with a piece of white cloth on top of the table in the room. Detective Pohiva saw that when he kicked the door, Kepilini was smashing a test tube on top of the table and it broke.
 - (b) Entry 50: Detective Televave asked Kepilini why the test tube was smashed, and she said she might have hit it and smashed it. She was then charged with possession of utensils. That entry was signed by the accused.
 - (c) Entry 51: Detective Pohiva found a scale inside the first drawer close to the wall. Detective Televave informed Kepilini of her rights to remain silent. He asked her what he was holding in her hand and she said it was a scale and it was something that was just thrown around there. She was then charged with possession of utensils and that entry was also signed by the accused.
 - (d) Entry 55: Detective Paea found one bottle used like a bong attached with a hose or tube under the table where the TV was. Detective Televave warned Kepilini again and asked her what the item was. She said it was just a bottle. She was then charged with further in relation to possession of utensils. That entry was also signed by the accused.
 - (e) Entry 56: Detective Finau found one pack of 'ice' placed in the wall near the bin. Detective Televave again warned Kepilini of her rights and then asked her who the pack of ice belonged to. Kepilini said 'it's a pack of ice' but it did not belong to her. She was then charged with possession of illicit drugs. That entry was also signed by the accused.

- (f) Entry 57: Detective Paea found one empty pack already ripped on the floor beside the bed. The accused told Detective Televave that they were empty packs and that while they were not hers, it was her room. She was then further charged with possession of utensils. Again, she signed that entry.
 - (g) Entry 59: Detective Finau found a total of \$2,400 in cash inside the base of a fan.
 - (h) Entry 60: Detective Paea found a black shoe which contained a black plastic bag which had empty packets inside. After again being cautioned, the accused was asked what was inside the plastic bag. She said they were empty packs, but she did not know to whom the shoe belonged as there was no other shoe to the pair. She was again charged with possession of utensils. She signed that entry.
 - (i) Entry 62: Detective Paea found a pack containing empty packs stuffed in the underside of a chair frame. After again being cautioned, the accused told Detective Televave that they were empty packs, but she did not know whom they belonged because "a lot of kids come here". She was again charged with possession of utensils and she signed that entry.
17. Each of the items to which I have just referred were depicted in the photographs comprising exhibit P2. Relevantly, photographs 26 and 27 show the location in which the pack of methamphetamine the subject of count 6 was found. The container was variously described firstly as a table and later as a bin. It was a blue plastic container roughly the size of a medium size container. The lid was opened and the pack of what was found to be methamphetamine was wedged in under the hinge line along the edge of the case.
 18. At the completion of the search, and after those who had been arrested at the premises were taken to Central Police Station, Detective Televave filed a report pursuant to s 24(3) of the *Illicit Drugs Control Act*. The report was tendered as exhibit P5. It was dated 21 December 2020. It contained a description of all the items of drugs and drug-related paraphernalia found and seized from the search. It also listed the person who were arrested in connection with the seized items. They were Sifitani Afu, the accused and one Kelepi Maile. Notably, Paletili Afu was not arrested.
 19. The accused asked Detective Televave whether the police officers who searched her room were themselves searched beforehand. Detective Televave confirmed that all the officers were searched before conducting the search of the premises which he described as "a must" before conducting any search.
 20. The accused then put to Detective Televave that the police planted the pack of methamphetamine. He denied that assertion and said that he saw no evidence of any officer planting methamphetamine during the search. I pause to note that the accused did not make that same allegation to police when the drugs were first shown to her.

21. The accused also put to Detective Televave, and he confirmed, that when Paetili was brought in after the subject pack of methamphetamine was found, he denied that it belonged to him.

Detective Tevita Pohiva

22. Detective Pohiva was also a member of the Drugs Enforcement Taskforce. Relevantly, he was one of the officers who searched the room in which the accused was found. He described it as the accused and Paetili's room because during previous searches, police had found both of them in that room and they had then said that it was their bedroom.
23. Detective Pohiva's evidence was consistent with Detective Televave's evidence. Further, he actually saw the accused smashing the test tube when the police entered the room. He also noted that most of the items in the room were for a female such as clothes, makeup, perfume and lotion.
24. In cross-examination, the accused put to Detective Pohiva that the search in question was in fact the first search conducted of the premises. He denied that and confirmed that there had been previous searches at the premises including most recently one about a month beforehand. He added that the accused was present during that search.

Detective Taniela Finau

25. Detective Finau was another member of the Drugs Enforcement Taskforce. He was also one of the officers who searched the room. He said that he initially stayed outside the room while the TRG cleared the house. When he got to the accused's room, she was already sitting outside it. During his part in the search of that room, Detective Finau confirmed that he found the pack of methamphetamine in the location depicted in photographs 26 and 27 to which I have referred. He also found the cash inside the base of the fan.
26. Detective Finau was not cross-examined.

Detective Emily 'Otuhouma

27. Detective 'Otuhouma was the female officer who originally searched the accused and found cash inside her top. She also compiled the search list. She was present when Detective Finau found the pack of methamphetamine. She confirmed that the accused was sitting on a chair directly outside the doorway to the room watching the search take place. Photographs 17 and 18 showed the accused's position with Detective 'Otuhouma standing behind her.
28. Before being taken to the police station, the accused retrieved some clothes from the room which had been searched. Detective 'Otuhouma noted that there were also articles of male clothing and shoes in the room.

29. During cross-examination, the accused put to Detective 'Otuhouma that she did not see the pack of methamphetamine when Detective Finau said he found it. The detective explained that she had a clear line of sight when Finau opened the bin lid which was about 2-3 metres from where she was in the room. She saw Finau open the bin lid with his right hand. She could not recall any delay between him opening the lid and then saying that he had found something. She did not see Detective Finau reach into his own pocket, for example, or take anything out or plant the drugs. She added that Detective Televave was immediately informed when the pack was found. When he came, the pack was photographed in situ. It was not moved in between times.

Constable Lile Fatai

30. Constable Fatai recorded the entries in the diary of action for the operation that day. She confirmed that she recorded each event as it occurred. She also confirmed that the accused signed the entries referred to above.
31. Constable Fatai featured in photographs 3 and 17. In the latter, she was seen inside the room directly visible to the accused at the point in time Detective Finau found the methamphetamine. She described the location as being a blue bin. She saw Finau open the lid and the pack wedged inside the hinge.
32. During cross-examination, the accused put to Constable Fatai that the accused was not 'read her rights' at the time when she was asked to sign the diary; she was simply just told where to sign. The Constable denied those allegations and explained that at the end of the work during the operation, around 6:20 pm, the accused was given an opportunity to read what was in the diary before signing the relevant entries. She said the accused appeared to read all the entries which were pointed out to her by the constable as being relevant to the accused. She confirmed the accused then freely signed the entries. She added that the accused did not say at the time that she did not want to sign the diary of action and that if she had, the constable would have recorded it.

Accused

33. Following the conclusion of the Crown's case, the accused elected to give an unsworn statement from the bar table. Relevantly, she said that:
- (a) at the commencement of the search, she did not open the door because she was scared as there were 'a lot of police' who appeared at her door;
 - (b) she also knew about the test tubes and other utensils in the room which is why she pleaded guilty to those charges;
 - (c) when the police kicked the door open, she was pushed towards the bed. She said she screamed because she was scared someone might beat her up. Constable Fatai told her not to be scared because they would not do anything to her;

- (d) her recollection of the balance of the search was consistent with the police accounts;
- (e) she was 'shocked' when one of the officers called her to come and look at the pack of methamphetamine and asked her what it was. She told the officers that she knew what it was and that it was 'ice'; and
- (f) when asked to whom the 'ice' belonged, the accused said she did not know.

Paletili Afu

34. The accused then called Paletili Afu. She explained earlier in the trial that she intended to call both Sifitani and Paletili and that she had made that decision the day before the trial commenced when she visited them at the prison. After discussions with the accused, it was evident that Sifitani's evidence, if any, was unlikely to be relevant but that Paletili's might be. Accordingly, I ordered that Paletili be brought before the court in the afternoon on the second day of the trial.
35. He gave sworn evidence which may be summarized as follows:
- (a) there was no methamphetamine at his 'home' (meaning his room) that day;
 - (b) when police showed the subject methamphetamine to him, he said he knew nothing about it;
 - (c) he had been in a relationship with the accused for the last 2 ½ to 3 years;
 - (d) the room belonged to him, but the accused came over and slept with him there on weekends which was why there were female belongings in the room;
 - (e) when asked whether he was aware that the accused had pleaded guilty to counts 5 and 7, including the possession of the utensils found in the room, he said that they belonged to him because it was his room;
 - (f) when asked whether he knew why the accused had pleaded guilty to that count, he said she felt sorry for him because, at the time, he had only just been released from prison where he had been on remand for some four months;
 - (g) he never told the police during the search that the utensils belonged to him;
 - (h) the accused never used the utensils to smoke drugs herself; and
 - (i) he heard the police during the search ask the accused about the utensils and that she admitted to owning them.
36. Towards the end of Paletili's evidence, the court translator brought to my attention that when he was asked whether the utensils belonged to him, the accused, who was standing at the bar table, mouthed the word "yours" in Tongan to him. When that was put to the accused, she agreed that she had done so because, she said, Paletili "looked like he was having a difficult time answering the question".

Submissions

37. In closing submissions, the accused had nothing further to add.
38. The Prosecutor submitted that:
- (a) most of the Crown's evidence was circumstantial;
 - (b) the accused's failure to open the door, requiring the police to force it, and the time she was in the room before the door was opened, suggested that the accused was trying to hide something which might incriminate her;
 - (c) the accused's statement to the court in which she admitted to the utensils meant that she must have known about the methamphetamine;
 - (d) there was no evidence to support the allegation that the police had planted the methamphetamine – "they were just doing their job";
 - (e) it could be inferred from her actions before the search was conducted that the accused had knowledge of the methamphetamines in the room and that she exercised some form of control over them;
 - (f) Paletili's evidence should be rejected because he was trying to protect the accused. He is currently serving a lengthy prison sentence for drug-related offending and it would make no difference to him if another term was imposed.

Consideration

39. I turn firstly to whether the search without warrant was lawful. Even though no issue was taken by the accused, which is not surprising given she was not legally represented, the Prosecutor did raise it and I will address it.
40. Section 24 of the *Illicit Drugs Control Act* enables an officer to carry out a search without a warrant if two requirements are fulfilled. The first is that the officer must have reasonable grounds to suspect that there are, relevantly, illicit drugs or other evidence relating to an offence under the Act in the place in question. Secondly, the officer must suspect on reasonable grounds that it is necessary to search without warrant to prevent the concealment, loss or destruction of anything connected with an offence under the Act, and that the circumstances are of such seriousness and urgency as to require the immediate exercise of the power to search without the authority of a warrant.
41. In this case, if the police had executed the search without warrant only on the basis of the information received from the first-time informant, I may have been concerned about the lawfulness of the search. However, I am satisfied that by the combination of that information and the previous successful searches, the police had reasonable grounds to fulfil the first limb of s 24.

42. I also accept that the nature of the information regarding methamphetamines being sold at the premises suggested that the police had to act urgently. Otherwise, any evidence could have been removed, destroyed or lost.
43. Therefore, I am satisfied that the search without warrant was lawful.
44. Even if the search was not lawful, I would not have been inclined to exclude the evidence for the reasons discussed and the discretionary approach taken in decisions of this Court in cases such as *R v Kitekei'aho* (unreported, Supreme Court, CR 36/2015, 27 July 2017), where Justice Cato stated at [24]:
- “... I raised with counsel the approach of the High Court of Australia in Bunning v Cross (1978) 141 CLR 54 where the Court sanctioned a balanced approach to such issues. The Court in considering whether illegally obtained evidence should be admitted had to balance the public interest in maintaining the integrity of search and seizure procedures and ensuring that those whose task it is to enforce the law act lawfully, against the public interest that those who commit criminal offences should be brought to justice” ...*
45. By application of the factors averted to by Stephen and Aickin JJ in *Bunning*, I would have found that:
- (a) there had been no deliberate disregard of the law;
 - (b) the evidence may not have just as easily been obtained if the police had to first obtain a warrant;
 - (c) the evidence was highly cogent and any illegality in the search would not have affected that cogency;
 - (d) the evidence was not only important, but vital, in the context of the case;
 - (e) the evidence was of an evanescent nature, so that if there was any delay in securing it, it could have ceased to exist; and
 - (f) any offending involving methamphetamines is very serious.
46. On that basis, the instant case may be distinguished from others such as *Tomasi* [2019] TOSC 38¹, *Pisima'ake* [2020] TOSC 22 and *Selu* [2021] TOSC 17 in which evidence from unlawful searches without warrant was excluded.
47. I turn now to an assessment of the witnesses and the evidence they gave.
48. Save for one minor inconsistency by Detective Finau as to the time of the search, which was inconsequential given the contemporaneous records, I found the evidence of each of the Crown witnesses to be clear and consistent and I accept their evidence in full.
49. The accused did not give sworn evidence, as was her right. However, a number of observations can be made.

¹ Overturned on appeal in *Attorney General v Tomasi* [2019] TOCA 19, but on a different point.

50. Firstly, her statement regarding pleading guilty to possession of the utensils was inconsistent with Paletili's evidence that they belonged to him.
51. Secondly, her refusal to open the door to police and then smashing the test tube when they did enter, in my view, constituted a consciousness to guilt.
52. Thirdly, she admitted to police that she knew the pack contained methamphetamine.
53. Fourthly, I found Paletili Afu's evidence unreliable. As noted, he is currently serving a lengthy sentence for possession of methamphetamines and other drug-related offences. He was, however, not charged on this occasion. His evidence that during the search, the accused admitted to police that she owned the utensils, was inconsistent with the diary of action in which the accused did not admit to owning the utensils. That was also inconsistent with his evidence that he owned them. He did not say anything to police at the time to that effect. In my view, that was not because he was 'tired' of being in custody for the previous four months, but because the items did belong to the accused.
54. Fifthly, having regard to the fact that the accused spoke with Paletili the day before the trial commenced, and what occurred during his evidence in which she mouthed to him that he was to answer that he owned the utensils, I have come to the view that the accused and Paletili tried to concoct a story to support the accused's case that while all the other drug paraphernalia in the room belonged to her, which was all for the purpose of dealing with and smoking methamphetamine, the pack of methamphetamine found was planted by police. There was no evidence of any motive or opportunity for Detective Finau, or any other officer, to have planted the methamphetamine, and Detective 'Otuhouma's directly refuted it. That, combined with Detective Televave's unchallenged evidence that each of the officers involved in the search were themselves searched for any illicit material before the search commenced, leads me to roundly reject the accused's unfounded allegation of planting.
55. Finally, as a matter of law, for a charge of possession of illicit drugs, the Prosecution must prove beyond reasonable doubt that the accused had knowledge of, and some control over, the drugs: e.g. see *Uasike* [2020] TOSC 88 and *Fa'aoa* [2021] TOSC 38.
56. Here:
 - (a) the accused shared the room with Paletili;
 - (b) she was in a relationship with him for over two years;
 - (c) she apparently spent weekends there and slept there;
 - (d) the search in question took place on a Friday;
 - (e) she failed to open the door when instructed by police;
 - (f) she smashed the test tube when the police entered;

- (g) she told the police she knew the pack contained methamphetamine;
 - (h) she pleaded guilty to counts 5 and 7 which I do not accept was in order to protect Paletili; and
 - (i) during Paletili's evidence, when he was asked who owned the utensils (something they obviously had not discussed the day before trial), she mouthed 'yours' to him.
57. Those findings of fact and observations on the evidence provide a sound basis for inferring that the accused knew of the methamphetamines and had some control over it.
58. I am therefore satisfied beyond reasonable doubt that the charge has been proven and I find the accused guilty of unlawful possession of 0.13 grams of methamphetamine.

NUKU'ALOFA
1 September 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE