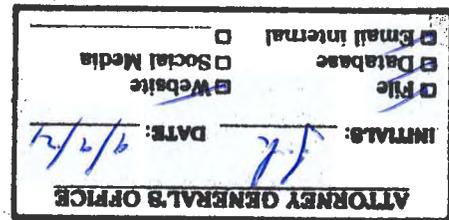


IN THE SUPREME COURT OF TONGA  
CRIMINAL JURISDICTION  
NUKU'ALOFA REGISTRY



CR 93 & 94 of 2021

REX

-v-

[1] TUPOU TAFUNA  
[2] 'AMELIA TAFUNA

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## REASONS FOR VERDICT

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BEFORE: LORD CHIEF JUSTICE WHITTEN QC  
Appearances: Mr T. 'Aho for the Prosecution  
Both Accused in person  
Trial: 1, 2 September 2021  
Verdict: 2 September 2021

### The charges

1. In this matter, the accused, who are married, stand charged jointly with one count of possession of 3.82 grams of methamphetamine and one count of possession of 22.6 grams of cannabis, contrary to s 4 of the *Illicit Drugs Control Act*. 'Amelia also stands charged with one count of obstructing a police officer in the performance of her duty, contrary to s 29(a) of the Act.
2. The accused were self-represented. At the time of their committal to this court, a direction of this court was in place which required the office of the Director of Public Prosecutions to serve with the indictment and summary of facts, indicative sentencing submission and a copy of an information guide for self-represented defendants on the criminal trial process. Mr Aho, who appeared for the Crown, confirmed that to the best of his knowledge the guide was among those documents served on the defendants. The Defendants said they could not recall receiving it. Therefore, on the first day of the trial, the matter was stood down for several hours (due to an unrelated reason), during which the defendants were provided with another copy of the information guide. When the trial resumed that afternoon, they confirmed that they had familiarised themselves with the guide. Importantly, the guide provided details of what is commonly known as the rule in *Browne v Dunn* (1893) 6 R 67 which requires, relevantly here, a defendant to put to an opposite witness any version of events which the defendant contends happened which is different to the evidence given by that witness so that the witness is given an opportunity to respond to the alternative version.

09 SEP 2021  
JH

## Evidence

3. The Prosecution called evidence from Senior Constable Tuivai, Senior Constable Fihaki, Constable Tevita Pohiva, Senior Constable Punaivaha, Constable Afu and Constable Laulelei Kava.
4. The Prosecution also adduced documentary evidence bound into a book of documents. No objection was taken to any of those documents being tendered into evidence.
5. During the trial, the Defendants took turns cross-examining several of the Crown witnesses. The questions asked by the Defendants did not reveal any feasible defence to the charges, failed to engage with the real issues in the case (if any) and did not seek to contradict any material aspect of the Crown's evidence in any meaningful way.
6. As a result, the totality of the evidence of the Crown witnesses may be summarised as follows.
7. On 15 October 2020, at approximately 5:40 PM, Senior Constable Tuivai of the drugs enforcement task force received information from one of his informants that Tupou Tafuna was selling cannabis and methamphetamine from his residence in Sopu and that a number of vehicles, all with dark tinted windows, were coming and going from that residence. Tuivai passed that information onto Senior Constable Fihaki. Fihaki considered the information to be reliable for two reasons. Firstly, he had been working with Tuivai for the past five years and during that time all information provided had been reliable. Secondly, Tupou Tafuna had been a long time suspect of drug offending and the subject of a number of previous searches. He added that Amelia was also known to police.
8. Fihaki decided to raid the accused property without a search warrant. He relied on s 24 of the Act because he considered that the nature of the information, namely, that drugs were being sold at the accuseds' property, meant that the police had to act urgently, otherwise any drugs or other evidence relevant to an offence under the Act could be lost.
9. He then assembled a team of more than 10 officers from the Drugs Enforcement Task Force, Tactical Response Group and the Dog Detector Unit. Around 6 PM, the team proceeded to the Defendants' residence.
10. After the TRG had cleared the property for any firearms, the officers from the Drugs Enforcement Task Force entered the property. Fihaki found both the accused sitting at the back of the house on the patio. He informed them as to why they were there, and that pursuant to s 24, police would be conducting a search of the house in relation to illicit drugs. Tupou Tafuna later stated that he communicated his consent to the search.
11. Constable Afu gave evidence that she was instructed by the officer in charge to search Amelia's person. Amelia was asked to come into the kitchen of the house

for that purpose. She refused to do so. After a number of requests, she eventually complied. She was asked to turn around and place her hands on the refrigerator so that the officer could pat her down. As the officer started to do so, Amelia brushed the officer's hands away and said she did not consent to being searched. She was told to stand still but refused to do so. She brushed the officer's hands away a number of times. Amelia then went to open the fridge and the officer told not to do so. The officer was pregnant at the time and was becoming concerned for her own safety. She therefore asked Fihaki for handcuffs to restrain Amelia. When the officer tried to apply the handcuffs, Amelia brushed the officers hands away again. As the constable could not restrain Amelia, another officer (Pua) assisted in handcuffing Amelia. She was then searched. She was later charged with obstructing police which constitutes count 3 on the indictment.

12. A sketch plan of the layout of the house was produced which, relevantly, depicted a cavity wall made of timber framing and clad with plywood between the Defendants' bedroom and a bedroom occupied by their eldest daughter who was said to be 11 years of age.
13. Photographs of the scenes at the search and the items seized as a result were taken. However, Mr 'Aho advised that they had all been either corrupted or lost. Notwithstanding, the balance of the oral testimony and documentary evidence painted a sufficiently clear picture of the scene and what was found there.
14. When the daughter's bedroom was searched, the police sniffer dog pointed to an area above a cupboard in a corner of the room opposite the bed. Senior Constable Punaivaha, the dog's handler, and who was related to Tupou, gave evidence that when he inspected the area of the room where the dog was pointing, he noticed that the plywood sheets along the wall were about 4 inches short of the ceiling. In particular, the sheet behind the cupboard where the dog was pointing was only fixed by one screw, whereas the other plywood sheets were all fully nailed to the framing. He removed the sheet behind the cupboard to find within the cavity an amount of cash, a white bottle and a small black bag. When he turned to show Tupou what had been found, he said that Tupou appeared to be asleep on a chair in the room.
15. The Senior Constable then opened the white bottle and found a number of small packs inside which contained white substances. From his experience, he suspected that the substances were methamphetamines.
16. He also gave evidence of a milk carton being found in a hole in the ceiling space in that bedroom. The carton contained leaf material wrapped in foil, which from the officer's experience, appeared to be cannabis. He also showed that to Tupou, who said that it did not belong to him.
17. The items seized from the search were recorded in a search list. They included, relevantly, the pill bottle which turned out to have 30 packs of methamphetamine inside, the cannabis, \$1550 in cash which included 24 x \$50 notes, test tubes

and weighing scales. The same items were recorded in the police exhibits register.

18. The white powder and leaf material were later analysed and confirmed to be methamphetamine and cannabis and of the weights specified in the indictment. The analyst's certificate in respect of the methamphetamine, using the TruNarc spectrometry analyser, was tendered as prima facie evidence pursuant to s 36 of the Act. A similar certificate in respect of the cannabis was tendered and the forensics officer who conducted that testing also gave evidence confirming the findings. He analysed a small sample of the total amount of the leaf material. Pursuant to s 34(1) of the Act, the finding in respect of the sample deems the rest of the seized leaf material to also be cannabis. The Defendants did not raise any objection to that scientific evidence.
19. At the conclusion of the Crown case, Tupou elected to give an unsworn statement from the bar table. Relevantly, he said that on the day in question he and a number of other people were doing work on the house. Part of the roof was open. He was shocked when the police arrived. He had no knowledge of the drugs found in the house. Equally importantly, he said there were other people there that day who were searched by police and found to possess cannabis, a pipe for smoking drugs and a scale, but they were not arrested. He described them as construction workers by the names of "Feto", "Aisake" and "Sioasi". None of them were called to give evidence. Moreover, when asked why he did not put any of those matters to any of the Crown witnesses, Tupou said it was because they were not mentioned by the police witnesses.
20. When asked to clarify whether his reference to the other men he said were found with drugs and related items meant that he considered that one or more of them owned the drugs found in his daughter's bedroom, he first of all said that yes they did belong to those men although he did not see them and he had no knowledge of the drugs.
21. Tupou also stated that Amelia was ill that day and that when the police tried to cuff her and she shook them off, a police officer slapped her face. That too was never put to any of the Crown witnesses.
22. 'Amelia elected to give sworn evidence which may be summarised as follows:
  - (a) On the day in question, she was in the living room with her husband and children. She felt cold so she went to her daughter's room to sleep. She was awoken by noises on the roof. She knew that workers were there fixing the roof including Feto. She called out to him and he responded. She then heard other sounds which got louder and then another voice said "stand still, it's the police". She opened the door to find an officer in the living room telling the children to go outside. A male officer asked her to come in. Because she was wearing shorts, she refused. She turned to get a lavalava so she could come out. The officer kept telling her to come out. She told him

wait so that she could find a blanket to cover herself. She grabbed her daughter's blanket and walked out with it. As she did so, she saw her husband handcuffed sitting on the ground. She asked what was happening. Other officers came out to start the operation. She then said that was when a "misunderstanding" occurred.

- (b) Detective Fihaki appeared, and female officer approached to handcuff her. The officer told her to sit next to Tupou. She refused because the blanket she had was small. A female officer then led her to the kitchen to search her. Amelia asked if they could go to another area because there are a lot of males around. The officer agreed and they went to another area. 'Amelia took of the blanket so the officer could start the search. However, she then asked if the officer could wait because there were still two officers standing by the door with her brother-in-law. 'Amelia told the officer that she had her period. The officer said it was okay and that she would start the search.
  - (c) After Amelia was searched, she was then brought outside. The police tried to make her sit down. She said she did not want to sit down because there were a lot of males around. So the police ended up carrying her to their vehicle. At one stage, she said, they dropped her and then dragged her, resulting in marks on her body. She said there was an engineer or mechanic fixing their car who witnessed this. I pause to note that none of that was ever put to the police witnesses, nor was the engineer ever called to give evidence.
  - (d) 'Amelia said that when she was placed in the police vehicle, she waited there until the police called her to see what they had found in the house. She was asked whether she knew who the drugs belonged to. She said she did not. She was then returned to the vehicle where she stayed until taken to Central Police Station.
23. During her cross-examination by Mr Aho, 'Amelia said that:
- (a) she and her husband had four children ranging in ages from 5 to 11;
  - (b) her 11-year-old daughter, in whose bedroom the drugs were found, was not a drug dealer, nor were any of their younger children;
  - (c) she and her husband has been living in the house since 2011;
  - (d) during that time, there had been no work done to the subject wall;
24. In response to questions about the plywood cladding on that wall, 'Amelia initially disputed the description by Senior Constable Punaivaha of the sheet behind the cupboard only being fixed by one screw. When asked why she did not put that to him when he gave his evidence, 'Amelia said she did not think it was important. She then said she did not know if that sheet was fixed by only one screw or more. She also then said that she did not know whether the other sheets along the wall were screwed or nailed. Later on, however, she said that all the plywood along

the wall was fixed by screws. She also said that the police took all the sheets of plywood off the wall during the search but that none of them were damaged. Again, none of that was put to the relevant police officers.

25. 'Amelia was then asked whether there were any other adults living in that house at the relevant time. She explained that Feto, who was named by her husband, and was one of his friends, had been living with them that year. She said that he had been sleeping in another small room on the other side of the daughter's bedroom where the drugs were found. 'Amelia said that she did not know whether Feto used drugs and denied that he was a drug dealer.
26. She was also asked about her and her husband's employment. She was not working. She described Tupou as fixing washing machines and cars, although she considered that he did not earn enough because he fixed a lot of things for free and many of his customers were his friends. Therefore, they lived off help from his and her families. Tupou also had kava growing in Tofua which her brother helped with since his bail conditions precluded him from leaving Tongatapu without a court order.
27. Finally, when asked how, in her view, the drugs came to be in the wall cavity and the roof space above the bedroom, 'Amelia said she did not know.

### **Submissions**

28. The defendants declined an invitation to make closing submissions.
29. Mr Aho submitted, in summary:
  - (a) in relation to the warrantless search:
    - (i) Fihaki took into consideration the nature of the information and the urgency associated with it;
    - (ii) that, combined with Fihaki's trust in Officer Tuivai, with whom he had worked for five years, and from whom all previous information had been reliable and relevant, satisfied Fihaki of the need for the search;
  - (b) he drew attention to the one screw holding the relevant sheet of plywood behind the cupboard;
  - (c) he also noted that the \$1,550 in cash found with the drugs in the wall cavity, included 24 x \$50 notes as being significant, because it was consistent with Fihaki's evidence that the going retail price for a 0.4-gram pack of methamphetamine is \$50;
  - (d) that cash plus the methamphetamines, empty packs and scales found supported an inference that there was drug dealing going on at the residence, which also corroborated the initial information to Tuivai and relayed to Fihaki;
  - (e) 'Amelia's evidence should be rejected because she was only attempting to distance herself from the drugs found in her and the husband's house;

- (f) Feto was said to have been only having on the roof of the house, i.e. there was no work done on the subject wall where the drugs were found;
- (g) there was no evidence of anyone other than the occupants of the property having access to the cavity in the wall; and
- (h) therefore, the drugs belonged to the defendants.

### **Search lawful**

- 30. I turn now to consider whether the search without warrant was lawful. Even though no issue were taken by the defendants, which is perhaps not surprising given they were not legally represented, the Prosecutor did raise it briefly and I will address it.
- 31. Section 24 of the *Illicit Drugs Control Act* enables a police 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 a possible 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.
- 32. In this case, I accept that the information originating from Tuivai's informant, as conveyed to Fihaki, the length of time they had been working together with similar information proving reliable, together with the previous searches at the defendants' residence, constituted reasonable grounds for suspecting that an offence under the Act was being or may have been committed at the residence.
- 33. I also accept that the nature of the information regarding drugs being sold at the premises suggested that the police had to act quickly, otherwise any evidence could have been removed, destroyed or lost.
- 34. I am therefore satisfied that the search without warrant was lawful.

### **Assessment of witnesses**

- 35. I now turn to an assessment of the witnesses.
- 36. Tupou's unsworn statement was not strictly speaking evidence. As such, it was unable to be tested. I therefore place little weight on it.
- 37. More tellingly, however:
  - (a) the matters he asserted during his statement to the effect of the other three men being at the premises that day and that they were found to have drugs or drug-related items in their possession;

- (b) that he implicitly attempted to blame them for the drugs the subject of counts 1 and 2, but without going as far as to squarely allege that they belonged to any one or other of those men (including Feto); and
- (c) his failure to put any of those matters to any of the police witnesses when he had been provided with information explaining the importance of doing so,

all smacked of recent invention.

38. In relation to 'Amelia:

- (a) the inconsistencies in her evidence concerning her search resulting in the obstruction charge;
- (b) her changing evidence about the plywood cladding in the room in question; and
- (c) her assertion about having been dropped and dragged by the police, none of which was put to any of the police officers, and no other witnesses were called to corroborate her account,

rendered her evidence unreliable.

39. On the other hand, I found the evidence of all the Crown witnesses to be consistent and credible. I therefore accept their evidence and prefer it wherever it differed from 'Amelia's.

### **Possession**

40. In relation to the possession charges, the Prosecution must prove, beyond reasonable doubt, that the defendants had knowledge of, and some control over, the drugs found, as discussed more recently in *R v Uasike* [2020] TOSC 88 and *R v Fa'aoa* [2021] TOSC 28.

41. Here, having considered all the admissible evidence adduced at the trial, and based on the above assessment of that evidence, I have come to the conclusion that the only plausible explanation for the presence of the drugs in the wall and ceiling cavity, and of which I am satisfied beyond reasonable doubt, is that the defendants both had knowledge of the drugs and control over them because they put them there.

42. I am fortified in that view because:

- (a) the defendants had lived in the house for approximately 10 years;
- (b) there was no evidence of anyone else having access to the wall cavity; and
- (c) the shortcomings and unreliability revealed by Tupou's statement to the court and 'Amelia's sworn evidence all reflected a consciousness of guilt and a forlorn attempt to distance themselves from ownership of the drugs without any logical basis founded in the evidence.

**Obstruction**

43. In light of my acceptance of and preference for the Crown evidence in relation to the events concerning the obstruction charge against 'Amelia, I find that charge also proven.

**Verdict**

44. Accordingly, I am satisfied that the Prosecution has proven the three counts beyond reasonable doubt and I therefore find the defendants guilty on all counts.

NUKU'ALOFA  
2 September 2021



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

M. H. Whitten QC  
LORD CHIEF JUSTICE