

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

ATTORNEY GENERAL'S OFFICE	
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CR 45 of 2021

REX
-v-
'OKUSITINO MAKA LANGI

REASONS FOR VERDICT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr T. 'Aho for the Prosecution
Mr D. Corbett for the Accused
Trial: 7, 8, September 2021
Verdict: 9 September 2021

The charges

1. In this matter of 'Okusitino Langi stands charged with two counts of possession of illicit drugs contrary to ss 4(a)(iii) and (ii) of the *Illicit Drugs Control Act*.
2. During the course of the trial, the Prosecution applied to amend the indictment to increase the weight of the methamphetamine alleged in count 1 from 42.19 grams to 43.85 grams and to reduce the amount of cannabis alleged in count 2 from 31.12 grams to 2.61 grams. The reason for the first was a minor arithmetic error. The reason stated for the second was that the Prosecution were unable to locate documentary evidence of the actual amount of cannabis alleged to have been seized, for which the accused was charged, and was therefore content to proceed on the basis of the weight of the samples recorded in the analyst's report. Mr Corbett, who appeared for the accused, did not object to either amendment and leave to amend was granted accordingly.
3. In order to secure a conviction in respect of either or both counts, the Crown is required to prove each of the essential elements of the charges beyond reasonable doubt, namely, that:
 - (a) on or about 13 July 2020;
 - (b) the accused;
 - (c) knowingly possessed;
 - (d) a class A and/or B drug (respectively, being the methamphetamines and/or cannabis referred to above).

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4. The evening before the start of the trial, Mr Corbett informed the Prosecutor, Mr 'Aho, that he had been instructed to challenge the lawfulness of the search without warrant (discussed further below) and the admissibility of evidence obtained by the police during that search. It was therefore expected that a voir dire would first be conducted. However, at the commencement of the trial, Mr Corbett informed the Court that after reviewing the authorities, he has decided to proceed with the trial.

Documentary evidence

5. The Prosecution tendered a number of documents which were conveniently bound in a paginated booklet and which included:
 - (a) a series of photographs taken during the course of the search on 13 July 2020 including the interior of a room of the house in question which according to a sketch map at page 1 of the booklet was marked as room 5. In that room there was a large bed and, more relevantly, a tower of built-in shelving. At a height of about 6 feet, there was a large flat screen TV which had been mounted on a solid piece of wood and connected to the wall of the shelving by hinges, which permitted the TV to be swung out exposing the inside of the deep shelf behind. I will return to further aspects of those photographs when summarizing the Prosecution evidence. Suffice to say, for now, that the balance of the photographs depicted numerous plastic bags or clip lock bags referred to as 'dealer packs' containing white crystals in some and plant material in others;
 - (b) a search list of the items seized on the night in question which included cannabis and 22 packs of suspected methamphetamine;
 - (c) excerpts from the police diary of action;
 - (d) excerpts from the exhibit register containing the same items as described in the search list;
 - (e) analysts' certificates and s 36 notices stating that the substances seized were methamphetamines and cannabis and that the weights tested were in accordance with those specified in the amendments to the indictment. That evidence was not contested by Mr Corbett;
 - (f) a report by Sergeant Carson Leveni, dated 16 July 2020, to the Chief Magistrate, pursuant to s 24(3) of the *Illicit Drugs Control Act* which identified, amongst other things, that the items seized during Operation Hangale included 24 packs of 'ice' weighing 48.46 grams. It also recorded that in addition to the accused, another man by the name of Saia Hakaumotulosi ("Saia") was also arrested and charged with possession of other cannabis and a utensil for smoking it; and
 - (g) a letter from Sergeant Leveni, of the same date, and again, to the Chief Magistrate in relation to the cash that was seized during the operation.

Relevantly, the Sergeant opined that the cash seized was, “without reasonable doubt”, related to drug dealing.

6. Of those documents, Mr Corbett only raised initial objection to the excerpts of the police diary of action. He did not state a basis for the objection. All other documents were tendered by consent.

Prosecution witnesses

Inspector Vi

7. Inspector Malolo Vi was, at the relevant time, a member of the Drugs Enforcement Task Force.
8. On 13 July 2020, he received information from one of his police informants that drugs were being sold by the accused at his residence at Halavave and that there were other persons in front of the house helping the drugs being sold. Inspector Vi knew the accused through long-standing family connections. His informant had provided information of more than 10 previous occasions, and each of those operations have been successful from that information, save for a few where Inspector Vi said that he had acted “too late” on the information provided.
9. As a result of that information, shortly after 10pm, Inspector Vi drove past the accused’s residence to confirm the information. He noticed people in cars parked at the front of the property.
10. He then decided to conduct a search without a warrant. His stated reasons for that decision were the reliability of the information from the informant and the urgent nature or time sensitivity of the information that there drugs being sold at the premises, such that if the police did not act immediately, they might have made another ‘mistake’ (as he called it) and it would be too late.
11. Vi then assembled a team of more than 10 officers to conduct the operation.
12. He then gave brief evidence about the outcome of the search during which methamphetamines, cannabis and cash were found. He also gave evidence as to the retail price for methamphetamine, namely, that when supply is plentiful, weights from 0.07 grams to 0.1 grams sell for \$50, and when supply is low, as little as 0.04 grams will sell for the same price.
13. During cross-examination Mr Corbett suggested to Inspector Vi that if he knew the accused, he should have avoided a “conflict of interest” by having another officer conduct the operation. Inspector Vi explained that, during the operation, he actually stayed out the front of the property to maintain a distance between himself and the accused whilst the other officers, in particular, Sergeant Leveni who was in charge of the actual search itself, conducted the operation.

Sergeant Leveni was also responsible for specifying which statutory provision for the search without warrant and the preparation of any report required by that provision. Inspector Vi emphasized that the decision to conduct the search without warrant was due to his belief that the police had to act quickly on the reliable information and they could not wait until the next morning to get a search warrant.

Constable Vea

14. Constable Vea is also a member of the Drugs Enforcement Task Force. He was a member of the team who searched the house. He said that the accused was present during the search. When police got to room 5, which he described as a TV room, he noticed the TV on the wall. He saw an empty pack under the TV which is shown in the bottom photograph of page 5 of the booklet. He then swiveled the TV out to the left. At the back of the deep shelf behind was a piece of plywood. The plywood fell forward at the top. He then pulled the plywood forward to find a cavity created by the framework behind in which he found numerous packs of what turned out to be methamphetamine and two packs of cannabis. Those items are depicted in the photographs on pages 5, 6 and 7 of the booklet with the plywood being depicted on page 8.
15. During cross-examination, Mr Corbett put to Constable Vea that only two packs containing white powder were found in the cavity. When asked whether that proposition, based on his instructions from the accused, amounted to an admission on behalf of his client, Mr Corbett explained that it did not and that he was simply putting his client's instructions as to what his client saw fall out of the cavity, but that his client maintained that the drugs were not his.
16. Mr Corbett also accused Officer Vea of lying in his evidence, which the officer denied.

Constable Otuhouma

17. Constable Emily Otuhouma was the officer responsible for recording the events of the operation in the diary of action. She confirmed that she made those entries as the search was being conducted. Upon her confirmation of the relevant entries in the diary, and without any further objection from Mr Corbett, I received those documents into evidence absolutely.
18. A number of entries were identified in particular.
19. Entry 4 was entered at 10:32 pm. It recorded that Acting Inspector Vi and the team moved in and cleared the house. Every person in the house was gathered outside the house where Inspector Leveni introduced himself to the accused as a police officer and advised him that the police intended to conduct a search of

the premises without warrant would proceed in accordance with s 24 of the *Illicit Drugs Control Act*. That entry was signed by the accused.

20. Entry 19 described Detective Vea's discovery of the drugs behind the TV.
21. Most relevantly, entry 21 (or the first of two entries numbered 21) recorded the following:

“Detective Leveni asked Okusitino who do these things that have been found belong to and he said it belongs to him. He is then legally charged by Officer Leveni with possession of illicit drugs and that it is his choice of whether he wants to continue to speak”.
22. That entry was also signed by the accused.
23. Constable Otuhouma also confirmed that during the search of room 5, the accused was present and that he saw when the police found the drugs behind the TV.
24. During cross-examination, Mr Corbett put to the Constable that the accused did not make any admission. She denied that and reiterated that everything recorded in the diary of action, including entry 21, was what actually happened. She added that nobody could change those entries, that they were the truth, and that the accused had signed the entries 4 and 21.
25. Mr Corbett also put to Constable Otuhouma that entry 21 (the time of which was recorded as 0046 hours the next day, 14 July 2020) was in fact made after the search was concluded, not in room 5 at the time of the discovery and laying out of the drugs. The officer denied that assertion and confirmed that the time recorded in the diary was when the conversation actually occurred.
26. She too was accused of lying, which she also denied.
27. At that stage, Mr 'Aho raised an issue in relation to whether the accused, by his counsel, had sought to impeach the credit of the Crown witnesses accused of lying, which might permit evidence being adduced of the accused's previous convictions. Mr Corbett then sought further instructions and returned to inform the Court that he withdrew the puttage in relation to entry 1 of the diary of action not having been made contemporaneously. However, he still challenged the truth of entry 21 and the time that it was made.
28. In answer to questions from the Bench, Constable Otuhouma:
 - (a) explained, via entry 20 in the diary, that Officers Fifita and Leveni placed the items found on top of the shelf and Senior Constable Tuitavuki then photographed them as shown in the booklet, which was what accounted

for the time between when the drugs were first found and when entry 21 was recorded;

- (b) confirmed that the accused was in the room during that period;
 - (c) confirmed that the accused was shown the drugs leading up to the exchange between he and Leveni in entry 21;
 - (d) said that when he was charged with “illicit drugs”, as referred to in the entry, the accused did not seek refute that they were drugs, and that if he had, it would have been recorded;
 - (e) described the accused’s demeanor or expression, if any, at the time the drugs were presented to him and he was were asked if they were his, as ‘not smiling’, just ‘kind of normal’;
 - (f) explained that there other people in the house during the search, whose names were in the diary, including an elderly man found on the verandah and two boys in the living room;
 - (g) confirmed that in room 5, as shown in the photographs of pages 4, 5, 8 and 9, there were several packs of feminine hygiene products;
 - (h) in relation to earlier evidence that the accused had told police at the time, that room 5 was ‘where the children stayed’, Constable Otuhouma recalled that she saw different kind of children’s hair ties in the room, but nothing else that indicated whether it was only children that occupied the room.
29. Upon further questioning by Mr ‘Aho, Constable Otuhouma specified that there are total of ten people present at the house between the ages of 11 to 41 years. They were seated at a hut in front of the house and accompanied by other officers. They were not questioned. One of the entries referred to Saia. He was the man found on the verandah lying on a mattress on top of a box. The police sniffer dog indicated something on the side of the bed. Police found a can used for smoking ‘weed’ (commonly referred to as a ‘bong’) and one small pack of cannabis leaves. Saia admitted that the cannabis belonged to him. He described it as his ‘medicine’ for which he said he had a medical note from New Zealand. He was nonetheless charged with possession of those items as recorded in the s 24(3) report by Sergeant Leveni.
30. When the Constable was asked why the accused was questioned in relation to what was found in room 5, and not any of the other persons in the house, she said it was because it was ‘his residence’ and police informed him that he was to be present during the search so he could see for himself the work conducted.

Sergeant Leveni

31. The final witness for the Crown was Sergeant Carson Leveni who gave evidence via video link from Vava’u. He too was a member of the Drugs

Enforcement Task Force. He confirmed the evidence given by the other officers in relation to his involvement in this operation.

32. In relation to the search of room 5, Leveni said that the accused told him that that was the room the children stayed in. However, Leveni said that he only saw adult clothes in the room and described it as 'not good enough' for children to stay in. In that regard, the photographs depicting the inside of that room showed various items of clothing strewn about the place. It was very untidy. Whether or not that was the product of the police search or whether the room was normally in that state was unclear.
33. Leveni described how when Vea found the drugs behind the false wall at the rear of the shelf, the accused had a clear view of the items found.
34. He was then asked about entry 21. He confirmed that:
 - (a) he showed the accused the items on the shelf and asked him who they belonged to;
 - (b) the accused said they were his; and
 - (c) the accused signed the entry to confirm that conversation.
35. Leveni said that if the accused had not wanted to sign that entry, another entry would have been made to that effect. In his opinion, the accused signed entry 21 voluntarily.
36. He also gave evidence in relation to his letter to the Chief Magistrate about the cash having being seized as being related to drug dealing. He explained that of the various denominations found, the 18 x \$50 notes were consistent with the street price for the quantities of methamphetamine at the time.
37. During cross-examination, Mr Corbett asked Sergeant Leveni about the accused being handcuffed. Leveni confirmed that the accused was handcuffed but that his hands were in front of him throughout the search and that therefore he was able to sign entries 4 and 21 of the diary of action. He added that if it had been difficult for the accused to do so, the cuffs would have been taken off him. Mr Corbett then put a different version, namely, that the accused had been taken outside after the search and that the handcuffs were removed there for him to sign the entries. In other words, that the exchange recorded in entry 21 did not occur in room 5 nor was the diary signed there. Officer Leveni said that that might have occurred with the other entries but he clearly recalled that entry 21 was signed in front of him inside room 5.
38. Mr Corbett also put to Leveni there only two bags were found in the cavity, which he denied.

39. He was asked about the reference to 24 packs of methamphetamines being found and their weight, as described in the s 24(3) report, compared to that which was specified in the amendment to the indictment, a reduction of about 10%. Leveni said when the accused was first charged, the items were weighed including the packs. I note there that the analyst's report for the methamphetamines, which were identified using the TruNarc analyser, clearly stated that it was the contents only of the packs that were weighed and which totalled 43.85 grams.
40. Mr Corbett also put to Leveni that police took the 'ice' from one bag and was placed it in the numerous packs shown in the photographs. That was also denied. Officer Leveni explained that the smaller packs already contained the drugs as depicted in the photographs on pages 6 and 7, and that those smaller packs were taken out of one or more other larger packs.

Accused

41. Following the close of the Crown's case, Mr Corbett provided a brief written opening, which may be summarized as follows:
- (a) "the defence challenged the legality of the search warrant and the chain of evidence regarding the weight of the alleged illicit drugs seized";
 - (b) he was proposing to only call the accused;
 - (c) the accused would challenge the alleged admission made by him in the police diary;
 - (d) the accused would give evidence that the drugs seized did not belong to him.
42. When asked about the stated challenge to the legality of the search given that at the start of the trial, Mr Corbett said that he would not proceed with a voir dire in that regard, he explained that he intended to address the issue in closing submissions.
43. The accused then gave evidence.
44. He spoke in English throughout without a detectable American accent. He described himself to be married with three boys. Mr Corbett began to ask the accused about his earlier life. When the relevance of that history was queried, Mr Corbett then explained, for the first time, that the accused did sign entry 21 but that he could not read Tongan.
45. The accused then gave the following evidence in chief. When the police arrived, they made everyone in the house lie down on the ground. He was searched and \$1,600 was found on him. No drugs were found on him. Three families lived in the house which was owned by his brother who was out of the country.

He 'has a water company' called Omni Services, which had been operating since 2014, delivering non-portable water and cleaning water tanks. The large amount of cash found on him was from that business. In addition to the ten persons listed in the dairy of action, there would have been another eight all together. All of those persons had access to the house, including room 5. There were two external structures outside the main house - he lived in one and his uncle lived in the other. During the search, the police walked through the various rooms in the main house. He described room 5 as being where the eight children living in the house watched TV, and that some of them slept in that room. He did not use room 5.

46. At that point, the accused described how when he was first apprehended by police, he was handcuffed with his hands behind his back. He said that he remained in that state until after the search was concluded and he was taken outside where the cuffs were removed to allow him to sign the diary entries.
47. During the search of room 5, the accused said he was seated on the bed, with Otuhouma seated by the door. He saw the police going through the whole room, cabinets and closet. He said that Officer Vea opened up the TV and found the fake wall. The accused said he had to stand up to really see what was inside. He saw the plywood and he saw Vea remove it. The accused said he didn't see much because he was sitting on the bed and that he did not see what was in the cavity until the police laid out all the bags. He did not count how many bags there were.
48. When shown all the bags as depicted in the photograph on page 5 of the booklet, and the police told him that they contained methamphetamine, the accused said that he was 'stunned', although he later said that he had been 'stunned' from the moment the police arrived with their firearms drawn.
49. When the items within the wall cavity were shown to him, he said 'he did not know what to say about that' and that he did not say anything to the police about them.
50. Crucially, the accused then gave the following evidence. In response to Officer Leveni asking the accused if the packs contained methamphetamine and whether they were his, the accused said that he responded by saying:

"Don't know. What do you think? Is it methamphetamine?"

To which, he said, Officer Leveni replied: *"Don't be a smartass"*.

51. In relation to entry 21, the accused said he was first taken outside, with his hands still cuffed behind his back and sat on a chair. Leveni told him that they had finished the search, he was being charged with possession of

methamphetamines and cannabis and that he was to sign what the accused described as the 'little booklet'. He said he was shown entry 21 in Tongan (as appeared at page 19 of the exhibit booklet). He said that Leveni had folded some other pages back and then just pointed to places in the diary and told the accused to sign there, which he did.

52. The accused also reiterated that there were other people who lived in the house all of whom had access to the house including room five. He also pointed to the fact that Saia had been arrested with cannabis and that no other drugs were found on the accused or any other person.
53. Mr 'Aho opened his cross-examination by seeking leave to put to the accused his previous convictions pursuant to s 121(1)(f) of the *Evidence Act*. In terms, that section provides that a person charged, who gives evidence, shall not be asked and, if asked, shall not be required to answer, any question tending to show that he has been convicted of any previous offence, unless, relevantly, he has, by his advocate asked questions involving imputations on the character of any of the witnesses for the prosecution. As a result, the accused admitted to previous for possession of Indian hemp in 2002 and cannabis in 2002.
54. The accused denied that the house belonged to him. He said that it belonged to his older brother who is not in Tonga. However, he agreed with Mr 'Aho that he lived in the house, that he controlled it and that he determined who entered it but not who had to leave it.
55. In relation to diary entry 4, which the accused also signed, the accused gave evidence that he asked the police "where is the search warrant", and that the police responded that because it was an 'emergency', they were going to do the search. The accused said that he replied 'okay', but that he 'was not happy with it'.
56. He was then asked about his hands being cuffed behind his back from the very beginning of the search. He was referred to a photograph on page 2 of the booklet depicting him with a number of officers on the verandah with a weights bench and lifting weights in the background. The photo showed the accused with his hands cuffed *in front* of him, while an officer behind him was searching him. When that was pointed out to the accused, and he confirmed that the scene depicted in the photograph was at the beginning of the search, he then changed his evidence about his hands having being handcuffed behind his back. He agreed with the Prosecution evidence that his hands were cuffed in front of him throughout the search.
57. The accused was then asked about his water business and his involvement in it. He denied being a director of Omni Services but said that he was the CEO of

the business and that it was his brother who was the owner. He said his brother had been out of the country since 2016. Mr 'Aho put to the accused that the business had been struck off the Business Register for some time. The accused said that he had no knowledge of that. He also denied ever signing any documents in relation to the business, while he had been managing it, because, he said, everything was sent by email to his brother, the owner.

58. When asked why he did not tell the police that the \$1,600 found on him was from the business, the accused said the police did not ask him. He denied the suggestion that the money was derived from the sale of drugs.
59. The accused also agreed, unsurprisingly, with Mr Aho's suggestion that none of the children who used room 5 were, to his knowledge, drug dealers.
60. When asked about entry 21, the accused admitted that he signed it voluntarily, although it occurred outside room 5 and after the search had been concluded and he had been charged. The accused denied the truth of the content of the entry. He also denied the suggestion that he knew that the items pulled out of the wall cavity were drugs.
61. In answer to a question from the Bench as to why he signed anything from the diary given his position that the drugs were not his, the accused said that he did so because he was told to. He said he did not read the entries before he signed them because he could not understand Tongan. He was asked about that in the context of his business operation and he agreed that it was not his habit to sign documents without first knowing what they contained. He confirmed that at no time during the search did he tell the police that he could not read the Tonga language. When he was asked why he did not tell the police, he said that he was "a bit shocked and was just waiting to be taken in".

Submissions

Defence

62. Mr Corbett made the following closing submissions.
63. He was not proceeding with any challenge to the lawfulness of the search without warrant. During cross-examination the defendant had challenged the alleged admission in entry 21. The defendant's evidence was that he did not make any admission to owning the drugs in question. The accused gave evidence that he did not sign entry 21 until after the search was conducted and he was taken outside the house. The defendant gave evidence that he had no knowledge of the drugs in the children's room. The accused did not use the children's room and stayed in another room. There were at least 18 people living in the house. Any of the 18 people living in the house other than the

accused had opportunity to hide the drugs in the false wall in room 5. One of them, Saia, was charged with possession of cannabis and a bong. Two of the boys at the house were known to police for housebreaking and theft offences. No drugs were found on the accused's person. There were discrepancies in Leveni's evidence about the number of bags of methamphetamine and the weight of it. The cash found on the accused was from the Omni Services business. There was no fingerprint evidence of the accused linking him to the drugs or the false wall. The accused has had a 'clean' criminal record since 2002. For those reasons, the Prosecution had failed to prove its case beyond reasonable doubt.

64. In relation to entry 21, Mr Corbett was asked about the accused's evidence in chief of his response to Leveni's question. Mr Corbett candidly explained that that was the first time the account given by the accused and then (notwithstanding any legal professional privilege) volunteered that his instructions on that point had simply been that, when asked by police, the accused had denied the drugs were his.

Prosecution

65. Mr 'Aho submitted that if it was accepted as constituting an admission by the accused, entry 21 would be sufficient to convict him of the charges. If on the other hand, entry 21 was not so accepted, or was considered unreliable, unclear or otherwise not an admission by the accused, then there was other evidence to prove the charges. In that regard he referred to a decision in *R v Falevai and Ta'ai* (unreported, CR 42 & 43/2019, Cato J, 22 November 2019). Mr 'Aho made emphasis in His Honour's reasons in that verdict to the presence of cash in denominations similar to that found in this case. His Honour was satisfied of the connection between the cash and the drugs found in that case. However, in that case, there was evidence¹ of what was referred to in the illicit drugs trade as a 'tick book' containing a list of customers, sales and amounts sold, and, in some cases, debts relating to drugs. In any event, for reasons developed below, the presence of the cash found on the accused here, which also included one \$100 note and many \$20 and \$10 notes, viewed in light of the accused's evidence that it from the water business, was equivocal at best, and unnecessary in order to determine the actual issues before me.
66. Mr 'Aho characterized the accused's case, correctly in my view, that the police either had to have made a mistake in relation to entry 21, or they fabricated it.
67. He then submitted in relation to the accused's evidence on entry 21, that:

¹ [7]

- (a) the accused's assertion he did not know what entry 21 meant was an attempt to distance himself from the offending;
- (b) the accused's failure to tell police at the time that he could not read Tongan should have been put to the police witnesses, but was not;
- (c) for that reason alone, the accused ought to be regarded as having concocted a story on the stand;
- (d) entry 21 was voluntarily given and signed;
- (e) no documentary evidence had been adduced to support the accused's assertions in relation to the Omni Services business; and
- (f) that was to be compared with the evidence that the accused was in control of the business in his brother's absence.

Defence reply

68. In reply, Mr Corbett explained that he did not 'really explore the chain of custody', that is, any issue of discrepancies between the weight of the methamphetamine or the number of packs found because he decided not to pursue it.

Consideration

69. Despite some earlier vacillation, the accused ultimately did not pursue any challenge to the lawfulness of the search. However, for completeness, I will address it.

70. As recently explained in *R v Pole'o* [2021] TOSC 146:²

"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 or anything connected with an offence under the Act and that the circumstances are of such seriousness or urgency as to require the immediate exercise of the power to search without the authority of a warrant".

71. In this case, I am satisfied that, by reason of the previous reliability of his informant, the information on this occasion of illicit drugs being sold by the accused at his premises constituted reasonable grounds sufficient to satisfy the first limb of the test stated above. I also accept that the nature of that information required police had to act urgently, otherwise, any evidence could

² [37] to [46]

have been removed, destroyed or lost. Therefore, I am satisfied that the search without warrant was lawful.

72. In order to prove unlawful possession of illicit drugs, the Prosecution must prove beyond reasonable doubt that the accused had knowledge of, and some control over, the drugs. For a more detailed discussion of those requirements, see, for example, *R v Uasike* [2020] TOSC 88 and *R v Fa'aoa* [2021] TOSC 38.
73. Were it to be viewed in isolation, the undisputed evidence of many others living in the house and having access to room 5 would likely have resulted in reasonable doubt in respect of the requisite elements of knowledge and control on the part of the accused.
74. However, the Prosecution relies heavily, as it must, on the alleged confession recorded in entry 21 and signed by the accused.
75. In *Police v Latu* [2016] TOSC 26,³ Cato J that a document containing a confession is such an important aspect of a criminal trial that its integrity must be assured to a very high standard and that the Court must be satisfied beyond a reasonable doubt that the confession is voluntary, no matter when that arises in trial.
76. In this case, the issue here is not whether entry 21 was given voluntarily but rather:
 - (a) whether its contents are a true account of what was said between Leveni and the accused; and
 - (b) in light of the accused's evidence that he could not read Tongan, whether it is reliable as a knowing statement of his guilt affirmed by his signature.
77. In *Carr v R* (1988) 65 CLR 314, Gaudron J observed:⁴

"The possibility that a person may be convicted on confessional material fabricated by police officers is odious and frightening. Yet, it is a possibility that must be accepted once it is acknowledged that confessional material may be fabricated and that an accused person faces an inherently difficult task in having a jury accept that possibility. The possibility that a conviction may be based on fabricated confessional material renders it necessary, in the interests of justice, that disputed confessional evidence be treated somewhat differently from other disputed evidentiary material. That necessity will endure until reliable means are adopted which, in the words of Lawton L.J. in Bryan James Turner and Others v. The Queen (1975) 61 Cr App R 67, at p 77 make confessional material 'difficult either to challenge or to concoct'."

³ [3]

⁴ [9]

78. Therefore, where evidence (including a confessional statement) is potentially unreliable, the jury/judge must be aware of the dangers of convicting on that evidence and special care should be exercised before convicting on that evidence: *Bromley v The Queen* (1986) 161 CLR 315 at p 319.
79. With that special care in mind, I now turn to an assessment of the competing evidence regarding entry 21.
80. In relation to the Prosecution witnesses, I generally found all their evidence to be clear, complete and consistent. That was not affected by the minor discrepancies identified by Mr Corbett in relation to Leveni's evidence as to the number of packs and weights of methamphetamine. As explained, the analyst's report describes how it was the methamphetamine only which were weighed without their packs and the 22 packs were confirmed in the search list and the photographs. The post search report does not affect the weights which have been particularized in the amendments to the indictment. Further, cross-examination of the Prosecution witnesses did not damage their evidence in any material respect, or at all, particularly, entry 21. Accordingly, and subject to the following assessment of the accused's evidence. I accept the Prosecution evidence in full.
81. I am mindful that if, after considering all the evidence, the accused's evidence in relation to entry 21 is accepted, he must be acquitted. Similarly, if I accept sufficient of his evidence to be left with a reasonable doubt as to the reliability of the alleged confession, then, for the reasons given in paragraph 73 above, I must also acquit.
82. In assessing the accused's evidence, I have considered the following.
83. Firstly, the accused's case was marked by a number of significant breaches of what is referred to as the rule in *Browne v Dunn*.
84. In *Australia and New Zealand Banking Group Limited v Lasike* [2016] TOCA 7, the Court of Appeal explained that:

"[71] The failure to cross examine a witness on a particular topic has legal consequences. In Browne v Dunn, a decision of the House Lords reported only in (1894) 6 The Reports 67, 70 Lord Herschell LC said that it was:

'absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth ... to direct his attention to the fact by some questions put in cross examination showing that the imputation is intended to be made ... If you intend to impeach a witness you are bound, whilst he is in the box to give him an opportunity of making any explanation which is open to him.'

[72] In the same case Lord Halsbury said at 76-7:

‘To my mind nothing would be more absolutely unjust than not to cross examine a witness ... and ... to ask the Jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to ... [He considered the facts of that case and continued at 78] Under those circumstances what question of fact remains? What is there now for the Jury after that? If [counsel] admits before the Jury ... by the absence of cross examination ... that these statements are true, what is there for the Jury. It is impossible ... to dispute ... that that absolutely concluded the question.’

[73] In other words in a proper case, such as the present, the failure to challenge the evidence of a witness by appropriate cross examination involves the acceptance of his evidence if it is otherwise credible. Browne v Dunn has been followed in Australia and New Zealand.”

85. The rule in *Browne v Dunn* has also been referred to in recent times in the *R v Kolomatangi* [2015] TOSC 40 and *R v Manu* [2019] TOSC 30. It has been applied even more recently in *R v Anatonu* [2020] TOSC 52.
86. Here, the following (non-exhaustive list of) evidence by the accused was not put to the relevant Prosecution witnesses; alternatively, assertions of fact were put, but not then given in evidence by the accused:
 - (a) the accused evidence in relation to entry 4, which he also signed, where he said that he asked police where was the search warrant, the police said it was an emergency and that they were going to search, and that the accused said it was okay but that he was not happy with it, was not put;
 - (b) the accused initial evidence of being handcuffed with his hands behind him was not put to any Prosecution witness;
 - (c) it was put to Officer Leveni that the ‘ice’ was taken from one bag and placed in the smaller labelled packs shown, which he denied. But that was not put to Officers Vi, Vea or Otuhouma and the accused did not go on to give that evidence;
 - (d) Mr Corbett put to Constable Vea and Leveni that there were only two packs of white powder in the cavity, which they both denied. Again, the accused did not go on to give that evidence;
 - (e) it was put to Constable Otuhouma that the accused did not make any admission, but Mr Corbett did not put to her or any other Prosecution witness the accused’s version that when he was asked by Leveni whether the pack contained methamphetamine the accused replied *“Don’t know. What do you think? Is it methamphetamine?”*;
 - (f) the accused’s evidence that he cannot read Tongan was not put to any Prosecution witness. Nor were they asked any question which might have

revealed that potential defence such as whether the accused appeared to read the entry before signing it or whether he was given time to do so.

87. Of the breaches of the rule in *Browne v Dunn*, perhaps the most telling was in respect of the accused's evidence of his response to Leveni about the methamphetamines. In closing submissions, Mr Corbett candidly explained that that was not put because he only heard it for the first time when the accused gave the evidence and that his instructions had been that the accused simply denied that the drugs were his. However, apart from putting to Otuhouma that the accused did not make the admission, Mr Corbett did not put to any Prosecution witness that the accused actually denied that the drugs were his.
88. Secondly, the change of evidence by the accused in relation to his hands being cuffed firstly behind his back and then secondly at the front was significant. That concession was consistent with the Crown's case, namely, that the accused signed entry 21 with his hands cuffed in front of him and whilst he was in room 5. That change in evidence was not satisfactorily explained by the accused.
89. Thirdly, in closing submissions, Mr Corbett boldly suggested that those aspects of the accused's evidence, to which I have just referred, could be explained as lapses of memories. However, the accused was never re-examined on that. Further, when asked whether the same explanation should be applied to the rest of the accused's evidence where it conflicted with that of the police officers, Mr Corbett did not respond. In my view, those two particular aspects of the accused's evidence were examples of recent invention.
90. Fourthly, where and when the accused signed entry 21 was, in my view, secondary to whether the accused knew of the contents and, that by signing the entry, he was affirming the truth of the confession therein. There was no evidence, nor even a suggestion, that he signed the entry due to any coercion or duress. There is no issue that he signed them voluntarily. The accused's explanation that he signed entry 21 because he was "a bit shocked and just waiting to be taken in" was unconvincing.
91. Fifthly, that the accused did not tell the police he could not read Tongan but nonetheless signed the entries without allegedly knowing what he was signing suggests either extraordinary naivety or foolishness. The accused did not strike me as suffering from either.
92. Sixthly, his explanation was also inherently implausible for the following reasons:
 - (a) the obvious seriousness of the matter;

- (b) his reaction was described as normal compared to what one might expect from a person who is genuinely innocent of such a serious crime and some remonstrations against any allegation that he is guilty of it;
- (c) if, the accused denied being in possession of the drugs, why would he sign anything which was consistent with the charge of being in possession of those drugs;
- (d) he had several years of operating a business which must surely have required him to have some Tongan literacy; and
- (e) there was no other independent evidence adduced to support his assertions.

93. For those reasons:

- (a) I find that the accused evidence was unreliable;
- (b) I reject his assertion that he could not read Tongan when he signed entry 21; and
- (c) I find that when he signed entry 21, the accused understood what it contained and that what it contained was the truth.

Result

94. Accordingly, I am satisfied that the Prosecution has proven the charges beyond reasonable doubt, and I find the accused guilty on both counts.

NUKU'ALOFA
9 September 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE