

SHU GIN LI

(Applicant)

V

THE CROWN

(Respondent)

BEFORE HON. JUSTICE CATO

J U D G M E N T

This was an application to discharge the accused Shu Gin Li from the indictment on a charge of being in possession of a controlled chemical namely pseudoephedrine contrary to s 5 (b) of the Illicit drugs Control Act 2003 on or about 1st July, 2011. She was charged jointly with ChanGui Wang and Xiu Ming Lin.

At the material time, there was evidence that ChanGui Wang and Xiu Ming Lin were the occupiers of a residence at Longolongo, in which pseudoephedrine had been located. A large container was located by police pursuant to a search conducted as part of a much wider and more significant drug investigation operation conducted by New Zealand and Tongan drug squads involving surveillance here and in New Zealand of consignments of pseudoephedrine from New Zealand to Tonga. The Crown contended that the two shipments were intended to have been

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used in the manufacture of methamphetamine in Tonga, and then for export to either Australia or New Zealand. One Tongan police officer and a number of Chinese nationals have been charged and are awaiting trials on importing charges arising from these consignments.

It is unnecessary for me to recite the various details concerning the consignments in relation to this application brought by Mr Corbett to have his client discharged from the single count of possession which she faces. She is not charged with any of the more serious charges involved with importing.

The essence of the evidence in the case she faces is that at the material time she was a girlfriend of one of the occupiers of the house Xiu Ming Lin and on her own admission in a record of interview conducted with her shortly after her arrest, she admitted that she had been for “maybe six to 7 months now”. She admitted that Li lived at the residence, with a man named Wang. Both men were charged with other importing offences. Wang has absconded on bail and is unlikely to face trial having been granted bail by a Magistrate to return to China, and having not returned. The accused admitted to often going to the accommodation, and sleeping in the house but only sometimes. She said when it rains I sleep there. She lived at another address. She said she sometime cleaned the room. She said she has some of her clothes there but the rest of the things belonged to Xiu Ming Lin.

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She was not asked about any of the small amount of what I was informed was pseudoephedrine located in a bag by what appeared to be a table in the bedroom. She was asked a question about a much large bag of pseudoephedrine which was located in the freezer compartment of a refrigerator in the kitchen, in these terms;

“ inside the fridge in the living room there is a plastic bag in there, and inside is something like beads, Zhang Gui Wang says it is medicine for cold for your boyfriend did you see that. “

Her answer was “I don’t know about that because I have never open the frig.”

That is the extent of the evidence relating to her involvement with the pseudoephedrine located in the house. There was evidence that a container in which a large amount of pseudoephedrine had been intercepted and a placebo substituted had been located in the house and some of the placebo as well. She was never questioned about these items. The second consignment was in fact intercepted by police arrival on the 1st July, 2011. As a consequence of information received, the police searched several houses on that day including the one where Mr Xiu Ming Lin and Mr Wang were the occupiers.

The police had information that the first consignment had been given to the two occupiers at that address. That information proved to be accurate because the container was located at the residence. It also

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would seem that the pseudoephedrine located in the house by the police on the 1st July was not linked at all with either consignment.

I have to determine whether there is sufficient evidence for the applicant Shu Gin Li to stand trial for possession of the chemical pseudoephedrine located in the house. In approaching this matter, I do so, on the basis of authorities that I considered and applied in *Dalgety v the Crown*. I must be satisfied that there is evidence upon which a properly directed jury could convict the applicant beyond any reasonable doubt. If I am not or if I consider the evidence is so tenuous a conviction would be unsafe it is my duty to discharge the accused from the indictment. *R v Galbraith*

In considering this matter, I remind myself following several authorities on the meaning of possession of a controlled drug or chemical in Tonga; *R v Motuliki* [2002] Tonga LR 124; *R v Pohahau* [2003] Tonga LR 270; *R v Tau* [2005] Tonga LR 418; *R v Tu'itavake* [2007] Tonga LR 180; *R v Mataele* [2007] Tonga LR 219; The essential ingredients of the offence of possession are;

- (1) Physical custody and control of an illicit chemical;
- (2) Without lawful excuse proof of which lies on the defendant;
- (3) Knowledge that it was an illicit chemical

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Mr Sisifa for the Crown argued that the applicant must have seen the small bag on the table in the bedroom, and the larger pack in the refrigerator, but examining the photographs and considering the evidence including the answers she gave in her record of interview I do not agree. First, whilst the pseudoephedrine was located by the police at the house on the 1st July, 2011 there is no evidence as to how long it had been at the house or even at a time coincident when the applicant was staying there. She was no more than a guest of the occupier staying overnight from time to time, and there is no evidence to contradict her about this. In my view, neither the location of the chemical (a small amount on a cluttered bedroom table), or a larger amount in a freezer compartment of the refrigerator, nor the association of the applicant with the house provides a sufficiently sound base from which a jury could draw an inference beyond any reasonable doubt that she must have known of its existence.

There is, in my view, however another difficulty for the Crown and that is a problem Ward CJ directed his mind to in his careful analysis of what can be a difficult factual issue in R v Pohahau [2003] Tonga LR 270, at 276. There, he made the point in acquitting one of the defendants of possession of an illicit drug that, whilst in that case, the accused knew what was going on in the house, (that is drugs were being prepared for sale) her relationship with a principal supplier was a reason for her being in the house other than for the preparation and supply of drugs. Ward CJ concluded, "As a result the evidence does not lead the court to

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the sure conclusion that she was involved with her partner's drugs such that she had custody or control of them."

In my view, the Crown case fails, as Mr Corbett submitted, for insufficiency of evidence against the applicant. Mere suspicion that she was linked in with the group of Chinese is not a proper basis for requiring her to stand trial on this charge.

I do not consider either that this in Galbraith terminology is a borderline case. In my view, it falls well short of this. However, if I am wrong about that I would use my discretion, such that Galbraith gives me, in a borderline case to discharge the Applicant. In my view, any conviction arrived at on the basis of this evidence would be unsafe. Further, there is a serious risk that her mere association with Xiu Ming Lin, and Zhang Gui Wang would unfairly prejudice her, and she might be convicted on not much more than evidence of association.

Accordingly, I discharge the Applicant from the indictment.

DATED: 28 NOVEMBER 2012

J U D G E