

JUDGMENT

INTRODUCTION

1. The defendant is charged as follows:

Statement of offence

UNLAWFUL CULTIVATION OF AN ILLICIT DRUG: *Contrary to Section 6(a) of the Illicit Drugs Control Act 2004.*

Particulars of Offence

Nathan Gadaraoa on the 1st day of May 2024, at Anibare District in Nauru, without lawful authority, cultivated 141 cannabis plants at the back of his house, to the total weight of 7.671 kg.

2. The Prosecution opened its case on 23 September 2024.
3. On 3 October 2024 the Prosecution closed its case. Thereafter, the defendant's counsel made an application for "no case to answer". The defendant's counsel filed her written submissions in support of the "no case to answer" on 25 October 2024. The Prosecution filed its written submissions in response on 11 November 2024. The parties were heard on their submissions on 25 November 2024. I delivered my ruling on the application for "no case to answer" on 29 November 2024.
4. On 29 November 2024, the defendant was put on his defence. Directions were given to him in relation to his right to remain silent, give evidence under oath or make an unsworn statement in court. He chose to remain silent and did not call any witnesses. The parties sought time to file written closing submissions. The Prosecution filed its closing submissions on 13 December 2024, and the defendant's counsel filed her closing submissions on 16 December 2024. I heard the parties closing submissions on 16 December 2024.
5. I am to determine the following issues:
 - i. Whether the defendant cultivated 141 plants alleged to be cannabis? A sub-issue to be determined under this main issue is whether there was a breach in the chain of custody.
 - ii. Whether the cultivated plants are controlled plants, namely, cannabis?

6. The following are my reasons for this judgment.

PRINCIPLES RELEVANT TO THE DECISION-MAKING

7. I will outline my role before I proceed to consider the evidence of the witnesses.
8. I am required to decide whether the prosecution has proven the essential elements of the alleged offence beyond reasonable doubt. The prosecution has the onus to prove the elements of the charge beyond reasonable doubt. The defendant is not required to prove or disprove anything. I cannot find the defendant guilty unless the evidence which is accepted by me satisfies me beyond reasonable doubt of his guilt. If there is an explanation consistent with the innocence of the defendant, or I am unsure of where the truth lies, then I must find that the charge has not been proven beyond reasonable doubt.
9. A reasonable doubt will result if in my mind I am left with an honest and reasonable uncertainty about the guilt of the defendant after I have given careful and impartial consideration of the evidence.
10. While the burden of proof is on the prosecution, it does not mean that every fact in dispute is to be proved beyond reasonable doubt, only the elements of the charge needs to be proven beyond reasonable doubt. However, evidentiary facts must be clearly proved before they are treated as established.
11. I have considered all the evidence placed before me. I must determine whether each of the witnesses are an honest, reliable and credible witness, and in doing so I can rely on the evidence that the witness has given and make a finding that the facts about which the witness has given evidence on has been proven. With this regard, I can accept part of the witness's evidence and reject part of that evidence or accept or reject it all. I am not required to give all evidence the same weight.
12. In assessing the credibility of a witness, I examined the veracity and/or sincerity of the witness to see whether he or she was trying to be truthful. Further, to assess the reliability of a witness, I examined the witness's ability to accurately recall a memory. The following are the factors that I considered:

- i. ability and opportunity to observe events*
- ii. firmness of memory*
- iii. capacity to resist pressure to modify recollection*
- iv. factors which might have resulted in reconstruction or mistaken recollection*
- v. willingness to make concessions where recollection may be faulty,*

especially when favorable to the other party

- vi. *testimony that seems unreasonable, impossible or unlikely*
- vii. *partiality/motive to lie*
- viii. *general demeanor*
- ix. *Internal consistency: does testimony change during direct or cross examination?*
- x. *External consistency: does testimony harmonize with accepted, independent evidence?*¹

13. I remind myself that inaccuracy about secondary, marginal or unimportant facts often arises in cases because the witnesses are focused on central facts, and may differ on what evidence they give based on what they perceive to be essential. Further, witnesses also have different abilities of observation and recollection of their memories.
14. I must deliver my judgment in accordance with the evidence, which would require me to make findings of facts upon considering the evidence before me. With this regard, I am to carefully consider the evidence logically and rationally, bringing an open and unbiased mind to the evidence but I may use my common sense and experience in my assessment of the evidence before me. I must do this dispassionately, impartially, without prejudice, and without favour or ill-will.
15. From the established facts, I may draw a reasonable inference, which must be a justifiable inference and drawn beyond reasonable doubt. I must not draw an inference from the direct evidence unless it is a rational inference in all the circumstances.
16. The defendant did not give evidence in his defence, and he did not have to do so. I may not draw any adverse inference against the defendant for not giving evidence, unless the law permits me to do so. I can only find the defendant guilty of the alleged offence after I have considered all the evidence, and have accepted beyond reasonable doubt the prosecution's evidence in relation to the essential elements of the alleged offence.
17. I must emphasize that in reaching my decision, I am not required nor is it necessary for me to articulate findings about every part of the evidence. All I have to do is determine whether the prosecution has proven all the elements of the alleged offence beyond reasonable doubt. With that regard, I may have to

¹ *R v Killman* [2024] BCPC 104

resolve some primary disputes over the facts.

18. I have considered all the evidence before me. I will summarize most of the evidence before me, and discuss the parts of the evidence which are essential to my analysis.

PROSECUTION'S CASE

19. On 23 September 2024 the prosecution opened its case and, and on 3 October 2024 it closed its case. The counsel for the prosecution called 9 witnesses, namely, Senior Constable My-Girl Cecil ("PW1"), Constable Darg Dageago ("PW2"), Acting Sergeant Jamieson Laan ("PW3"), Sergeant Vicromic Starr ("PW4"), Sergeant Dan Lobendan Botalanga ("PW5"), Sergeant Marson Notte ("PW6"), Constable Samuel Tagamoun ("PW7"), Senior Constable Jenson Thoma ("PW8"), and Acting Inspector Luke Agege ("PW9").
20. I have considered all the evidence given by the prosecution witnesses. A summary of the prosecution witnesses' evidence are as follows.

Evidence of PW1

21. PW1 gave evidence that she was part of the team of police officers tasked to conduct a search of the defendant's residence. Acting Inspector Luke Agege executed the search warrant and was their team leader. She identified the defendant in court. On 1 May 2024 they went to the defendant's residence in Anibare District. The defendant's house was closed. Sgt Luke Agege gave the search warrant to the defendant and then the defendant let them into his house. They entered the house from the front entrance. They went to the back of the house and existed the house into the back yard. The back yard was fenced off using "galvanized roofing sheets". The only way to enter the back yard was through the house.
22. The back yard was being utilized to cultivate cannabis. Initially they went into the back yard and looked at the plants. Thereafter, the area was divided into 4 sections. PW1 was the seizing officer for section 4. She was assisted by Sgt Jamieson and Constable Rachel. They uprooted all the cannabis plants in section 4. The length of the plants were approximately 6 inches to 1 foot. She identified the cannabis plants from photographic evidence tendered in court. After uprooting the cannabis plants, she packed them in a "rice bag" and took it to the front of the house and placed the bag in the police vehicle designated for her. She then went to the police station. She placed the "rice bag" which contained the cannabis plants on the veranda in front of the front office where Sgt Dan Lobendan Botalanga took photos of them.
23. After the photos were taken she took the "rice bag" to the Criminal Investigation Unit ("CIU") room for testing and weighing. At the time Sgt Dan Lobendan Botalanga,

A/Sgt Jamieson Laan, Sgt Vicromic Starr, Sgt Marson Notte, Acting Inspector Luke Agege, and Snr Const Jenson Thoma were in the CIU room. PW1 handed over the “rice bag” containing the seized cannabis to Sgt Dan Lobendan Botalanga and Sgt Vicromic for testing and weighing. While Sgt Dan Lobendan Botalanga and Sgt Vicromic conducted the weighing and testing of the cannabis plants from section 4, PW1 filled out the Report by Seizing Officer. She confirmed that the tests conducted by Sgt Danlobendan and Sgt Vicromic were positive for cannabis. She identified the same test results from photographic evidence tendered in court. She also confirmed the weight of the seized cannabis from section 4 being 0.397 kg. She also identified the same weighing and the weight from photographic evidence tendered in court.

24. PW1 was assisted to pack the seized cannabis plants from section 4 into a brown exhibit bag which she sealed and labelled, after which she placed it in the exhibit room. PW1 tendered the seized cannabis plants from section 4 in evidence. My personal observation of the brown exhibit bag is that it was the smallest exhibit bag of cannabis plants that was tendered in evidence during the trial.
25. During cross-examination, PW1 gave evidence that she did not seal the “rice bag” in which the seized cannabis from section 4 was kept as some of the bigger plants were sticking out of the “rice bag”. It remained unsealed right up to the moment it was handed over for weighing and testing. However, she stated that she was holding the “rice bag” the whole time and always had her eyes on it. She was asked about leaving the “rice bag” at the veranda in front of the front desk at the police station, while being body searched. She stated that she forgot of the body search and agreed that the “rice bag” was left unattended during the body search. No questions were led by the defendant’s counsel to suggest actual tempering of the evidence.
26. PW1 also gave evidence that she did not record the “re-packing” of the seized cannabis plants from section 4 in her Report by Seizing Officer. That she left Part 6 of the Report by Seizing Officer in relation to information relating to description of packaging, seals and other identifying features blank. She agreed that at Part 3 (c) she did not listed all the names of the officers who were present during seizure. She also agreed that she did not document the method used to test the cannabis plants.
27. During re-examination, PW1 clarified that she remained in her designated police vehicle with the seized cannabis from section 4 at all material time when it was transported to the police station. She also clarified that during the body search her seized cannabis plants were about 3 meters away from her and that she could see them.

Evidence of PW2

28. PW2 also gave evidence that he was part of the team of police officers tasked to

conduct a search of the defendant's residence on 1 May 2024. He identified the defendant in the dock. His evidence is consistent with PW1's evidence in relation to initial part of the search. I do not need to repeat it. I will only add in this summary any additional evidence that is particular to PW2.

29. PW2 gave evidence that he was guarding the defendant in the front porch with Constable Jesse Adun. After some time, Acting Inspector Luke Agege called PW2 inside. PW1 asked Constable Genaro Hiram to watch over the defendant. He saw a lot of cannabis plants in the defendant's backyard when he reached there. He was tasked to divide the backyard into 4 sections. He started to count the cannabis plants after he had divided the backyard into 4 sections. According to his calculation, there were 141 cannabis plants in the backyard. He identified the cannabis plants from the photographic evidence tendered in court. He then informed Acting Inspector Luke Agege that there were 141 cannabis plants.
30. Four officers were assigned the task to uproot and seize the cannabis plants. Each one of them were assigned a section. Seizing officers uprooted the cannabis plants and packed them in bags. After the seizure there were four bags of cannabis plants, one from each section. He then assisted in the destroying of the pot plants in which the cannabis had been planted. After this he exited the house and went to the police vehicle and sat down in the back tray of the police vehicle. Each seizing officer was allocated one police vehicle in which they transported the seized cannabis to the Central Police Station. PW2 travelled in the police vehicle allocated to him. When they reached the Central Police Station, all the police officers who attended to the search were "body searched". He then accompanied the seizing officers to CIU's room where the weighing and testing was conducted. He observed the weighing and testing of the cannabis plants. Sgt Vicromic Starr and Sgt Dan Lobendan Botalanga were conducting the weighing and testing of the cannabis plants.
31. In cross-examination PW2 gave evidence that he did not see the seizing officers uproot the cannabis plants and did not see the seized bags of cannabis plants being loaded to the police vehicles. He stated he saw PW1 carrying her bag of seized cannabis plants and that she was seated behind the front passenger's seat. He stated that when they reached the Central Police Station the bags of seized cannabis plants were placed in the front where everyone could see it, and then they were searched. He also gave evidence that he only counted the cannabis plants before it was uproot, and did not count the uprooted cannabis plants.
32. The Prosecution did not re-examine PW2.

Evidence of PW3

33. PW3 also gave evidence that he was part of the team of police officers tasked to conduct a search of the defendant's residence on 1 May 2024. He identified the

defendant in the dock. His evidence is consistent with PW1's and PW2's evidence in relation to the search. I do not need to repeat it. I will only add in this summary any additional evidence that is particular to PW3.

34. PW3 took a video recording of the defendant's residence when the police officers searched it. The video recording was played in court and PW3 gave evidence in relation to the video recording. The video recording was tendered as evidence.
35. At the Central Police Station PW3 and Constable Krissman conducted the body search on the officers who attended to the search. Nothing was found on them. He accompanied the seizing officers to the CIU's room. There he took photos of all the seized cannabis, and the weighing and testing of the cannabis plants. The photographs were tendered in as evidence. After taking the photographs he assisted the seizing officers to seal the brown exhibit bags. The seizing officers placed the cannabis plants in the brown exhibit bag.
36. PW3 observed the testing of the cannabis plants by Sgt Dan Botalanga and Sgt Vicromic Starr. He confirmed that the results of the drug tests conducted by the two on the samples taken from the 4 sections were positive for cannabis.
37. During PW3's cross-examination, he gave evidence that when he left the house he saw the seizing officers with their bag of seized cannabis plants in their respective cars. He couldn't recall the number of bags. He gave evidence that in his vehicle there were 2 bags of seized cannabis which were placed in the trunk of the police vehicle. He travelled with PW1, PW2, and Constable Rachel.
38. PW3 further gave evidence that at the Central Police Station it took him and Constable Kissman about 30 minutes to conduct the "body search" of the police officers who attended to the search at the defendant's residence.
39. In re-examination, PW3 gave evidence that he was seated behind the front passenger's seat when they left the defendant's residence after the search, and that PW2 was seated in the trunk of the police vehicle that they were traveling in.

Evidence of PW4

40. PW4 gave evidence that in 2016 he was one of the first 4 police officers from Nauru who attended a drug analyzing training in Taipei. He has done more than 10 drug cases up until now. PW4 also gave evidence that he was part of the team of police officers tasked to conduct a search of the defendant's residence on 1 May 2024. He identified the defendant in the dock. Initially he was stationed outside the defendant's residence in Anibare, and was tasked to cordon off the area. Thereafter, he was tasked to assist the officers to seize the cannabis plants. He also assisted in the uprooting of the cannabis plants from sections 1 and 2. He identified the cannabis plants from the

photographic evidence. He also gave evidence that he has experience identifying cannabis plants and he also knows how it smells. His evidence is consistent with PW1's, PW2's and PW3's evidence in relation to the search. I do not need to repeat it. I will only add in this summary any additional evidence that is particular to PW4.

41. PW4 gave evidence that he and Sgt Dan Lobendan Botalanga analyzed the cannabis plants. They began by weighing and measuring the cannabis plants. Then they tested the cannabis plants using the "Narcotic Identification System Kit (NIK Test)". They used the NIK Test specific for cannabis. He gave evidence in relation to the process used by them to analyze the cannabis. For each section two tests were conducted. PW4 conducted the first test, accompanied by another test by Sgt Dan Lobendan Botalanga. Both tests for all of the sections were positive for cannabis. Photos had been taken of the weighing, measuring and the testing. PW4 identified the weighing, measuring and the testing from the photographic evidence. He also gave evidence of the weight of the cannabis plants from each section while referring to the photographic evidence. He also confirmed that the weighing, measuring and the testing of the seized cannabis plants took place on the same day it was seized, that is, 1 May 2024. In relation to the analysis of the cannabis plants, PW4 tendered in photographic evidence taken by him of the weighing, measuring and the testing of the seized cannabis, 4 Illicit Drug Test Certificates in relation to the drug tests conducted by him on the cannabis plants seized from the 4 sections, and Gazette Notice of his certification as a police officer qualified and experience to conduct presumption testing and issuing of certificates of the illicit drug, G.N. No. 564/2016.
42. PW4 was the seizing officer for section 3. He tendered his Report by Seizing Officer. Once the testing was done, he placed the seized cannabis from section 4 in a brown exhibit bag. He was assisted by PW3. The brown exhibit bag was then stored in the exhibit room by him. He also tendered in evidence the brown exhibit bag in which the seized cannabis plants from section 3 had been stored. My personal observation of this brown exhibit bag is that it was slightly bigger than the brown exhibit bag containing the cannabis plants from section 4.
43. During the cross-examination, issue arose in relation to PW4's appointment as a drug analyst. His appointment was made under the Illicit Drugs (Analysis) Regulation 2016 which was repealed and replaced by the Illicit Drugs Control (Drug Testing Kit) Regulation 2021. PW4 gave evidence that he was not aware that the former regulation was repealed and replaced by the current regulations. He was adamant that he was still an approved drug analyst. He had also sought advice on the same and was advised that his appointment was still valid, and based on that advice he continued to carry out his duties as a drug analyst.
44. PW4 also gave similar evidence as PW1 in relation to the inaccuracies in his Report by Seizing Officer. The inaccuracies were as a result of misinterpretation of the

forms, and there was no evidence of malice.

45. During re-examination, PW4 clarified that the cannabis seized from sections 1, 2, 3, and 4 were placed separately in the CIU's room.

Evidence of PW5

46. PW5 gave evidence that he was trained in using NIK Test and drug analysis. PW5 also gave evidence that he was part of the team of police officers tasked to conduct a search of the defendant's residence on 1 May 2024. He also identified the defendant in the dock as the person to whom the . His evidence is consistent with PW1's, PW2's, PW3's and PW4's evidence in relation to the search. I do not need to repeat it. I will only add in this summary any additional evidence that is particular to PW5.
47. After the officers had searched the defendant's residence and back yard, PW5 took photos of the back yard. He tendered the photos in evidence. After the photos were taken he instructed PW2 to note down the identified cannabis plants, and he also divided the back yard into 4 sections. Each section was assigned a seizing officer. He gave evidence that the counting of the cannabis plants occurred section by section. Section 1 cannabis plants were counted, and then uprooted and packed in bags. This process was followed for section 2, 3 and 4. Once the seizing officers had uprooted and packed the seized cannabis plants in bags, he advised them to hold their own bag of seized cannabis plants for it to be transported.
48. PW5 also tendered in evidence the photographs that he took of the cannabis plants in the CIU's room. In the CIU's room PW5 and PW4 weighed, measured and tested the cannabis section by section. PW5 did the second test on the cannabis plants from each section. All the NIK Test results for all of the sections were positive for cannabis. He also identified the weighing and testing of the cannabis plants from the 4 sections through the photograph evidence tendered in court. PW5 also tendered in evidence 4 Illicit Drug Test Certificates in relation to the drug tests conducted by him on the cannabis plants seized from the 4 sections. He also tendered in evidence gazette notice in relation to his appointment as a person qualified in the analysis of illicit drugs pursuant to Illicit Drugs Control (Drug Testing Kit) Regulations 2021.
49. During cross-examination, PW5 gave evidence that the level of training PW4 received for analyzing drugs was higher than his training. He gave evidence that police officers conduct two tests when conducting tests on substances alleged to be drugs. The second is to reconfirm the first test. PW5 gave evidence that he has been a police officer for 20 years and he has a lot experience in conducting drug tests, even for large batches of plants.

50. PW5 gave evidence that in the CIU's room the cannabis plants had been recounted by them. Questions regarding representative sampling were asked, which PW5 could not answer clearly. He was not being evasive, but rather he may have misunderstood the legal jargons being used. His evidence represents random sampling of cannabis plants.
51. During re-examination, PW5 clarified that in this case they came across a number of cannabis plants, and due to this they had to pick out a few samples to conduct testing on it. If they had seized a small number of cannabis plants, then they could have tested the whole batch. He also gave evidence that for each section the cannabis plants were laid down on the weighing machine and from that machine they picked the sample.
52. He further gave evidence that PW4 had trained them in identifying cannabis plants, and that they used that training to identify cannabis plants at the defendant's residence.

Evidence of PW6

53. PW6 also gave evidence that he was part of the team of police officers tasked to conduct a search of the defendant's residence on 1 May 2024. He identified the defendant in the dock. His evidence is consistent with PW1's, PW2's, PW3's, PW4's, and PW5's evidence in relation to the search. I do not need to repeat it. I will only add in this summary any additional evidence that is particular to PW6.
54. PW6 was the seizing officer for section 2. He seized two bags of cannabis plants from section 2 and took it to the police vehicle that was designated to him. The seized bags of cannabis plants from section 2 was with him until the "seizing operation" was completed. He identified the cannabis plants that he seized from section 2 from the photographic evidence. He gave evidence that they travelled direct to the Central Police Station after seizing the cannabis plants. His evidence in relation to the testing and exhibiting of the cannabis plants in the CIU's room is consistent with the evidence of the other witnesses, and I do not need to repeat his evidence with that regard. He identified the weighing and testing of the cannabis plants from section 2 from the photographic evidence tendered in court.
55. PW6 tendered in evidence his Report by Seizing Officer. He also tendered in evidence the brown exhibit bag containing cannabis plants from section 2. My personal observation is that this brown exhibit bag was larger than the brown exhibit bags containing cannabis seized from sections 4, and 3.
56. During cross-examination, PW6 also gave similar evidence as PW1 and PW4 in relation to inaccuracies in his Report by Seizing Officer. The inaccuracies were as a

result of misinterpretation of the forms, and there was no evidence of malice. He also gave evidence that he took the seized bags of cannabis plants from section 2 to the CIU's Unit's room and stayed there while it was tested. He also gave evidence that he had his eyes on the bags of cannabis plants that he seized when he had placed them in front of the Central Police Station so that he could be searched. It was only 3 meters away from him.

57. The counsel for the prosecution did not re-examine PW6.

Evidence of PW7

58. PW7 also gave evidence that he was part of the team of police officers tasked to conduct a search of the defendant's residence on 1 May 2024. He identified the defendant in the dock. He was the arresting officer. He gave evidence in relation to the defendant's arrest.
59. PW7 was not cross-examined.

Evidence of PW8

60. PW8 also gave evidence that he was part of the team of police officers tasked to conduct a search of the defendant's residence on 1 May 2024. He identified the defendant in the dock. He was the seizing officer for section 1. He gave his evidence through audio visual link from overseas. His evidence is consistent with PW1's, PW2's, PW3's, PW4's, PW5's and PW6's evidence in relation to the search. I do not need to repeat it. I will only add in this summary any additional evidence that is particular to PW8.
61. PW8 prepared the search warrant in relation to the search in this matter. The executed search warrant was tendered in evidence by PW8. He also identified the cannabis plants that he uprooted from section 1 from the photographic evidence tendered in court. He also identified the seized cannabis plants from section 1 that were weighed and tested from photographic evidence tendered in court.
62. PW8 uprooted and seized the cannabis plants from section 1. He packed them in a rice bag and kept his seized cannabis plants with him at all times during the search. Then the cannabis was transported to the Central Police Station. He placed his bag in front of the Central Police Station and underwent a body search. Thereafter, he took his seized cannabis to the CIU's room and handed the seized cannabis plants for analysis to PW4 and PW5. He was in the room while the analysis of the seized cannabis plants took place. After the analysis and tests PW8 packed the seized cannabis plants in a brown exhibit bag and sealed the bag and stored it for safe

custody in the exhibit room. Sgt Jamieson Laan assisted him with the sealing of the brown exhibit bag.

63. PW8 also tendered in evidence his Report by Seizing Officer. Further, he also tendered in evidence the brown exhibit bag containing the seized cannabis plants from section one. My personal observation of the exhibit bag was that it was the largest exhibit bag out of all the brown exhibit bags tendered in court. The seal on the exhibit bag was loose and slightly open. PW8 gave evidence that the cannabis plants in the brown exhibit bag that he tendered were “strong when it was packed into it and that the tape used to seal it was not strong”.
64. During cross-examination, issue arose with regard to the sealing of the brown exhibit bag. PW8 gave evidence that the seal on the brown exhibit bag for the cannabis plants seized from section 1 was the same. The only difference on the day of the tendering of this evidence in court is that the seal was slightly open, and that on the date the cannabis plants were tested and stored for safe custody it had been sealed tightly.
65. PW8 also gave evidence that even if the brown exhibit bag was slightly open it could not be tampered with because it was stored safely. Officer Brando brought the brown exhibit bag into the courtroom so that it could be tendered in evidence. Officer Brando moved in and out of the court room with the exhibit bag a few times.
66. PW8 gave similar evidence as PW1, PW4, and PW6 in relation to inaccuracies in his Report by Seizing Officer. The inaccuracies were as a result of misinterpretation of the forms, and there was no evidence of malice. He also gave evidence that when he reached the Central Police Station he took the bags of seized cannabis to the CIU’s room for testing first and then went out for a body search.
67. During re-examination, PW8 clarified that he could see the bags of seized cannabis plants when it was placed in front of the Central Police Station for photographing.

Evidence of PW9

68. PW9 was the team leader of the group of police officers who attended to the search and seizure at the defendant’s residence on 1 May 2024. He identified the defendant in the dock as the person to whom the search warrant related to. His evidence in relation to the search and seizure is consistent with the evidence of the other prosecution witnesses. I will not re-state them. I will only state evidence that are specific to PW9 in relation to the search and seizure.
69. PW9 gave evidence that they assessed the risk and size of the area to be searched when they entered the defendant’s residence and its back yard. Thereafter, the forensics team carried out their duty. PW5 was taking photographs, and PW3 was

taking video recording of the search area. The search area was divided into 4 sections. Each section was assigned a seizing officer. Thereafter, the defendant was arrested. The defendant's sister was present during the search (this is also consistent with the evidence of other prosecution witnesses). PW9 elaborately identified the cannabis plants seized from the defendant's backyard from the photographic evidence tendered in court. He also gave detailed evidence in relation to the video recording of the defendant's residence. The video recording was replayed in court.

70. PW9 gave evidence that after the cannabis plants were uprooted and seized from the 4 sections, they rechecked the area and then destroyed all the pot plants and bags used to cultivate the cannabis plants. The seizing officers placed the bags containing the seized cannabis plants in front of the Central Police Station for its photographs to be taken. The police officers attending the search and seizure were "body searched" before they entered or left the Central Police Station. After the body search, PW9 went to the CIU's room. PW4 and PW5 were laying out the cannabis plants seized from section 1. They then measured, weighed and tested the cannabis plants. Sgt Jamieson Laan was assisting them. The seizing officer was present, and was filling out the Report by Seizing Officer. PW9 confirmed the positive results of the tests carried out on the cannabis plants seized from section 1. After the analysis of the plants were done, the seizing officer packed the cannabis in a brown exhibit bag, sealed it, and stored it for safe custody in the exhibit room. This process was repeated for the other sections. PW9 also identified the cannabis plants which were weighed, measured and tested in the CIU's room from photographic evidence tendered in court.
71. PW9 conducted the record of interview of the defendant. The defendant was given an opportunity to consult a lawyer. He advised PW9 that he had already consulted a lawyer and did not need her to be present. He did not make any admissions in his record of interview.
72. PW9 also gave evidence that on 2 October 2024 he was instructed by the counsel for the prosecution to retrieve the brown exhibit bag containing the seized cannabis plants from section 1 from the exhibit room and bring it to the District Court so that it could be presented to PW8 during his examination in chief. PW8 was overseas and gave evidence via audio visual link. PW9 brought the brown exhibit bag to the District Court with Senior Constable Brando Tabia. At the District Court the brown exhibit bag was handed over to Senior Constable Brando Tabia because PW9 could not come into the courtroom as he was the next witness. Senior Constable Brando Tabia was seated inside the courtroom, while PW9 was seated outside. Senior Constable Brando Tabia left the courtroom twice to go to the wash room. Everytime he did so, the brown exhibit bag was handed over to PW9.
73. PW9 gave evidence that the seal on the brown exhibit bag was loose when he retrieved it from the exhibit room.

74. During cross-examination, PW9 was referred to a photograph taken in the CIU's room of the weighing of the seized cannabis from section 4. In that photograph the cannabis plants were placed on the weighing machine, and beside it was 3 pot plants with a cannabis seedling in each pot plant. During the closing submissions counsel for the defendant raised issues regarding the weight of the cannabis from section 4 due to this fact. However, I must emphasize that this question was never put to the officer carrying out the weighing of the cannabis plant. Further, the picture is also self-explanatory. Only the cannabis plants on the weighing machine were being weighed for record purposes. The three pot plants with a seedling in each one of them were not placed on the weighing machine.
75. PW9 could not recall the number of bags of cannabis plants that were seized from the defendant's residence. He also gave evidence that he reviewed the sealed brown exhibit bags before they were stored in the exhibit room and he confirmed that they were sealed properly.
76. PW9 gave evidence that on 2 October 2024 when he retrieved the brown exhibit bag containing cannabis plants seized from section 1, he saw that the seal was loose. The tape was still intact but it was no longer held tightly. He did not take any steps to seal it properly before bringing it to court nor did he document this issue. He also agreed that Senior Constable Brando Tabia was not part of the search and seizure team. He emphasized that whenever the brown exhibit bag was brought out, it was under his control and it could not be tampered with.
77. In re-examination, PW9 could not explain as to why the 3 pot plants were in the photo, and what happened to it.

ANALYSIS

78. The defendant is charged for unlawful cultivation of cannabis in contravention of section 6(a) of the *Illicit Drugs Control Act 2004* ("the Act").
79. Section 6 of the Act provides as follows:

A person who without lawful authority;

- (a) *acquires, sells, supplies, possesses, produces, manufactures, cultivates, uses or administers any illicit drug; or*
- (b) *engages in any dealing with any other person for the transfer, transport, supply, use, manufacture, offer, sell, agree to sell, offer for sale or have possession for sale, import or export of any illicit drug,*
- is guilty of an offence and is liable to imprisonment for 10 years and a fine not exceeding \$50,000.*

80. Before I proceed any further, I find that the prosecution witnesses were reliable and truthful. There was no substantial dispute or conflict in the evidence given. I find that the evidence given by the prosecution witnesses as being the established facts in this matter.
81. The elements of the offence are:
- i. The defendant
 - ii. Cultivated 141 plants
 - iii. The plants cultivated are controlled plants, namely cannabis
82. The prosecution does not need to prove that the cultivation of the cannabis plant was unlawful. If the prosecution would be required to prove this, then it would mean that the prosecution would need to prove a negative averment. In criminal proceedings such as this, the prosecution is not required to prove a negative averment, the onus of proof of the negative averment shifts to the defendant: see *R v Edwards* [1974] 2 All ER 1085 with regard to the application of this principle. Therefore, the onus was on the defendant to prove the lawfulness of the cultivation of the cannabis plants.

Whether the defendant cultivated 141 plants alleged to be cannabis?

83. *Blackstone's Criminal Practice 2012* at B19.53 provides as follows:

Mens Rea

The prosecution is not required to prove that the accused knew that the plant he cultivated was in fact cannabis (Champ (1981) 73 Cr App R 367),...

84. The prosecution need not prove that the accused knew that the plants he cultivated was in fact cannabis. The cultivation was organized and active steps were taken to plant and nurture the cannabis plants. There is evidence of a nursery, cultivation tools and equipment's, all of which were located in the defendant's backyard. The backyard was enclosed with roofing iron, which restricted visibility into the backyard from the outside: see *MacDonald v Police* [1980] 2 NZLR 482 with regard to evidence needed to establish cultivation.
85. All the witnesses identified the defendant and gave evidence that the cannabis seized by them was cultivated at his residence. The defendant's counsel, through cross-examination, did not dispute the fact that the cannabis plants were cultivated on his residence. All the prosecution witnesses gave evidence that when they reached the defendant's residence he was not there. He came later and let the police officers enter into his residence. From all the established facts in this case I also draw the inference that the defendant cultivated the cannabis plants in his backyard: see *Director of*

Public Prosecutions - v - Choung Vu [2015] IECA 257 (16 November 2015) in relation to drawing of inferences in similar circumstances. This is the only reasonable inference that can be drawn in this matter.

86. PW2 gave evidence that he had counted the cannabis plants at the defendant's residence and it amounted to 141 plants. There is also evidence that for each section the cannabis plants were counted first, and straight afterwards they were uprooted and seized. Further, PW5 also confirmed that he also counted the plants when he was measuring and weighing the cannabis plants at the CIU's room.

Whether there was a break in the chain of custody?

87. The defendant's counsel seems to submit in her closing submissions that the failure of the seizing officers to provide correct information in the Report by Seizing Officer amounts to a break in the chain of custody and/or taints the evidence in a manner that the evidence is rendered inadmissible and/or unreliable.
88. With this regard I refer to *Harding v MMG Australia Ltd* [2018] FWC 594 (2018) in which the following observations were made at [64] of its judgment with regard to chain of custody forms provided under written law containing inaccurate information:

64 Therefore, from Ms Eastaughffe's perspective at least, all the information that was required to be completed had been completed. However, I accept that the chain of custody form was not completed to the required standard. However, once again, the fact this occurred does not of itself give rise to a concern about the integrity of the sample.

89. In light of the above observations in *Harding v MMG Australia Ltd*, supra I find that the incomplete and/or the inaccurate information provided in the Report by Seizing Officer does not by itself raise any concerns in relation to the integrity of the seized cannabis plants. The inaccuracies were as a result of misunderstandings and no malice was involved. Further, all the seizing officers gave oral evidence in relation to the chain of custody. The only issue raised with regard to the oral evidence about the chain of custody was that the bags in which the seized cannabis plants were kept was not sealed. This on its own does not amount to a breach in the chain of custody. A mere doubt about whether a break in the chain of custody could have occurred is not sufficient. The doubt must be reasonable. PW1 gave evidence that the branches of the seized cannabis plants came out of the bag which is why it could not be sealed.
90. The evidence in this relation is that the seizing officers always had the seized cannabis in their possession and/or under their supervision, and no evidence was led that would

give rise to a reasonable doubt in relation to a breach in the chain of custody. I find that the evidence in this case establishes an intact chain of custody from the point in time the cannabis plants were seized to the point of time the cannabis plants were measured, weighed, tested and stored in the exhibit room.

91. The issue in relation to the loose tape on the brown exhibit bag containing cannabis plants seized from section 1 does not break the chain of custody because under the Act the seized drugs may be destroyed after samples have been taken and tested. Further, with this regard I refer to *Director of Public Prosecutions v Noonan (Approved)* [2024] IECA 275 (15 October 2024) in which the Irish Court of Appeal made the following observations in relation to chain of custody at [37] and [38] of its judgment:

37. *The chain of custody of a particular exhibit is established, in the normal way, by viva voce evidence (if the respondent is put on full proof of this issue)*
...

38. *The chain of custody of an exhibit is required to be established from the time of seizure of an item to the time it is forensically examined so that it can be established that the item at issue is the item which was examined and that therefore the results of the forensic examination relate to the exhibit seized which has not been interfered with since its seizure. It appears that the issue with the chain of custody which arose in the instant case, occurred after the forensic analysis of the controlled drugs exhibits was conducted. The significance of any break in the chain of custody is not apparent to the Court, but if there was a significance, it is clear that extensive cross examination took place of the various witnesses who were called by the respondent with a view to establishing a chain of custody of the relevant exhibits. Accordingly, the jury were well positioned to determine whatever issue arose in relation to this particular matter, if an issue did indeed arise at all.*

92. In light of my reasons above, I find that the integrity of the evidence led by the prosecution has not been discredited. I also find that the prosecution has proven beyond reasonable doubt that the defendant cultivated 141 plants in his backyard which were seized by the police officers during a search and seizure operation conducted by them on 1 May 2024.

Whether the cultivated plants are controlled plants, namely, cannabis?

93. The defendant's counsel raised two issues with regards to the testing of the seized cannabis plants. Firstly, she submitted that the drug tests conducted by PW4 were invalid because he was not appointed as a drug analyst under the *Illicit Drugs Control (Drug Testing Kit) Regulation 2021* ("the Regulation"), and that this affected the drug tests conducted by the PW5 because it is not in accordance to procedure. Secondly, she submitted that the sampling method used by the testing officers was not structured and documented and this affected the integrity of the samples taken.

94. I will deal with both issues simultaneously below. Section 42 of the Act provides as follows:

Presumption relating to samples

Where in any prosecution for an offence under this Act it is proved that a sample which was taken from any illicit drug or controlled chemical possesses particular properties, it shall be presumed, unless contrary is proved, that any such illicit drug or controlled chemical possesses the same properties.

95. The Regulations do not provide any guidelines on the procedure on how drug tests are to be conducted. Section 42 of the Act requires the minimum sample in relation to testing. There are no legal requirements for two tests to be conducted on a sample to confirm the validity of the first test. It may have been an internal practice but it is not a mandatory requirement. Therefore, even though the Illicit Drugs Test Certificates of PW4 are invalid, the Illicit Drugs Test Certificates prepared by PW5 are valid, and the presumption under section 42 of the Act will apply in the current circumstances.
96. The Supreme Court of British Columbia in ***R v Malenfant*** [2016] B.C.W.L.D. 1075 made the following observations in relation to sampling procedure at [87] of its judgment:

87 For the purposes of this case, the sampling process must be sufficiently random, so that the seizure and analysis of the samples, together with all the other evidence in the case, allows the court to be satisfied beyond a reasonable doubt that the only reasonable inference to be drawn from all the evidence is that all the plants were marihuana. Since Professor Swartz was not produced for cross examination, and was not asked to comment on Cst. Tite's evidence, his opinion is of limited use and application.

97. UNODC Guidelines on Representative Drug Sampling (2009) at page 1 in its introduction states that:

the present guidelines contain a number of sampling strategies for cases with large numbers of items of relatively homogeneous material. However, from the descriptions of the sampling methods, it is not automatically clear which strategy should be preferred (or would be optimum). This is mainly due to the fact that it is not possible to define a sampling strategy, if the requirements have not been defined. This is the main reason why it was decided to refrain from giving advice at local, regional or national level.

98. The Guidelines goes further to acknowledge that complex sampling methods would be a draw back for the courts. In its introduction at page 1 & 2 it also states that:

Since sampling is often carried out by police and customs, the guidelines

refrain from giving advice where the number of samples must be calculated for each separate case; this would be confusing and bother law enforcement personnel with computers or lists with Bayesian and hypergeometric tables. Therefore the final sampling advice just mentions the (minimum) number of samples to be taken (5, 8 or 11, the number of samples being dependent on the circumstances). The forensic laboratory can then, if necessary, perform the final evaluation and probability calculations.

99. Chapter 3 of Guidelines titled Representative Sampling Techniques, pages 7 & 8, states the following regarding random sampling:

The practical solution for random sampling is quite easy: after having observed that the external characteristics are the same, all the units can be put in a “black box” (plastic bag or something similar) and a sample can be chosen randomly. This kind of solution can be applied to practical cases such as seizures of a thousand heroin street doses in similar external packages or a thousand tablets. In this case this “black box” sampling method can be applied to eliminate (or at least reduce to a minimum) any bias that may be introduced by the person selecting the samples...

100. I will now discuss the case of **R v Lee**, 2017 ONSC 2403, 2017 CarswellOnt 6985 (2017) which involved the sampling of 2000 cannabis plants. Only 3 samples from the 2000 cannabis plants were randomly taken. Issues regarding representative sampling arose in the matter. The court in that matter endorsed the random selection method. Further, it was held in that case that based on the results obtained from the 3 samples together with the whole evidence presented in that case the prosecution had proven beyond reasonable doubt that there was substantial cannabis cultivation. The only issue that was not determinative in that case was the number of cannabis plants in the cultivation.
101. In light of all the evidence presented before me, I find that a criterion for random selection was in fact used to allow for representative selection. The whole area in which the alleged cannabis plants were cultivated was divided into four sections. The exhibits containing the alleged cannabis plants were of different sizes, ranging from small plants in a small exhibit bag to larger plants in larger exhibit bags. This represented the fact that the search area was divided into four separate sections representative to the sizes of plants contained in those sections. PW5 selected a sample from each section. Therefore, 4 samples were taken, and all four samples tested positive for cannabis. PW5 is qualified to conduct analysis of illicit drugs under the Regulations, and I accept his Illicit Drug Test Certificate as evidence in this court proving the truth and accuracy of the drug tests conducted by him.
102. In light of the above, I find that the prosecution has proven beyond reasonable doubt that the 141 plants that were seized from the defendant’s backyard where controlled

plants, namely, cannabis.

VERDICT

103. For the foregoing reasons, I find the defendant guilty of the charge laid against him.

ORDER

104. The Registrar of Courts is to make necessary arrangements for the destruction and/or disposal of the cannabis plants tendered in evidence.

Dated this 27 day of January 2025.


Resident Magistrate
Vinay Sharma

The seal of the District Court of Nauru is circular, featuring a central emblem with a sun and a shield, surrounded by the text "DISTRICT COURT OF NAURU" and two stars. The emblem includes the motto "KORON - WIL - TINI".