CROWN LAW

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IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY **CR 62 of 2017**

23/12/19.

BETWEEN: **R E X** **- Prosecution**

AND: **CHRISTOPHER TA'UFO'OU** **- Accused**

BEFORE THE HON. JUSTICE CATO

Counsel: Ms. H. Aleamotu'a for the Prosecution

Mrs. L. Kuli for the Accused

SENTENCE

[1] The prisoner, Christopher Ta'ufo'ou, was originally charged with two counts;

(a) Possession of illicit drugs contrary to sections 4(a) and (b)(ii) of the Illicit Drugs Control Act 2003, particulars of which were that, on the 17th March 2017 at Malapo, he did without lawful justification possess a total of 635.54 grams of cannabis.

(b) Possession of 22. 22 calibre long rifle live ammunition without a licence.

[2] Originally, on the 14th July 2017, he pleaded not guilty to both counts but shortly prior to trial on the 19th November 2018 he pleaded guilty to count one, and I was informed in exchange the Crown withdrew a charge of possession against his wife and offered no evidence on count 2.

[3] The accused was in possession of a substantial amount of cannabis, totalling 635.54 grams. This comprised one bag containing cannabis found on the front lawn, one cannabis branch with leaves found in the living room, one bag with cannabis seeds found in the first bedroom; 3 bundles of cannabis plant branches found in the ceiling

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and 4 cannabis branches found in the ceiling. Also located, were 7 bags containing small plastic bags suitable for packaging small amounts of cannabis.

[4] The accused, aged 30, comes from a large family of 14 siblings. He is married and has four children. He is the breadwinner for the family from construction and plantation work. He finished school without formal qualification. He does not drink and says he has never used drugs. I do not believe this assertion since it seems he enrolled himself in a Salvation Army drugs programme prior to this sentencing. He has a family plantation. He asserted in his probation report that the cannabis was for personal use and it is suggested friends would gather also and some used marijuana. He has previous convictions; one for housebreaking in in 2005 and a trespass in 2012 but nothing for drug offending.

[5] I am guided by the Court of Appeal in *Vea v R* [2004] TOCA 7, where the Court of Appeal adopted the approach of the New Zealand Court of Appeal in *R v Terewi* [1999] 3 NZ 62 where it was said that there were three general categories of cannabis drug offending ;

(a) The growing of cannabis in small quantities for personal use should attract a sentence of up to two years imprisonment;

(b) Small scale commercial cultivation with sentences up to 4 years imprisonment; and

(c) Large scale cultivation for commercial purposes where sentences over 4 years were appropriate.

[6] The Terewi guidelines are apposite here also because the maximum sentence of 7 years imprisonment that applied in New Zealand is also the maximum sentence that applies to this charge under Tongan drug law. Terewi was a case of drug cultivation but in my view the guidelines are useful for drug possession and dealing generally. There is no distinction in Tonga between possession, supply, or cultivation of cannabis which all carry a maximum sentence of 7 years imprisonment.

[7] The prisoner had obtained mature cannabis plant material as evidenced by the branches found in his house. The presence of a bag of seeds also suggests an ongoing activity. The presence of small bags suggests an element of commercial

exploitation of the plant material. However further than, this there is no indication of the value of the material located as the Court of Appeal suggested in Terewi would give a sentencing judge an indication of the value of the cannabis located.

[8] The weight of the cannabis is 635.54 grams. In Siaosi Helu, (7th September 2018) Paulsen CJ considered that a starting point of 2 years was appropriate for 39.65 grams of cannabis. In Le'oto CR 124/16 he selected a starting point of two years and 9 months imprisonment. This is representative of other cases for cannabis sentencing in Tonga. For example, in *Rex v Talia'uli* CR 99/07, Andrew J had sentenced an offender convicted of possession of 3 bags containing 54 grams of cannabis to 2 years imprisonment with the last 6 months suspended upon the condition that he undertake and complete a drug rehabilitation programme Plainly the weight of the cannabis in this case was considerably more. The Crown drew my attention to *R v Fololeni Mesui* CR 55/13 (5th September 2013) where I had sentenced a first offender and a single mother of 4 children to two and half years imprisonment for supplying the drug cannabis and 18 months for possession to be served concurrently where the amount involved was 641.2 grams or 22.9 ozs. I fully suspended both sentences requiring the offender to complete a rehabilitation course on drugs and community work of 50 hours.

[9] Mesui was decided in 1913 when, in my experience, there were far fewer cases of drug offending coming before the Supreme Court. It may be that with more cases coming before the Supreme court that drug offending is more prevalent in Tonga, a point the Crown and the Media has emphasised recently. It may also be because there is a greater police emphasis today on investigation of drug activity. On either basis, this Court cannot ignore the reality that drug offending is probably becoming more prevalent in Tonga and this has excited community concern.

[10] Mrs Kuli for the prisoner submitted that this was a charge of possession and not supply and I bear this in mind although the legislation does not discriminate, as I have said, in relation to the maximum sentence according to the nature of drug activity. There was a large amount of cannabis found here and it is likely that for a similar amount in Mesui I adopted a starting point of about three years and three months to three and half years imprisonment. I take the view that, from the aspect of proportionality or relativity with the cases I have mentioned, a starting point of three years and three months is in order here. This brings the case within the second category of Terewi. It is not cultivation but it is sizable possession with aspects that I

have mentioned (the presence of bags and seeds which suggests some intended commercial exploitation and ongoing activity) although the amount of commercial exploitation is unclear.

[11] Although not a first offender, this is the prisoner's first conviction for drugs and I take this into account. His plea of guilty was not a timely plea being on the point of trial but I take into account that the Crown withdrew a second charge of possession of ammunition and a charge of what would have amounted to joint possession against his wife, also at this late stage. I will accordingly give him full credit for his guilty plea and expression of remorse. I also take into account,t but only to a limited degree, that he is the breadwinner for his family and they will be deprived of his maintenance whilst he is in custody. I will advert to this factor on the issue of suspension. I allow him, by way of mitigation, 12 months discount making his sentence of imprisonment two years and three months, backdated to the date of his remand in custody.

[12] I consider that he should be allowed largely because of his guilty plea and expression of remorse to the final 12 months of his sentence of imprisonment suspended on the following conditions;

(a) He is not to commit any offences punishable by imprisonment for the term of his suspension;
(b) He is placed on probation for the period of his suspension;
(c) He is required to undergo under the direction of his probation officer a course on drug abuse under the Salvation Army.

[13] He is warned that a failure to carry out the terms of his suspension may mean that he is recalled to prison to serve the balance of his term of imprisonment.

[14] I record that I considered a defence submission that I should also fully suspend his sentence, following the approach I adopted in Mesui but I decline to do so. It may be that I was overly lenient in Mesui in allowing her full suspension on the basis she underwent rehabilitative treatment and carried out community work of 50 hours, but as against this, she was a single parent with four young children and a first offender who had entered her guilty plea in a timely way shortly after appearing in this Court. Since 2013, there has been greater community concern voiced with drug offending in Tonga. In my view, the public interest and the deterrent message that must be

communicated in drug sentencing would not be well served by full suspension in these circumstances where a significant weight of cannabis is involved.

[15] I note finally in Terewi, the New Zealand Court of Appeal emphasized that personal circumstances should be given less significance in drug cases at least where there was commercial exploitation involved, and suspension should not granted either unless in exceptional circumstances. I have not applied those dicta here because in my view, personal circumstances may become very relevant, on the question of suspension which is no longer a sentencing option in New Zealand. The fact that an offender has a young family to support may well be important in encouraging his rehabilitation. A suspended sentence is attractive for drug rehabilitation and affords an opportunity for an offender to gain counselling and assistance whilst under supervision and thus may prevent further offending. In any event, I do not see why personal circumstances should be of less relevance in drug offending than in other area of the penal law where commercial exploitation is often a motive for offending.

C. B. Cato

JUDGE

NUKU'ALOFA: 17 December 2018