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

CR 49 of 2019

REX

-V-

KALAUUSA TUALAU

BEFORE HON. JUSTICE NIU

**Counsel : Ms. T. Kafa for the Crown
Mr. S. Tu'utafaiva for defence**

Hearing : On Mitigation on 20 April 2020

Sentencing : 27 April 2020

SENTENCING

- [1] Kalausa Tualau, you were licensed under the Arms and Ammunitions Act to possess and use a .22 rifle which was particularly specified in your licence and you were also licensed to possess only up to 50 bullets at all times. That licence was issued to you on 9 February 2018.
- [2] On 25 June 2018 (some 4 months later) the police found 297 bullets in your possession. 71 bullets were in a black fabric bag and 200 bullets were in a clear plastic bag. Both bags were in a hollow in the dashboard of your Voxy van right above the steering wheel of the van and you were just standing by the driver's door which was open at the time. 26 bullets were found together with cash and a packet of Winfield cigarettes on your person.

Altogether 297 bullets were found, but you were licensed to have only up to 50 bullets.

- [3] Accordingly, you were charged with possession of 297 bullets which was in breach of the licence you were given.
- [4] You pleaded not guilty to that charge, as you did to a charge of possession of methamphetamine which was also brought against you as a result of the search made by the police in which the bullets were found.
- [5] You were acquitted of the charge of possession of the methamphetamine, but convicted of the charge of possession of the 297 bullets which was in excess of the number authorised by your licence.
- [6] You gave no evidence and you called no evidence as to why you pleaded not guilty to this charge. No submissions were made as to any reason why you should not be convicted of that charge.
- [7] It was clear from the evidence that you were aware of the presence of the bullets on the dashboard because the 200 bullets were visible through the clear plastic bag in which they were placed in front of the steering you would have used whilst driving the van. The black fabric bag with the 71 bullets, were right beside the clear plastic bag. The remaining 26 bullets were in your pockets. You indeed had possession of all the bullets found because you were aware of them and that they were in a position in the van over which you as driver had control over them. You were rightly convicted of possession of them in excess of the number allowed by your licence.
- [8] Your counsel informed me in his oral submissions in mitigation on 20 April 2020 that the reason you had so many in your possession was because you cannot buy any .22 bullets in any place in the Kingdom and that you had to bring them from overseas, and therefore had to bring so many each time to keep you in stock of the bullets for your rifle at all times. He also said that you took all

these 297 bullets (and the rifle) with you wherever you went in the van in order that they are safe from persons at your home and so that they were constantly under your care.

- [9] I have to say that that reason is irresponsible, unreasonable and unlawful, because it defeats the purpose of the Arms and Ammunitions Act. That Act is aimed at controlling the possession and use of arms and the bullets for the same, to ensure that there is no irresponsible use of guns and more importantly, to ensure that there is no stock piling of arms and ammunition by any person or persons for unlawful use within the Kingdom. By keeping to the licensing system, every gun and every bullet is accounted for and who has them and where.
- [10] If you thought you wanted more than 50 bullets you ought to have applied for an increase and for an import licence to import them. But you did not. If every other gun licence holder was to import the bullets they want without such licences, the whole purpose of the Act would be defeated.
- [11] As I see it, you just could not care less what your licence allowed you to have in your possession. You deliberately and knowingly acquired these excess bullets in flagrant disregard of the number your licence allowed you to have.
- [12] And what is worse, you did that whilst you were on a suspended sentence of one month imprisonment imposed by the Magistrate's Court on 11 May 2018 – that is, just a month and a half before you were caught with these 297 bullets. And even worse still, the offence in respect of which that sentence was imposed was unlawful possession of arms under the same Act.
- [13] I also consider the circumstances in which these bullets came to be found in your possession. You were out in a bush area with 2 other men in the van who could have, if they wanted to, pick up the rifle which was in the van and the bullets from the dashboard of the van and load and fire the rifle. This was because the rifle

was placed between the driver's seat and the front passenger seat with its butt resting on the floor of the seat behind the driver. The rifle had all its parts together. It would have been prudent, and it is done by careful gun users, to remove the bolt of the rifle altogether to prevent its use by any other person. But you did not do that. You just had no regard to safety of persons, including yourself, to do that.

- [14] However, the Act does provide for a lighter sentence to be imposed upon a person who has breached the condition of his licence than the sentence to be imposed upon a person who had no licence at all. Where there is no licence to have arm or ammunition, the maximum penalty is 5 years imprisonment. And where there is a licence but its condition is not complied with, the maximum penalty is only 2 years imprisonment.
- [15] In a case of *R v Pisima'ake* (CR 87/2018) (unreported), the accused pleaded guilty to possession of a hand gun and 7 bullets for it without licence. He was sentenced to pay a fine of \$2,000 in respect of the gun and \$500 in respect of the bullets or 3 months imprisonment in default.
- [16] In *R v Vakapuna* (CR 133/18) (unreported) the accused pleaded guilty to possession of a .22 rifle and 24 bullets for the same without licence. He was sentenced to 1 year 6 months imprisonment in respect of the rifle and 6 months imprisonment in respect of the bullets but both sentences to be suspended for 2 years on strict conditions.
- [17] In *R v Katoa* (CR 157/18) (unreported) the accused pleaded guilty to possession of 51 bullets of various calibre without licence. He was sentenced to a fine of \$200 or 1 month imprisonment in default.
- [18] All those cases concern possession of ammunition without a licence. I cannot find and am not aware of any case of possession

of ammunition in excess of the amount prescribed in a licence held, such as in the present case.

[19] Accordingly, both your counsel and Crown counsel agreed that an appropriate sentence in your case is by a way of a fine which they indicated can be between \$500 and \$1,000.

[20] Your counsel said that you are married and that you have 4 children and that you have a quarry and that you also farm, so that you are in a position to pay such a fine.

[21] However your counsel made no submission at all, after Crown Counsel revealed that you had breached the suspension order that was made by the Magistrate Court on 11 May 2018, namely that your 1 month imprisonment sentence imposed on you was to be suspended for 6 months. In breach of that order, namely the condition of suspension, you committed this present offence of possessing the 297 bullet which was in excess of the number prescribed in your licence. Accordingly, you are liable to serve that prison sentence of one month forthwith.

[22] S.24 (3) of the Criminal Offences Act provides for it as follow:

“(3) (a) It shall be lawful for the Court when imposing a sentence of imprisonment to suspend the whole or part of such sentence for any period up to 3 years.

(b) Such sentence will be conditional on the offender not being convicted of an offence punishable by imprisonment committed during the period of suspension.

(c) In the event of the offender being convicted of an offence punishable by imprisonment committed during the period of suspension he will thereupon be sentenced to serve the term of the suspended sentence in addition to the

punishment imposed for such subsequent offence.

- (d) The Court may also impose conditions during the period of suspension of sentence, including a requirement that supervision by a probation officer or another responsible member of the community takes place. A breach of such conditions may, upon application, result in the rescission of the suspension order.
- (e) In special circumstances the Court may release an offender from the operation of paragraph (c) and may extend the original period of suspension for a further period not exceeding 1 year."

[23] That means that if you are convicted of an offence which is punishable by imprisonment and which you committed during the period of suspension of the sentence, you will be sentenced to serve the term of the suspended sentence in addition to the sentence for the subsequent offence, unless there are special circumstances relating to you or to your case in which event the Court may release you from having to serve the suspended sentence and extend the original period of suspension for a further period of up to 1 year.

[24] As I said, your counsel made no submission to me that there are special circumstances in your case which would warrant releasing you from that sentence and extending the period of suspension. And I do not see or think of any. Such a circumstance must be such that it would be unjust that you serve the one month prison sentence so that you have further time to prove that the suspended sentence should be cancelled. You were aware of it and you accepted it by not appealing against it. You are now bound by it, and in the absence of any special circumstances, I am required to enforce that suspended sentence against you.

[25] I consider that I, and this Court, are able to do that although the suspension order was made by the Magistrate's Court because it is in this Court that you have been convicted of the subsequent offence and the provision requires that "thereupon" the convicted person will be sentenced to serve the suspended sentence as S.24(3)(c) specifically provides, "in addition to the punishment imposed for the subsequent offence".

[26] I have considered the amount of fine to be imposed upon you, and the "couldn't care less" attitude you have manifested as I have described earlier, and the fact that you had nearly 5 times more bullets than you were licenced to have. I believe that a fine of \$1,000 be imposed on you, and I so order, and that you are to pay that amount within 60 days from today. If you fail to pay it all within that period you are to serve 3 months imprisonment.

[27] In addition to that, you are to serve one month imprisonment forthwith commencing today for the suspended sentence ordered by Magistrate's Court on 14 May 2018.

NUKU'ALOFA: 27 April 2020.


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J U D G E

The seal of the Supreme Court of Tonga is circular, featuring a central emblem with a crown and a cross, surrounded by a wreath. The words "SUPREME COURT TONGA" are inscribed around the perimeter, and a five-pointed star is positioned at the bottom center.