

Simon and J.L.

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

CR 50 of 2020

REX

-V-

FILOMILA KAUFUSI

BEFORE HON. JUSTICE NIU

**Counsel : Ms. 'A. 'Aholelei for the Crown.
Mr. Filomila Kaufusi, accused, for himself.**

Probation Report: by H. Telefoni on 1 June 2020.

Submissions : by Ms. 'Aholelei on 16 June 2020.

Hearing : on 26 June 2020.

Sentencing : 17 July 2020.

SENTENCING

[1] Filomila Kaufusi, you pleaded guilty and I convicted you on 4 May 2020 of the offence of cultivation of illicit drug, namely 17 Cannabis plants, contrary to S.4 (a) of the Illicit Drugs Control Act. The total weight of the 17 plants came to 94.45 grams.

Summary of facts

[2] The summary of facts provided by the Prosecution to the Court states that the police, acting on reliable information provided to them, and without a search warrant, came to a tax allotment at Hauloto where you and another person were present on 30 May

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2019. The police asked you if there were any drugs on the allotment and you replied that there were, and you then led them to where you had planted the 17 cannabis plants and which were growing there. You cooperated with and were helpful to the police and when you were charged in this Court with possession of the 17 plants you readily pleaded guilty.

Probation Report

- [3] I directed that a probation report be made by the probation officer, and probation officer, H. Telefoni, filed that report on 1 June 2020. He says that you are 28 years old, you were married to your wife this year after she had given birth to your second child in February. He says that you have now settled down and have lived together with your wife and your 2 children, and have been keeping a steady job at a construction company since January this year, earning \$200 per week. He says that you are working 6 days a week because of the need of the company to complete so many of the hurricane relief houses by the end of this year. He recommends that your imprisonment sentence be suspended in full to enable you to continue to maintain your job and your family.
- [4] He says that you are a changed man and that you have become a trustworthy and hard-working husband and father, and that you are the only one working because your wife has to look after your newly born child, as well as the 4 year old child.
- [5] Attached to the probation report is a letter from your bishop at the Latter Day Saints Church at Havelu, Bishop Kalapa. He says that there has been a big change in your life for the better, and that he wants to help to keep you at it for your sake and for your family's sake. He says that you now regularly attend all the church services and meetings as well as the required activities which are aimed at promoting the unity and closeness of the families.
- [6] Also attached is a letter from the town officer of Havelu, Vika Kaufusi, who confirmed that whereas you were once a troublesome

and "fakakina" boy in the village, you have now settled down with a wife and 2 children and have become a model citizen, that is, being a good husband, working to support your family and going to Church with your family on Sundays.

Crown Submissions:

Previous convictions

[7] Ms. 'Aholelei for the Crown has stated that you have previous convictions, and I had asked you in court whether those previous records were correct and you stated that they were. They are as follows:

(1)	Manslaughter	CR143/2012	Supreme Court	6years imprisonment
(2)	Drunkenness	CR85/2016	Ha'apai	\$200 fine
(3)	Escape	2016	Ha'apai	
(4)	Found by night	2016	Ha'apai	
(5)	Housebreaking/theft	2016	Ha'apai	6 months imprisonment
(6)	Housebreaking/theft	2016	Ha'apai	3 months imprisonment

[8] I had asked you in Court about those offences and you told me that you were working for a construction company in Ha'apai at the time and that was when you committed those offences there.

Comparable cases

[9] Ms. 'Aholelei has referred me to 4 drug cases which may be compared to your case:

(a) ***Vea v R*** [2004] TOCA 7 where that accused had:

20 branches of Indian hemp.

125 Indian hemp seeds

1 Indian hemp cigarette.

8 Indian hemp plants.

Dried branches and leaves of Indian hemp.

The Court of Appeal held that the sentence of 2 year 9 months imposed in the Supreme Court be reduced to 1 year 3 months to recognise the assistance given by the accused to the police and his efforts to rehabilitate himself.

- (b) ***R v Le'ota*** (CR124/16) where that accused had cultivated cannabis plants which when weighted came to a total of 52.42 grams. He pleaded guilty and said that he only grew them for his personal use. The Court sentenced him to 2 years imprisonment but fully suspended subject to stipulated conditions.
- (c) ***R v Matakaiongo*** (CR135/2017) where that accused had 89.2 grams of cannabis material, empty plastic packets and cash of \$800 pa'anga NZ\$1,430, US\$20 and AUS\$10. Because of his guilty plea and remorse he was sentenced to 2 years 3 months, with the last 9 months being suspended on conditions. Court accepted he was in possession for commercial purpose.
- (d) ***R v 'Ahokava*** (CR106/2019) where that accused had 62 packets of cannabis weighing a total of 46.63 grams. He also had previous convictions in 2011 and 2015 for assaults and no drug offences. He pleaded guilty. He was sentenced to 18 months imprisonment which was fully suspended on conditions, amongst which was that he served 50 hours community work.

[10] Comparing your case and those 4 cases, Ms. 'Aholelei submits that a starting point for your offence is 2½ years imprisonment, in view of the substantial amount of 94.45 grams of cannabis found in your cultivation. She submits that 18 months be deducted from that starting point leaving a balance of 1 year imprisonment, which she says should be served in full without any suspension, in view of your previous convictions whereby you do not qualify for suspension.

Accused submissions

- [11] During the hearing of submission in Court on 26 June 2020, you told me that you were really repentant of what you have done because when you were growing the plants you had no job and you were not married and you had no future in your life. But that after you were caught and arrested, you then saw and realised the hopelessness of your life and the misery you will have for a long time while you will serve out another long prison sentence. You also told me that you saw your woman heavy with your second child which was soon to be born. You then decided to find a job and to stick with it in order that you would be able to support the woman and your 2 children, which before then you had not cared much about.
- [12] You told me that after your second child was born and were already living together with her and your two children, you then decided to marry her which you did in May of this year. Your Church bishop confirmed that in his letter which I have referred to, and like I have said, he confirmed that you have indeed become a good husband and father as well as being a good member of the Church, that is, non-drinking and non-smoking.
- [13] You told me that the work that you do at your construction job is construction of timber trusses, brick laying, and carpentry work, works for which you had been trained to do during your student days in Liahona High School in 2006. You said that you had worked in construction jobs at Vaiola Hospital, A3Z and other smaller construction works, and even at Ha'apai. You said it was at Ha'apai that you had committed those offences whilst you were working there in construction of the prison there.
- [14] You told me that now you are living together with your wife and two children with your wife's mother at the mother's home at Havelu, and that you take the mother's vehicle when you go to work and that you now support them all with your wages from your work. You said that you now have most of the tools for your trade as builder, and

that you are well trusted in your work. You told me that you now earn \$300 per week.

Consideration

- [15] In considering the sentence to impose on you for your offence, I have to consider the seriousness of the offence of possession of illicit drugs on the one hand and the consequences of the sentence upon your life on the other hand. You already knew the seriousness of the offence of possession, let alone, cultivation of cannabis. You tried to grow it secretly in the bush of the tax allotment in order that no one would see it, because you knew it was a serious offence. The law provides a penalty of imprisonment of up to 30 years for such offence. You knew that. That was why you grew the plants secretly.
- [16] But I also know that you were young and foolish and that you had had a bad start to your life upon leaving school. You fell in with boys who had bad starts as well and soon you went on to commit a serious offence of manslaughter for which you were sentenced to 6 years imprisonment, as punishment for your first offence in life. You had no second chance. You went in the deep end in 2012 and never came out of it until January of this year.
- [17] It is true, such as Ms. 'Aholelei, has pointed out, that you have had previous convictions, first of which was that manslaughter, but you had no previous conviction in connection with illicit drug at all. Secondly, what is more important is whether or not there is any chance that you can change your life for the better.
- [18] Most times, the Court cannot foresee what an accused person would do with his life in the foreseeable future. It can only hope that the person would make use of the opportunity offered to him and change his life for the better. It offers that person that opportunity by way of a suspended sentence of imprisonment for a set period of up to 3 years. If the person makes use of that opportunity and changes his life and become law abiding, the suspended imprisonment sentence

is cancelled and the person thereby continue as a useful and productive member of society. That is the whole purpose of a suspended sentence. It is based upon a trust which the Court has in the person, that he will make use of the opportunity.

[19] Such opportunity is not dished out "willy-nilly" or as the Court feels the urge to do so. It is given only upon evidence which the Court can accept that the accused would make use of it, properly.

[20] In your case, Filomila, you have shown me evidence by your statements in Court, and by letters written and signed by your Church bishop and by your village's town officer. They speak highly and warmly of the vast and welcome change which you have made to your life. I accept those evidence. They are evidence that you will make use of the opportunity, if it be given to you, to continue to make a worthwhile life for you and for your wife and for your children.

[21] If I was to sentence you to prison without suspension, you would lose your job, you would be separated from your wife and children. You would be thrown back to the deep end where you were, to be together with the other convicts whom you are now trying to distance yourself from. I do not consider that justice demands that. You have truly shown your remorse by pleading guilty and accepting the error of your ways and you have rehabilitated yourself already. I do not need to be convinced that you will make use of the opportunity of suspension because you have already shown it.

[22] As to the term of imprisonment to which you should be sentenced, I consider that the amount that you cultivated, namely 17 plants, is far beyond any amount you would have required for your personal consumption. The summary of facts does not reveal at what stage the plants were at the time they were discovered by the police, but if the total weight of 94.45 grams is divided by the number of plants of 17, there would be an average of 5.55 grams per plant. That weight would indicate that the plants were either still young or were poorly kept.

[23] Nevertheless the total amount is not minimal. In the case of 'Ahokava, he had 46.63 grams of cannabis in 62 packets. He was sentenced to 18 months imprisonment, but which was fully suspended although he had had 2 previous convictions for assault, and he had to serve 50 hours of community work.

[24] I consider that you deserve a higher sentence than 18 months because you have twice the amount 'Ahokava had, but I do not think that you need to serve a community service because of commitments you have to complete the construction of hurricane relief houses by the end of this year.

Sentence

[25] I have therefore considered that I should sentence you, and I hereby sentence you as follows:

For your offence of cultivation of illicit drug, namely, 17 cannabis plants, at Hauloto on 30 May 2019, you are sentenced to 2 and a half years imprisonment but which shall be fully suspended for 2 years from today upon the condition that you do not commit an offence punishable by imprisonment within those 2 years of suspension.

26 *I also order that the drug in respect of which the accused is sentenced is destroyed by the police.* *Jan*

NUKU'ALOFA: 17 July 2020.



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