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

CR 198/2019 & CR44/2020

REX

-V-

MANASE TONGA

BEFORE HON. JUSTICE NIU

**Counsel : Mr. F. Samani & Mr 'I. Finau for Crown.
Mr. M. Tonga, accused for himself.**

Probation Report: by Patelesio Pale on 24 July 2020.

**Submissions : by Crown on 31 July 2020.
by Accused on 7 August 2020**

Sentencing : 28 August 2020

SENTENCING

Offences

[1] Manase Tonga, I found you guilty after a 3 day trial and convicted you on 26 June 2020 of 2 offences:

- (a) possession of cannabis in that you had in your possession 29 packs of cannabis in your car at Sopu on 7 November 2018, and
- (b) possession of ammunition without licence in that you had 9.22 rifle bullets in your possession in your car at Sopu on 7 November 2018, without licence.

[2] You pleaded guilty to 3 other offences and I convicted you of them on 3 July 2020 as follows:

- (a) possession of a firearm without licence in that you had in your possession in your car at Veitongo on 30 April 2019 a .22 rifle without licence,
- (b) possession of ammunition without licence in that you had in your possession in your car at Veitongo on 30 April 2019 8.22 ball cartridge bullets, 20 .22 magnum bullets, and 2 12 gauge shotgun shells, without a licence.
- (c) possession of cannabis in that you had in your possession in your car at Veitongo on 30 April 2019 4 packets of cannabis seeds which weighed 1.26 grams.

The facts re Sopus offences

[3] You were in your vehicle which was a black car and you were parked on a quiet road with no houses nearby and no street light or light from any house was seen, on the outside of Sopus at about 2:00 am of the morning of 7 November 2018. You had your engine off and the car lights were off. There was complete darkness.

[4] The police came to the area to attend to a domestic violence complaint and after they sorted that out, which was that the husband had to leave and the police followed the husband in his vehicle to ensure he left. The husband turned right at the intersection and went southward and the police continued eastward from the intersection and you were sitting in your car as I have described on that eastward road some 50 meters from that intersection, and they stopped right beside you. Your car was facing west and the police vehicle was facing east.

[5] They got out and found that you were holding a .22 magnum rifle for which they later found you had a licence, and a telescopic lense for it, and they also found in a bag, which was on the floor by your feet, 29 packs of cannabis. They also found in the rear of the car an

airgun which was not in working condition. They also found some 9 ordinary .22 rifle bullets in the car. You told the police that all these things were yours.

- [6] You however pleaded not guilty to the charges of possession of the cannabis and of the 9 bullets but I found that you were guilty and convicted you of both offences.

The facts re Veitongo offences

- [7] Because you pleaded guilty to the offences at Veitongo, the police provided a summary of facts which state that on 30 April 2019 (that is after the Sopy incident on 7 November 2018) the police received information that a certain person whom I name A. B. was in the act of purchasing illicit drug from you at Veitongo at a particular location there. The police came to that location and found you sitting in your vehicle there and the person A. B. was standing just beside your vehicle.

- [8] The police found the following things in your vehicle.

.22 rifle (serial no. EMC 366 7849).

2 .12 gauge shotgun shells (bullets).

8 .22 ball cartridge bullets.

20 .22 magnum bullets.

1 rifle scope.

4 packs of cannabis seeds, which was later found to be 1.26 grams in weight.

- [9] The police state that you did not cooperate with them but that you have no previous conviction. You have now cooperated with them by having pleaded guilty to these 2 offences at Veitongo.

Probation report

- [10] Because of the seriousness of these offences, I directed that the probation officer carry out a report on your circumstances for the purpose of considering the appropriate sentence for these 4 offences

at Sopu and at Veitongo. Mr. Patelesio Pale has prepared that report and he filed it on 24 July 2020.

[11] He says that both your parents have died leaving you, the eldest, and a brother and a sister, both of whom now live in New Zealand. He does not say when your parents died but he says you went to Takuilau College from 1990 to 1995 and then Liahona High School from 1995 to 1996 at which you did not complete form 5 or pass the certificate examination. You then went to Fokololo Institute and took courses in Electricity, Welding and carpentry but which you did not complete because you left in 2000 before you got to the third year.

[12] He says that you live with your wife and you have 1 child and that you grow your crops for your consumption and sometimes for sale at the market. He says that you told him that you use the drugs for yourself without your wife's knowledge and that you have now learnt your lesson not to have it at all and that you have totally quit it.

[13] He says that you did not have any previous conviction until you committed these 2 offences. He says that you have the capacity to change and to be a law abiding citizen if given the opportunity to do so.

[14] I take that to mean that he does not think that you should be sentenced to serve a prison sentence and thereby be imprisoned together with hardened prisoners but that you be given the opportunity to mend your ways in view of your previous good behavior for 42 years of your life.

Crown submissions

[15] Mr. Samani for the Crown agrees with that view of the Probation Officer. He says that in accordance with the view of the Court in **Mo'unga v R** [1998] Tonga LR 154 an appropriate sentence be 2 years imprisonment but to be fully suspended for 2 years.

[16] He also referred to **Vea v R** TOCA 7 where that accused had 20 branches of Indian hemp, 125 Indian hemp seeds when first

arrested, and whilst he was on bail he was found with 8 Indian hemp plants and dried Indian hemp branches and leaves. The Court of Appeal held that the appropriate sentence be 1 year 3 months imprisonment.

[17] He also referred to ***R v Le'ota*** (CR 124/16) where that accused had 52.42 grams of cannabis plants. He pleaded guilty and had no previous conviction. He was sentenced to 2 years imprisonment but which was fully suspended subject to conditions.

[18] He also referred to ***R v Kaufusi*** (CR 50/2020) where that accused had 94.45 grams of cannabis plants and had pleaded guilty and had no previous conviction for drugs. He was sentenced to 2 years imprisonment which was fully suspended for 2 years.

[19] In respect of the possession of the rifle and of the bullets without licence, he points to the cases of **Tuilakepa** (CR 172/2014), **Tu'iha'ateiho** [2015] Tonga LR 44, and **Tuita** (CR 17/2019) where fines of \$2000 per gun was imposed and also in respect of the bullets. He recommends that a fine of \$1,000 be imposed in respect of the bullets in the Sopu offence and another \$1,000 be imposed in respect of the Veitongo offence, making a total fine of \$2,000.

Hearing

[20] On 7 August 2020, you appeared before me and made oral representation on your behalf because you had no legal counsel to represent you. You did not say much except to say you have changed and would not do what you have done again. So I had to ask you a lot of questions.

[21] You say you are the one, the only one, who can maintain the water pump which pumps up the water from the well and provides the water for the village of Fua'amotu, and that you are paid \$400 per month for that work. You say you also plant and maintain lose yams which you send overseas for money, which is 30 sacks twice a year. You told me that that is all the money you receive for maintenance of yourself and your family, and that that was why when the drug

people came and offered you the job of selling the drug for them, you accepted.

[22] You said that the water well of Fua'amotu is indeed over 150 feet deep and it is a round hole about 8 feet wide dug through the rocks from ground level all the way down to the water, and that the pump is an electric submersible pump, that is, the pump must be below the surface of the water in order for it to be able to pump the water up to ground level and then up to the overhead tanks 30 feet above ground level.

[23] You said that the pump always had problems and that it had to be attended to down at the bottom of the well and that you have to be lowered by a rope tied around you and lowered by 2 men feeding the rope through an overhead pulley. You said that as you descend, you find it difficult to breathe and that you only take small amounts of air with each breath and that while you are down there you have to move very slowly so that you conserve the little air there is down there. You say because you take things slowly, you take a long time to finish the job that is required to be done and so it takes from morning until evening for it to be done.

[24] You say that you do not use any oxygen bottle or breathing apparatus or air hose or any such aid. You say you have been doing this job for the village for many years because no one else can go down the well and do what you do.

[25] I believe you because the town officer, Telefoni Laume, says the same thing. And also the Water Manager, Tamoni Pakileata, says the same thing and even the district officer, Vili Lausi'i Lui, also say so. They all praise you for your unique and selfless service to the people of Fua'amotu. They say that without you, there would be no water for the village and I can well believe that.

[26] All those 3 officials of your village, Fua'amotu, have written and asked that you be not sentenced to serve a prison sentence because the village and all the people of Fua'amotu would have no water

because there would be no one to carry on the work that you do. I believe and I accept that that is so.

Your income

[27] I am however concerned that the people of Fua'amotu do not appear to appreciate the work that you do enough to compensate you for what you have lost by doing that service for them. They do not seem to realise that because you work without sufficient oxygen down in the well for so long, and over many years, your body has to function that much slower than a normal person, and that when you come back up and try and do your normal work as a farmer, your body cannot adjust to normal oxygen level and so you cannot dig, cut and hoe like other farmers. Even your brain cells are slower. I had to ask you the same question several times when I was questioning you because you did not seem to understand what I was asking you.

[28] And you told me that because the \$400 which the village pay you was not enough for you and your family to live on, and because you were not thinking properly, you were easily tempted and you accepted the offer which the drug people offered you – that you sell the cannabis for them and you keep part of the money for your own income. I accept that \$400 a month is not sufficient to maintain you and your family in one month. It would be gone in two weeks and you would have nothing to live on for another two weeks.

[29] I would think that the village should pay you at least \$1,000 per month, and that you be paid weekly the sum of \$250 so that you do not have to wait one month to be paid.

Work facilities

[30] I also consider that the village must also provide better working facilities for you and for anyone else who works in the well:

- (a) Have a proper above surface suction pump on ground level to pump the water up from the well, or
- (b) Install proper work ladder for climbing down and climbing up the well, with safety harness attached thereto;

- (c) Install air pumps to pump air all the way down to the bottom of the well;
- (d) Install proper electric lights all the way down to the bottom and for work down there, and
- (e) Install telephone connection for communication between the worker down the bottom and workers up on the ground.

[31] I do not think it is wise for the present system of lowering a person down with a rope held by 2 people should continue. And oxygen should be provided by an air pump pumping air down air pipes to the bottom at all times while a person is working down there.

[32] I have no authority to make any order that the village water committee carry out these necessary improvements. I can only recommend that they do so and that they do so right away.

[33] I make these recommendations because these three responsible officers, the town officers, the district officer and water manager have written to me to consider allowing you to continue to render this essential service for the sake of the well-being of the people of the village, and I consider that that can be done if I am satisfied that you would not commit another offence concerning illicit drug. With your physical and mental condition as I have described, the only way you would be able to remain law abiding, such you have done for 42 years, is if you are sufficiently paid for the work that you do and that the facilities which I have mentioned are properly provided to ensure you do not continue to suffer the present health and safety hazards which I have described.

Conclusion

[34] I agree with Mr. Samani that the two offences of possession of illicit drugs are serious, and you had them for the purpose of sale for use by users of those drugs. That is very serious. I agree with his recommendation that you be sentenced to imprisonment for 2 years but that it be suspended for 2 years.

[35] As to imposing of conditions on that suspension, I consider that the only condition that is required is what the law imposes, namely, that the suspension is conditional on you not committing an offence punishable with imprisonment within the period of suspension. If you re-offend by committing such an offence, you will serve the 2 years imprisonment sentence, as well as the sentence for that subsequent offence.

[36] As to attending the Salvation Army course on drug, I do not think you need to do that because you were never an user, that is, you did not take the drug at all. I asked you and you told me you never used it. I accept that. I accept that you were only selling the drug because you needed the money and that you were in such a situation, both financially and mentally, that you were not able to refuse the offer made by the drug dealer.

[37] As to the possession of the rifle and of the bullets without licence, Mr. Samani has recommended that you be fined \$2,000, such as was the case with the accused persons in the cases he referred to. But I cannot see how you can pay that if I was to order you to pay it. You would either ask other people to pay it for you, including perhaps the drug dealer, in which case you would continue to be abused by such people, or you would default payment in which case there would be imprisonment for you, which I have found would be inappropriate in your case.

Orders

[38] I therefore make the following orders:

- (a) You, Manase Tonga, are sentenced to 2 years imprisonment in respect of the offence of possession of 29 packs of cannabis at Sopu on 7 November 2018.
- (b) You are sentenced to one month imprisonment for the possession of 9 bullets .22 without licence at Sopu on 7 November 2018.

- (c) You are sentenced to three months imprisonment for possession of .22 rifle without licence at Veitongo on 30 April 2019.
- (d) You are sentenced to two months imprisonment for possession of 8 .22 ball cartridge bullets, 20 .22 magnum bullets and 1 12 gauge shells without licence at Veitongo on 30 April 2019.
- (e) You are sentenced to 12 months imprisonment for possession of 4 packets of cannabis seeds weighing 1.26 grams at Veitongo on 30 April 2019.
- (f) All the above stated sentences are to be served concurrently, but they are all to be fully suspended for 2 years from today upon the condition that if you commit another offence which is punishable with imprisonment, you will serve the suspended sentence in addition to any sentence for the subsequent offence, unless for proper reasons the Court extends the period of suspension as provided by law.
- (g) The rifle and all the bullets which are the subject of these offences are forthwith forfeited to the Crown.
- (h) All the drugs which are the subject of these offences shall be destroyed by the police forthwith.

NUKU'ALOFA: 28 August 2020.



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