

Scan and file.

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

**CR 46 of 2020**

**REX**

**-V-**

**TINITALE FINAU**

**BEFORE HON. JUSTICE NIU**

**Counsel : Mr. F. Samani for the Crown.  
Mr. S. Tu'utafaiva, for the accused.**

**Probation Report: by Ms. Kelela Fetu'u on 9 September 2020.**

**Submissions : by Mr. Samani on 28 August 2020.  
: by Mr. Tu'utafaiva on 16 September 2020.**

**Sentencing : 18 September 2020.**

**SENTENCING**

**Offence**

[1] Tinitale Finau, you now appear before me for sentence because the jury found you guilty of cultivation of cannabis, in that you cultivated 54 cannabis plants on 27 June 2019, at 'Ohonua, 'Eua, which is an offence under S.4 (a) of the Illicit Drugs Control Act.

**Facts**

[2] I have to accept that the jury believed the evidence of the police officer, Hungalu, rather than your evidence, at the trial. He said that he and Officer Fa'asolo were led by a little girl into the bush area

near the 'Eua High School at 'Ohonua and showed them where she had pulled out 3 cannabis plants which her father had brought to the police station. The area shown to them had several other cannabis plants and that they were well weeded and maintained.

- [3] The little girl left and the two officers hid nearby and waited to see if anyone would come to tend the plants but no one did and so they left at about 9 pm. The next morning Officer Hungalu and Officer Tu'ivai went back there at about 6 am and hid and waited. Then at about 9 am or so, you arrived there, carrying 2 bottles of water with you. They then came out and arrested you and charged you with possession of the plants. Then together with you they searched in the bush and found 2 other plots of cannabis, and you told them of a fourth plot. Later on you told them of another 3 plots, altogether 7 plots with a total of 51 plants, which with the 3 plants which the little girl had pulled out, made a total of 54 cannabis plants.

#### **Probation Report**

- [4] The probation officer says that you are 45 years, married and you have 5 children. You hold a Bachelor of Commerce degree from the University of the South Pacific which you attained in 2008 and you taught as teacher at the 'Eua High School, and until you were charged with this offence, you were head of the Maths' department. Your wife was the deputy principal at that school. At that time, you and your family occupied one of the school's dwelling houses.
- [5] After you were arrested and charged, you were then suspended from your position as teacher and head of department without pay. Your wife is now relocated to Ha'apai with the children and I take it that she is now teaching there because the probation officer says that you now rely on your wife's work and on your kava plantation for financial support of the family. But despite that, the officer says that you are active in the community, and that you are the secretary of the 'Eua Sports Council and that you handle all communications and liaison with the Ministry of Internal Affairs.

- [6] She says that you have grown up in a humble home of 5 children and your parents were farmers at Tufuvai, 'Eua, and you were the most academic of the children and you excelled above the others and you became a teacher, and with the financial help of your aunt in the U.S. you went on to study at the USP where you graduated with your degree in Commerce. You then returned to Tonga and taught at 'Eua and have contributed to school and sports at 'Eua, even up to now.
- [7] She says that you are not like the ordinary run of the mill drug user or dealer and that what you have done is out of character because you have always been law abiding and a model citizen. She says that you pose no likelihood of re-offending. She says that you have had no criminal conviction until now and that you have been of good character and that you would be more likely to remain law abiding again from now on. She recommends that you be given a fully suspended sentence but with strict conditions to be monitored by the probation service.

#### **Crown submissions**

- [8] The Crown however does not agree. It recommends on the other hand that you serve 2 years imprisonment without suspension. It bases its view on the large amount of cannabis that you had – 54 plants – which came to a total weight of 115.23 grams, and that it indicated your cultivation of the same for commercial purposes, that is, for sale for profit.
- [9] It points to the fact that there were 7 plots, each plot being located, and hidden, in thick bush which was well weeded and watered which indicated constant attention. It says that your offence was premeditated and well planned. It refers to the heavy penalty of 7 years maximum imprisonment enacted by Parliament for this offence and the \$50,000 maximum fine which may even be both applied for an offence concerning cannabis.
- [10] It refers to cases of possession of cannabis such as your case and the sentences imposed therein:

(a) **Vea Case**, [2004] TOCA 7 where that accused had 20 branches of indian hemp (which was another name for cannabis), 125 seeds and 1 joint. Whilst he was on bail in respect of that offence, he was again caught with 8 plants and dried branches and leaves. He was sentenced to 1 year 3 months imprisonment because although it was for commercial purpose, it was a very small operation and because the accused was a first time offender.

(b) **Huni Case** (CR 135 – 136, 139 – 142/2017) where that accused was found guilty of cultivation of 3894 cannabis plants. The Court found that that was a large scale operation and it sentenced the accused to 5 years imprisonment.

[11] The Crown says that as this offence of yours in the present case is only a very small scale commercial operation, a correct starting point be 3 years imprisonment but that it be reduced by one year for your previous good character and for volunteering to show the police the other plots of cannabis, so that you end up with 2 years imprisonment. It says there should be no suspension of those 2 years because the offence was premeditated and well planned.

#### **Submissions of the accused**

[12] Mr. Tu'utafaiva has submitted that the case of Vea be distinguished because it was decided at a time when the law did not have a distinction between a class A and class B drug as it is at present. It just had a maximum sentence of 25 years for any illicit. But now there is a maximum of only of 7 years in respect of cannabis, the matter is now looked at differently, namely, by reference to weight of the drug because the new law refers to 28 grams as the minimum for consideration of sentences of up to 7 years imprisonment.

[13] He submits that the starting point for the accused be 1 to 2 years.

[14] He agrees with the probation officer that the imprisonment sentence be fully suspended because you are a first offender and you showed the police the other plots and that you would be sure to continue to rehabilitate yourself and not reoffend.

## **Consideration**

[15] Every commercial operation is premeditated and planned. That is what it means, and that is why there is a heavier penalty for a commercial operation. That is why the Crown had started with a starting point of 3 years, because that is the sentencing scale for a small commercial operation. It has suggested that 1 year be deducted for your previous good record, thereby leaving 2 years imprisonment. But when it suggests that there be no suspension because this offence was premeditated and well planned, it thereby again penalises you for operating a small scale commercial (for which it had assessed the starting point of 3 years).

[16] If that was to be so, then there cannot be any possibility to consider whether or not such an offender has shown willingness or evidence of rehabilitation, which is the purpose for which a suspension of an imprisonment sentence may be granted, and which I must also consider.

## **Suspension and rehabilitation**

[17] Every offender must be penalised for the offence which he has committed. That is what the law of every offence provides. It provides for what it is that is an offence and it also provides for the penalty to be imposed for the offence. As the Crown has pointed out, in respect of the offence you have committed, the law has provided that the penalty may be a fine up to \$50,000 or imprisonment of up to 7 years or both. Its aim is to deter persons from offending.

[18] But there are also other penalties provided by the law which may be imposed as may be appropriate in the circumstances of the particular offender, and which may at the same time be seen to be deterrent. Suspension of a prison sentence is one such penalty. In an appropriate case an imprisonment sentence is imposed in order that the offender is penalised by imprisonment, but it is ordered to be suspended for a set period not exceeding 3 years. That means the offender does not serve the imprisonment sentence unless, within the period of suspension, he re-offends. If he re-offends then he has

to serve the suspended sentence and also the sentence for the subsequent offence.

[19] Suspension may be appropriate to be applied where the offender may be a first time offender and when it would appear from his circumstances that he has rehabilitated himself, that is, he has shown a change and a commitment to be law abiding. He may be said to be remorseful for what he has done, he has shown repentance, and has shown commitment to become a law abiding and productive member of the community.

[20] The rationale of suspension is that if an offender maintains an offence-free life for the duration of the period of suspension, the community benefits, not only because there is one less offender in it, but the offender has also made a better person of himself. He is then rewarded for that by the cancellation, by operation of law, of his suspended imprisonment sentence, so that it does not hang over his head any more. At the same time, it assures the offender that if he re-offends during the period of suspension he has to serve the suspended sentence – hence the term “suspension”.

#### **No remorse or repentance**

[21] The probation officer says that you are not remorseful or repentant for what you have done, that is, for the offence you have committed. She says that you have maintained that you had nothing to do whatsoever with the 7 plots of cannabis which had the 54 plants. But I have to say that you did not tell the two police officers who arrested you that you had nothing to do with the plots of cannabis. You knew one of them well, Manu Tu’ivai, because you had taught him at school for some 6 years and you have known him since. Yet you did not tell him that you had nothing to do with the plots of cannabis. If you had had nothing to do with the plants you would have told the two officers straight away that you had nothing to do with the plots. You would have told them that you were trying to track down a person who had roamed around your kava plants, and that you and a school boy had been picking pele leaves for the sports

team meal that morning. But you did not. You kept absolutely silent. It is now too late for you to claim your innocence of the offence because you did not claim it at the time when you should have claimed it.

[22] Nothing you can say now can change that fact – you failed to tell the two police officers of your innocence. Furthermore, the officer Hungalu said that you instead asked Manu Tu’ivai to help you because you only had the thing to try out – “ke vakai’i”. The jury was entitled to believe that you said that to the officer because you did not claim or say to the two officers that you had nothing to do with the plots or the plants in them.

[23] Remorse and repentance for what one has done wrong makes an honest person. He admits he has done wrong and takes the consequences of his error. If he denies it or tries to evade its consequences, he is not honest. He cannot be trusted. I hope you will appreciate that.

#### **Your sentence**

[24] I agree with the Crown counsel, Mr. Samani, that the appropriate sentence for your offence is 2 years imprisonment but I do not agree with him that no suspension of that sentence be allowed. I agree with the probation officer and Mr. Tu’utafaiva that your sentence be suspended and I consider that the suspension be as long as the law allows, namely, 3 years. That is because you have led a productive and useful life to you and your family as well as to the community at ‘Eua, and you continue to do so even up to now. You have shown that you have rehabilitated yourself and have got on with your kava farming to maintain yourself and your family. And as the officer has said, this offence is out of character for you and I believe that you have realised that and that you will resume your law-abiding life in the years to come. I consider however that you can and you should carry out some community service for the offence you have committed as well.

## Orders

[25] Accordingly, I sentence you to 2 years imprisonment but which is to be fully suspended for 3 years from today upon the following conditions:

- (a) you will not commit another offence which is punishable with imprisonment during the period of suspension; and
- (b) you will serve 80 hours of community service as directed and monitored by the probation officer.

[26] I order that the police shall forthwith destroy all the cannabis which are the subject of the offence of which I have now convicted and sentenced you.



  
Niu J  
J U D G E

**NUKU'ALOFA: 18 September 2020.**