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Crown Law

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

CR 290/2020

BETWEEN : R E X

-Prosecution

AND : HEAMANI SAAFI

-Accused

SENTENCE

BEFORE : JUSTICE LANGI

Counsel : Ms 'Elisiva Lui for the Crown Prosecution
The Accused in Person

Date of Sentence: 04 February, 2021

A. THE CHARGE

1. The Accused was charged with one count of cultivation of illicit drugs contrary to section 4 (a) (ii) of the Illicit Drugs Control Act;

2. On 8 November 2020 he pleaded guilty on arraignment and appears before me today for sentencing;

B. THE OFFENDING

3. On or about 21 July 2020 the Police received reliable information that the Accused was cultivating cannabis plants at his residence at Ha'asini.

4. The Police went to the Accused's house and found him there with his family. They informed the Accused that they were there to conduct a search without a warrant. The Police asked the Accused whether he had anything unlawful at his residence whereby the Accused told them that he had three cannabis plants behind the kitchen. He led the Police to where he had planted the said cannabis plants.

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5. The Police uprooted the cannabis plants and took them to the Police station. The Accused was subsequently charged with cultivation of illicit drugs.

6. The cannabis plants were weighed and the weight recorded is 59.18 grams of cannabis;

C. CROWN'S SENTENCING SUBMISSIONS

7. The Crown submits the following as aggravating factors in this case:
    a. Drug offending is an issue in Tonga;
    b. The amount of cannabis seized was extensive;
    c. The offence of cultivation is more serious because these plants could have bore seeds which could have produced more plants;
    d. The Accused has been using drugs for a long period of time and clearly has a drug addiction;
    e. The Accused has demonstrated an incapacity to be rehabilitated by continuing to commit criminal offences at the mature age of 66 years;
    f. The Accused demonstrated a blatant disregard to the law when he openly cultivated the cannabis plants at his own home in the view of his family.

8. The mitigating factors submitted by the Crown includes the Accused's early guilty plea, this is his first drug offending and he had cooperated with the police when he led them to the cannabis plants.

9. The Crown also submit a few comparable cases to assist me in determining the appropriate sentence:
    a. *Rex v Le'ota* CR 124/2016 – The Accused was charged with possession and cultivation of the same cannabis plants which weighed a total of 53.43 grams. He pleaded guilty on arraignment, was married with an 8-month-old daughter and had a clean record. Lord Chief Justice Paulsen adopted a starting point of 2 years and 9 months' imprisonment. The Accused was allowed a discount of 9 months in light of the mitigating factors. The final sentence of 2 years' imprisonment was fully suspended for two years on conditions.
    b. *Rex v Talia'uli* CR 99/2007 – The Accused was charged with possession of 54.27 grams of cannabis. He pleaded guilty on arraignment. The mitigating factors were that he was married, pleaded guilty at the first available opportunity, had no previous convictions and had cooperated with the police. His Honour Justice Andrew adopted a starting point of 3 years' imprisonment. One year was deducted in light of the mitigating factors with the final

sentence being 2 years' imprisonment. The final 6 months was suspended for two years on condition that he complete a course on alcohol and drugs with the Salvation Army.

c. *Vea v* R *[2004] TOCA 7* – The appellant in this case had pleaded guilty to two counts of possession and cultivation of cannabis. The police seized 20 branches of Indian hemp, 1 plastic containing 9 hemp seeds, 1 plastic bag containing 116 Indian hemp seeds, 1 plastic bag containing 1 Indian hemp cigarette. He was later charged with cultivation of 8 Indian hemp plants and possession of dried Indian hemp branches and leaves. He was a first-time offender and had pleaded guilty at the first available opportunity. The Judge sentenced him to 9 months' imprisonment for the possession charge and 2 years' imprisonment for the second possession charge and 3 years for the cultivation charge. The last two sentences were concurrent but were to be served cumulative to the first making it 3 years and 9 months' imprisonment. The appellant was to serve 2 years and the balance was suspended for two years from the date of release.

d. On appeal, the Court of Appeal held that because it was a small scale commercial operation, and also bearing in mind that the Accused was a first-time offender, the appropriate starting point should have been no more than 4 years. The Court further emphasized that a sufficient deduction is made to recognize the Appellants assistance to police and efforts being made by the Appellant to rehabilitate himself. The Court of Appeal stated:

"[15] *The Court in Terewi identified three categories of offending. The first related to the growing of marijuana or as it is called here Indian hemp in small quantities for personal use. The Court said that in such cases a non-custodial sentence was generally appropriate. A similar approach is taken in relation to charges of possession for personal use. In a case of growing for small scale commercial purposes, the Court has said that a starting point of between two and four years may be appropriate, and for large scale growing for commercial purposes, a sentence in excess of four years is appropriate*"

e. The Court of Appeal further referred to their decision in the case of *Tuita v* R [1999] Tonga LR where they had stated:

"In our view, a conviction for growing any significant amount of marijuana should carry a sentence within the range of three to five years' imprisonment. That sentence would not normally be suspended in whole or in part unless there are good reasons relating to rehabilitation, along the lines of the judgment of this Court in R *v Misinale (CA 13/99 & 23 July 1999). Further, we consider that similar sentences should be imposed on persons convicted of possession for supply of amounts of marijuana that indicate a commercial scale operation."*

f. The Court of Appeal took into consideration that the amount found was for a very small scale commercial operation, the Accused was a first offender and allowed the appeal. The

court was of the view that the appropriate starting point should be no more than 4 years and that sufficient deduction should be made to recognize the assistance given to police and efforts being made by the Accused to rehabilitate himself. The Court's final judgment was to reduce the 2-year 9-month sentence to 1 year and 3 months.

10. The Crown submits that in light of the authorities cited an appropriate starting point is 3 years imprisonment. For the mitigating factors, the Crown submits a deduction of 1 year from the starting point resulting in a final sentence of 2 years' imprisonment.

D. PREVIOUS CONVICTIONS

11. The Crown also submitted as an aggravating factor the fact that the Accused has the following previous convictions:
    a. Convicted of Assault in 1978 at the Magistrate Court where he was sentenced to $30 fine or 4 months' imprisonment;
    b. Convicted of Indecent Assault in 1987 at the Mu'a Magistrate Court where he was sentenced to 1-year probation and $100 compensation;
    c. Convicted of Trespass in 1988 and sentenced to $100 fine or 2 weeks' imprisonment;
    d. Convicted of house-breaking in 1988 and sentenced to 3 years' probation;
    e. Convicted for disturbance in 1993 and sentenced to $100 fine
    f. Convicted of theft in 1993 and sentenced to 20 months' probation;
    g. Convicted of abusive language and disturbance in 1994 and sentenced to $20 fine or 7 days imprisonment;
    h. Convicted for assault in 2014 and sentenced to $600 or 3 months' imprisonment.

12. The Crown submits that the extensive list of previous convictions demonstrates an incapacity to be rehabilitated by continuing to commit criminal offences at the mature age of 66 years.

E. PRE-SENTENCE REPORT

13. The Accused is 66 years old. He is married to his third wife, Fokikovi Saafi of Ha'asini and they have 8 children. His has two daughters with his first wife. He had left to the United States and remarried again to his second wife but they later separated without having any children.

14. The Accused confessed that he became addicted to drugs whilst he was in the United States and continued to use drugs for the relief of chronic pain.

15. The Accused's wife told the probation officer that it was their own son who had reported the Accused to the police because he wanted his father to stop using the illicit drugs.

16. The Accused accepts the charges and is remorseful and asks for the courts leniency in sentencing.

17. The probation officer recommended that the Accused is ordered to undertake a drug and alcohol course with the Salvation Army in addition to any sentence passed by the court.

18. In addition to the pre-sentence report, two reference letters were submitted on behalf of the Accused. One was from Filipe Liuanga who is a church bishop and the other was from the town officer of Ha'asini, 'Efoti Grewe.

19. The church bishop wrote a brief letter informing the court that he grew up with the Accused at Ha'asini and that the Accused helps out in the community as the local (unqualified) person who treats fractures and dislocated joints. He also stated that the Accused assists his wife in looking after their 8 children and other family obligations.

20. The town officer also confirmed that the Accused is a resident of Ha'asini and vouched for the Accused's character and personal attributes. He stated in the letter that the Accused is involved in all the town activities and contributes in those events. He stated that despite the Accused's wrongdoings, he confirmed that the Accused is trying to get his act together for the betterment of himself as an individual and his family.

F. DISCUSSION

21. The maximum penalty for cultivation of illicit drugs in the quantity of 28 grams or more is provided for in section 4(ii) of the Illicit Drugs Control Act which states that the maximum penalty is a fine not exceeding $50,000 or imprisonment for a term not exceeding 7 years, or both.

22. I consider the fact that the accused has an extensive list of previous convictions a serious aggravating feature in this case. Even though the convictions are not drug related, it demonstrates a blatant disrespect for the laws of this country and as submitted by the Crown, it shows that the Accused is unable to be rehabilitated. However, whilst previous convictions are relevant to establish the character of an accused for sentencing purposes and whether he has a predilection to commit a particular type of crime, a sentencing Judge should be on guard against sentencing the accused twice for the same offences on which he had previously been convicted and sentenced. In R *v Casey* [1931] NZLR 594 Sir Michael Meyers CJ stated at 597

"The Court should always be careful to see that a sentence of a prisoner who has been previously convicted is not increased merely because of those previous convictions. If a sentence were increased merely on that ground it would result in the prisoner being, in effect, sentenced again for an offence which he has already expiated. We agree that the sentence passed ought to bear some relation to the intrinsic nature of the offence and gravity of the crime. But it by no means follows that his previous convictions must be ignored. It is necessary to take them into consideration, because the character of the offender frequently affects the question of the nature and gravity of the crime, and the prisoner's previous convictions are involved in the question of his character. Further the previous convictions of a prisoner may indicate a predilection to commit the particular type of offence of which he is convicted, in which case it is the duty of the Court, for the protection of the public, to take them into consideration and lengthen the period of confinement accordingly".

23. I am mindful that any additions made to the sentence in this case does not punish the accused twice for offences which he has been convicted and sentenced, but his previous convictions do indicate a predilection to breaking the law, in which case it is the duty of the Court, for the protection of the public, to take them into consideration and lengthen the period of confinement accordingly.

24. The Crown submits a starting point of 3 years' imprisonment for cultivation of 59.18 grams or 3 plants of cannabis in light of the authorities cited above. In the Court of Appeal decision in *Vea* the 3 years sentence for cultivation of 8 Indian Hemp plants was reduced by the court to 2 years and 9 months. However, the amount of Indian Hemp plants in *Vea* is more than double the amount in this case which is only 3 cannabis plants.

25. In my opinion, the circumstances of this case are similar to the circumstances of R *v Le'ota* cited above. The Accused in that case had pleaded guilty to cultivation of 52.42grams of cannabis, he was a first-time offender and had been reported by his own wife. Lord Chief Justice Paulsen (as he was then) adopted a starting point of two years and 9 months' imprisonment. The Accused was allowed a discount of 9 months' imprisonment in light of the mitigating factors. After considering the principles on suspension outlined in the case of *Mo'unga v* R [1998] Tonga LR 154, the Lord Chief Justice Paulsen ordered that the final sentence of 2 years' imprisonment be fully suspended on conditions.

26. In this case, the Accused is charged with cultivation of a similar amount of cannabis as in *Le'ota*, that is, 59.18 grams of cannabis. He pleaded guilty at the first available opportunity, he had been reported to the police by his own son who was concerned over his addiction. Given the similarity

in the weight of the cultivated plants and the circumstances leading to the arrest, I propose to adopt the same starting point adopted in *Le'ota* of 2 years and 9 months' imprisonment.

27. I further increase the starting point by 6 months for his extensive list of previous convictions. Although the convictions are not drug related, it does however demonstrate a predilection of a life of crime and of having no regard to the laws of this country.

28. For his mitigating factors of early guilty plea, first drug offending, assisting the police and showing remorse, I deduct 9 months. His total sentence therefore comes to 2 years and 6 months' imprisonment.

29. I have considered the principles in *Mo'unga v* R [1998] Tonga LR 154 and note that a suspended sentence may be appropriate where an offender is likely to take the opportunity offered by the sentence to rehabilitate himself and where there has been co-operation with the authorities and where the accused has pleaded guilty at the earliest opportunity.

30. The Crown submits that the previous convictions of the accused indicate an inability for the accused to be rehabilitated. However, I note from the previous sentences submitted by the Crown that the Accused has not been sentenced to undertake any rehabilitation courses. Most of his sentences included fines and probation orders. This does not make his offending any less serious, but I am of the view that given the right assistance through rehabilitation courses, there is still hope for the Accused to change is life around and become a law-abiding citizen.

31. I also take into consideration that the cannabis was planted for personal consumption. In Vea, the Court 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.

32. The amount of cannabis seized is, in my view, a minimal amount and not an extensive amount as submitted by the Crown. Three cannabis plants do not indicate cultivation for commercial purposes and I believe that they were planted for personal use. I also take into consideration that the Accused has been free from criminal activity since 2014. In light of all the circumstances I have

referred to, I order that the sentence of 2 years and 6 months' imprisonment is fully suspended for two years on conditions.

G. SENTENCE

33. On the charge of cultivation of illicit drugs, the Accused is convicted and sentenced to 2 years and 6 months' imprisonment. The sentence is fully suspended on the following conditions:
    d. Not to commit any further offences punishable by imprisonment for a period of 2 years;
    e. The Accused is to be placed on probation during the period of his suspension;
    f. He is to complete the Salvation Army Drugs and Alcohol Awareness Program and Life Skills Course within the first year of his suspension;
    g. He is to undertake 70 hours of community work as directed by the probation officer. He is to report to the probation office within 48 hours.

34. As requested by the Crown, I order that the drugs seized are destroyed.

E. M. L Langi
JUDGE

NUKU'ALOFA: 04 February 2021