

IN THE COURT OF APPEAL OF TONGA  
CRIMINAL JURISDICTION

*Scan & file* *Crown Law* *13/08/14*  
AC 13 of 2014  
[SC CR 70 of 2013]

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BETWEEN: MICHELL TUKIA - Applicant

AND : REX - Respondent

S.V. Fa'otusia for the Applicant

J. Lutui for the Respondent

**DECISION**

- [1] On 30 April 2014 the Applicant was convicted, after trial, of two offences (i) conducting activity not authorised by the Tonga Police, contrary to Section 166 of the Tonga Police Act 2010 and (ii) housebreaking contrary to Section 173(1)(b)(5) of the Criminal Offences Act (Cap 18).
- [2] On 26 April 2012 the Applicant had been convicted on his own plea of cultivation and possession of an illicit drug – cannabis. He was sentenced to 3 years imprisonment suspended for 3 years and ordered to pay a fine of \$1000 which has been paid.
- [3] Following his conviction on 30 April 2014 the Court activated 15 months of the suspended sentence and imposed concurrent terms of 18 and 6 months imprisonment for the fresh convictions cumulative to the activated

sentence of imprisonment. The result therefore was an immediate term of 33 months imprisonment. The Applicant seeks leave to appeal against the sentence.

- [4] The maximum sentence provided by Section 166 is a fine of \$15,000 or 5 years imprisonment, or both. The maximum sentence provided by Section 173 is 10 years imprisonment.
- [5] The first ground of appeal is that a) the sentence was “excessive” and that b) the Applicants “basic human right” to be represented by counsel was breached.
- [6] In brief, the Applicant and his co-accused went to the complainant’s house pretending to be police officers, exercising a power of search. While the Applicant waited outside the house with the complainant, an elderly lady, the co-accused went into the house and looked through it. In fact nothing was taken. The convictions were based on proof of joint enterprise.
- [7] Mr Fa’otusia emphasised that the Applicant had not actually gone into the house. He suggested that his client had a bright future if only given a chance. He had expressed remorse.
- [8] The sentencing submissions and remarks run to 14 pages and it is clear that the judge took every possible consideration, including those now advanced by Mr Fa’otusia, into account. He however pointed out that it was only 10 months after the suspended sentence was imposed upon him that the Applicant re-offended. In these circumstances I take the view that the Applicant was fortunate indeed not to have the whole suspended sentence re-activated (see *R v Kengike* [2005] To. L.R. 400).

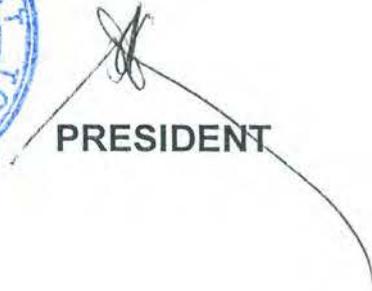
- [9] As to sub-ground b) there is no constitutional right in Tonga to be legally represented. The only requirement is that the trial be fair (Clause 14). Such a requirement is not violated merely by the fact that an accused is unrepresented (*Dietrich v The Queen* [1992] 177 CLR 292). Even when a constitution affords the right to legal representation, this right is not absolute (*Errol Dunkley v The Queen* [1994] 3 WLR 1124). In my opinion the transcript of the sentencing proceedings demonstrates that the Applicant was treated with conspicuous courtesy and fairness throughout.
- [10] The second ground of appeal is that the Court erred in the exercise of its powers under Section 24(e) by not merely extending the period of suspension imposed in respect of the 2012 convictions. I can find nothing in the transcript to indicate any failure in the exercise of the trial judge's discretion. As already mentioned, the judge took very great care when considering the sentence to be imposed. The final result, 33 months, was in my view wholly appropriate and in no way excessive.

Result: The application for leave to appeal against sentence is dismissed.

NUKU'ALOFA: 8 August 2014.

N.Tu'uholoaki  
8/8/2014.



  
PRESIDENT