

IN THE SUPREME COURT OF TONGA  
CRIMINAL JURISDICTION  
NUKU'ALOFA

Solicitor General  
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03/12/13

CR 116/2013

REX

V

LORD TU'I HA'ATEIHO

BEFORE HON. JUSTICE CATO

Mr Sisifa for the Crown

Mr Kahungunu Barron Afeaki SC for the Accused

**Ruling of the Court on Application to Stay or Discharge prosecution**

1. The accused, after the presentation of an indictment which alleged one count of being in possession of firearm without a license contrary to sections 4(1) (2) (b) and 47 of the Arms and Ammunition Act (Cap 39), made an application to stay the proceedings, before pleading His complaint on the application was first; there had been an inordinate delay between his arrest in October 2010 and his committal in or about September 2013. The second complaint was that, whereas the summons had alleged that he was in possession of

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an automatic pistol, the indictment which was presented recently particularised the firearm as a semi – automatic pistol.

2. Mr Afeaki SC had acted for Lord Ha'ateiho at the committal which was under the new procedure which confined the proceedings to a paper committal only. There, the issue of the kind of firearm automatic or semi- automatic had been raised by Mr Afeaki SC in support of an argument that the evidence did not meet the charge and the charge should be dismissed. It appears that, whereas the summons had alleged an automatic firearm, a report later obtained and disclosed to the defence from a firearms expert had described the gun as a semi- automatic. The Magistrate correctly, in my view, took the view that there was sufficient evidence to commit because the charge was unlawful possession of a firearm, which was established at least to a prima facie stage whether it was fully automatic or semi - automatic. The Crown, subsequently, as, in my view, it was perfectly entitled to do and indeed proper in these circumstances, proceeded to particularise the firearm in the charge, as a semi - automatic. There is no prejudice. There is no substance in this complaint.
3. Nor do I think there is any substance in the second complaint. In this case, whilst there was a delay in proceeding to committal after arrest which was lengthy, it was not undue or inordinate in my view. In any event, it was, as the Crown explained, largely because of the unavailability of Lord Ha'ateiho's former counsel, and, indeed, also because of Lord Ha'ateiho's commitments that the committal was

delayed. Mr Afeaki SC, who had been briefed shortly before the committal, did not refute this. Accordingly, I do not find this ground made out, either.

4. In any event, delay as a reason for discharging an indictment without proof of material prejudice or other indicia of unfairness, would seldom, if ever, provide a reason to discharge an indictment in the face of the approach taken and explained by Lord Bingham in Attorney-General's Reference (No 2 of 2001) [2004] 2 AC 2; [2004] 1 All ER 1049, adopted by the Supreme Court of New Zealand in *R v Williams* [2009] 2 NZLR 750, at 760-761. Rather than stay a prosecution for inordinate delay, the preferred remedy is to proclaim or publically acknowledge the delay and the breach, and allow a reduction in sentence. The stay remedy should be confined to those cases where there can no longer be a fair hearing or it would be otherwise unfair to try the defendant.
5. Mr Afeaki SC appreciating that his arguments would not succeed then instructed his client to plead to the indictment. Lord Ha'ateiho pleaded not guilty to the charge and elected trial by Judge without a jury. A trial date has been set for later next year with the agreement of the defence.

NUKU'ALOFA: 29<sup>th</sup> November, 2013.



*[Handwritten signature]*

JUDGE