**IN THE SUPREME COURT OF TONGA** **Cr227/00 and 230/00**

**CRIMINAL JURISDICTION**

**NUKU'ALOFA REGISTRY**

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**BETWEEN :** **REX** - **Prosecution**

**AND :** **1. SIKAHEMA PUAMAU** - **Accused**
**2. HEAMASI SAAFI**

**BEFORE THE HON. CHIEF JUSTICE WARD**

**Counsel :** Mr Fusitu'a for prosecution
Mr Tu'utafaiva for both accused

**Date of Hearing :** 24 and 25 September 2001.

**Date of Judgment:** 1 October 2001.

## Judgment

Both accused are charged with growing Indian hemp "on unknown day before 29 September 2000". The Indian hemp was found growing on the 29 September and had clearly been cultivated for some time prior to that.

The first accused, Puamau, is also charged with obstructing a police officer in the execution of his duty.

The two accused live close to each other in Ha'asini. Prior to 29 September, a police officer had noticed what he suspected was Indian hemp growing on the first accused's father's 'api. A search warrant was obtained and two cars set off to execute it on 29th. As they approached the 'api, they noticed what appeared to be more Indian hemp growing in the 'api where the second accused, Saafi, lives.

As a result, the party split into two with one group searching the Puamau 'api and the other searching that of Saafi. There is no dispute about what was found.

The party searching Puamau's place saw, in a small garden fenced with roofing iron, what appeared to be a small Indian hemp nursery. There were three small beds; two each contained three young plants and the other a single older plant. There was also a bed about about 4 feet by 1 foot 6 inches which contained 58 small seedlings. The officers considered they were all Indian hemp and they were collected and taken to the police station.

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When they had first arrived, the officers introduced themselves to the first defendant's father and explained about the search warrant. There was, at that time, no sign of the accused. However, while the officers were examining the plants, they heard a sound and looked up to see the first accused coming at them with a bush knife raised in his hand. His father was trying to stop him and succeeded. The accused then ran off to a neighbour's house. Shortly afterwards, he again appeared brandishing the knife but was discouraged by the appearance of one of the officers who appeared with a gun.

Meanwhile the other party had driven to the Saafi home. The second accused was sitting there and they pulled up so their vehicle was facing the plants growing under an old breadfruit tree. They told the accused they were there because he was growing marijuana and he replied that he does not grow it. However, when the plants under the tree were pointed out to him, he apologised and said it was only for his own use and not to sell.

Further search revealed a number of plants in a pit that had been dug apparently for a septic tank and some more in the scrub around the house. Altogether, 14 plants were seized. In the septic tank were 4 plants ranging in size from 2'1" to 4' 3" together with the stump where one plant had been cut. 4 more were growing by the breadfruit tree and a further 5 were found in the bushes nearby.

All the plants were measured and photographed although the photographs have not been developed successfully. They were then taken to the police station at Mu'a.

The accused were both interviewed under caution.

Puamau agreed there were 50 plus mid sized plants and 6 large ones. He told the officers that he had planted them in August and that they were just for him to smoke although, in his written statement, he said that he had also planned to sell some of them. He said they were grown from seed he had received from a person in Vava'u and he had given some of the seeds to Saafi.

When Saafi was interviewed, he agreed he had grown 14 plants from seed he had received from Puamau in June. He had planted them in July.

Samples of the plants seized from each of the 'apis were taken to the hospital where they were examined by a Senior Medical Scientist. He was able to confirm they were Indian hemp following examination under a microscope.

Neither accused gave evidence or called any witnesses.

Mr Tu'utafaiva for both accused submits that the prosecution has not proved the case on two grounds. The first is that the Tongan word used by

the accused does not mean growing in the terms of the offence. There would appear to be a difference of opinion as to the exact meaning of the word but I do not need to resolve it. I am satisfied beyond any doubt that the plants found by the officers were growing and both accused admitted that it was they who had cultivated them. That is ample evidence of growing.

The second point challenges whether the prosecution has proved the chain of possession between the plants seized by the police and those examined by the scientist. Mr Tu'utafaiva also suggests that the identification of those plants was not done in such a way as to prove all the plants were the same species as the samples.

I am satisfied beyond reasonable doubt that the chain of possession has been proved. One of the officers in the search party, PC Sili, acted as the exhibits officer and he filled in the exhibit list at the scene in both cases. He took the plants to the Mu'a police station and placed them in the exhibits room. It was he who later took a sample to the scientist. He selected three plants from those found on Saafi's 'api and broke a part off one of those found on Puamau's 'api.

I am satisfied beyond any doubt that the scientist accurately identified those sample plants as Indian hemp.

The plants seized were produced to the court during the trial in plastic bags having been placed in them on the instructions of the committing magistrate. Those from Saafi's 'api were in three bags according to where they had been found. There was a label in one of the bags. It referred to 14 plants but that bag contained only 5. The officer stated that the other two unlabelled bags were a part of the same exhibit but altogether they only totalled 13 plants. The stump of the plant that had already been harvested was not there and there was no way of seeing from which plant the sample had been broken. The bags were open and were not attached to each other. The officer explained he had opened them before the case to check he had the correct plants.

In the case of the plants from Puamau's garden, the label refers to 56 plants but there was no sign of them because, the officer explained, they were very young and had rotted away.

Neither of the labels had the court case number on it even though that number is apparently given to the case at the time the summons are issued.

I do not accept that the fact the plants produced in the court may not be the right ones is relevant in this case. The prosecution must prove that the plants seized were those identified by the expert and that has been done. That is sufficient.

However, it does go further in relation to the remaining plants. The scientist identified the samples he was given. In order to do that he needed to examine them under a microscope. At no time did he see the remainder of

the plants. On that evidence, I am only able to find that the prosecution has proved that the actual plants looked at by the scientist are Indian hemp. The police officers are familiar with Indian hemp plants and considered the plants they had found were such plants. However, they are not experts and their opinion is of no value in proving the actual species of plant.

As far as the examined plants are concerned, I am satisfied beyond any doubt that they were the plants found on each of the accused's 'apis, that they were growing them and that they are Indian hemp. To that extent the accused are each convicted of growing Indian hemp.

Puamau also faces a charge of obstructing an officer. Mr Tu'utafaiva suggests that, as he was not there when the officers explained about the search warrant, he did not know they were Police officers. I note one of the officers was in uniform and must have been seen by the accused. Even if he did not realise the first time, he must have known the second time. However, those arguments are of no relevance in determining guilt or innocence to a charge of obstructing an officer in the execution of his duty in this case. It is not necessary for the accused to have known that they were Police officers or that they were acting in the execution of their duty. The prosecution must prove that he acted in a way that was directed at them and obstructed them in their duty. I am satisfied beyond any doubt that the officers were acting in the execution of their duty and that the accused obstructed them by threatening them with the bush knife. He is convicted on count 2.

Before leaving the case, I feel I should say a little more about the identification of the suspected material in cases of this nature.

In all such cases, the officer must be meticulous in his labelling of the material. The label must clearly relate to it and, where the material is placed in more than one container, each container must be labelled or attached to the labelled container in such a way that it cannot be separated from it. Any sealed container of the material must not be opened until it is produced to the court and only in the view of the court.

It is perfectly acceptable only to have the scientist identify a sample of the material but he must be given an opportunity to see the whole of the material so he can give his opinion that the rest is the same as the sample he has examined. In this case that was not done and there is no evidence upon which the court can accept that the remaining material is the same as that identified.

**NUKU'ALOFA:** 1 October, 2001.

SUPREME COURT TONGA

**CHIEF JUSTICE**