IN THE SUPREME COURT OF TONGA **CR.APP.NO.893/99**
CRIMINAL APPEAL
NUKU'ALOFA REGISTRY

BETWEEN : *LAVAKI LOLOHEA* - ***APPELLANT;***

AND : *POLICE* - ***RESPONDENT.***

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: S. Tu'utafaiva for Lolohea
J. Cauchi for Crown

Date of Hearing: 29 September
Date of Judgment: 5 October, 1999

Judgment

On 7 July 1999, Lavaka Lolohea appeared before the Ha'apai Magistrate's Court and pleaded guilty to four charges of growing Indian Hemp and possessing seeds.

Both the prosecution and the accused asked the magistrate to deal with the case summarily and the magistrate, after hearing an outline of the case, considered it was within his power of sentencing and accepted jurisdiction.

The facts were that the accused, who was only 23 years old, was employed to grow Indian Hemp on Tofua. He was supplied with the seed and planted 1000 plants in April followed by another 100 plants the same month and a further 2300 plants in June. When the police raided the island in June, he still had a further 2346 seeds.

The magistrate accepted that he was being employed by someone else and was paid $12.00 per day. He gave credit for the plea of guilty, his good character and the fact that the person who employed him had not been charged at that time. The magistrate then sentenced him to two years imprisonment on each charge concurrent.

The accused appealed against that sentence and the Crown cross-appealed.

At the hearing, the accused withdrew his appeal and it is dismissed.

The Crown pursues its appeal on the basis that (1) this was a case where the magistrate should not have taken the case and (2) this was a serious charge of commercial growing and the sentence passed by the magistrate was out of line with recent sentences in such cases.

Sentencing guidelines in such cases were suggested by Hill J as long ago as1978 in Anders v Police (1974-1980) TLR 60. In the recent case of Tuita and Mafi v R; Appeals 2, 15 and 122 of 1998, the learned Judges of Appeal adopted his comments.

Tuita's and Mafi's case concerned growing plants and possessing seeds amounting to a total of 1196. The court commented;

"The volume of plants and seeds was large. The conclusion is inescapable that Tuita and Mafi were engaged in a commercial scale operation likely to produce, if it were successful, a volume of marijuana far beyond what would reasonably be required for their own use. A firm deterrent sentence is essential to drive home to persons minded to become engaged in an operation of this kind, that it is not worth the risk."

They suggested that a conviction for growing any significant amount of marijuana should carry a sentence within the range of three to five years imprisonment.

It is noteworthy that Hill J in Anders case specifically stated, "I want all the magistrates in this country to take notice of this judgment because I expect them to follow my directions." Had the very experienced magistrate who tried the present case borne that case and the Tuita and Mafi case in mind, he would not have considered his powers of sentence adequate in a case involving four times as many plants and would have declined the request for summary trial.

Similarly one would have expected a police prosecutor to be aware of any guideline cases before asking the magistrate to deal with a case of this nature.

This was a very substantial operation – far larger than that in Tuita and Mafi. The magistrate did not have the principal offender before him but he was sentencing a person who was willing to commit a very serious offence knowing only too well what he was doing. Such a case should not be at the lower end of the scale of sentencing and would, therefore, be out of the magistrate's jurisdiction.

The prosecution appeal is allowed. The sentence must be increased but, by section 80 of the Magistrates' Courts Act, I am limited to the power the magistrate could have exercised. I therefore quash the sentences passed and instead order that the accused shall be imprisoned for three years on each count concurrent giving a total term of three years.

This court has recently expressed concern at the number of cases in which Magistrates have accepted a request for summary trial of offences that should, because of their gravity, have been committed to the Supreme Court.

It would help if the police prosecutors gave them more assistance. The police know the true scope of the case far better than the information any magistrate can glean from a brief summary. It is thus the responsibility of the police to ask for summary trial only in a case where it is clear it could fall within the sentencing power of the Magistrates' Court.

Equally magistrates must remember that they are there to make their own decisions on the material they have before them. That can never mean blindly accepting the suggestions of either the prosecution or the defendant.

In future a magistrate should deal with cases of growing or possessing substantial amounts of marijuana only in the most exceptional circumstances which should be stated.

Finally, before leaving this case, I must mention another matter. It is clear that this accused was only the employee of the person really responsible. That person was responsible for establishing a very substantial plantation. He presumably had obtained the supply of seeds to do so and he had found a relatively remote place in which to carry out his business.

In a case on such a scale, it would be reasonable to expect the police to use every means at their disposal to arrest the principal offender. In order to determine a fair and proper sentence, the court needs to know what has happened to the principal offender or the likelihood he will be arrested and charged and it will expect to be given such information by the prosecution.

However, when I asked Crown Counsel whether the principal offender had been identified and/or arrested, counsel informed the court he had not been able to ascertain the present state of the investigation because the file had not been made available to him. Counsel for the accused also advised the court that, following sentence in the Magistrate's Court, the accused had not been detained in prison but in a place and in a manner that was different from the normal method of detention. Again, counsel for the Crown was unable to assist about why this had been done.

There are, of course, many reasons why the police may not wish to open a file to another department and there may be good reason why a particular prisoner

should be treated differently from others. In such cases the court will be careful not to request information that may compromise the police or prison authorities but there are aspects of the case the court must know if it is to do justice and it will expect to be sufficiently informed of those matters.

This appeal was in open court and I have no doubt members of the public are anxious that the main offenders in cases such as this are being pursued vigorously. The public and the court share a need to know that the police are carrying out proper investigation.

In future I shall expect the prosecution to be sufficiently informed about the case he is presenting to be able to give information about any related investigation if requested by the court. If he is unable to do so, the hearing will be adjourned where necessary and a senior officer summoned to give it.

NUKU'ALOFA: 29 September, 1999.

CHIEF JUSTICE