

Scan, file + Upload

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

AC 23 of 2018
[CR 119 of 2018]

[Signature]
17/04/19.

BETWEEN : REX

Appellant

AND : MAIKA MAILE

Respondent

Coram: Paulsen P
Handley J
Blanchard J
Randerson J

Counsel: Mr 'A Kefu SC and Mrs L Fakatou for the Appellant
Mr V Moale for the Respondent

Hearing: 8 April 2019
Date of Ruling: 17 April 2019.

JUDGMENT OF THE COURT

The appeal

[1] Mr Maile pleaded guilty in the Supreme Court to one count of possession of 0.52 grams of methamphetamine, a Class A drug. On 26 November 2018, Niu J discharged him without conviction under s. 204 of the Criminal Offences Act. Under s. 204(2) of the Criminal Offences Act the discharge is deemed to be an acquittal.

- [2] On 12 December 2018, the Crown was granted leave to appeal the ruling on sentence.
- [3] On appeal the Crown argues that the Judge ought not to have discharged Mr. Maile without conviction and that the appropriate outcome was that Mr. Maile be convicted and sentenced to a suspended term of imprisonment subject to appropriate conditions. For Mr. Maile, it is argued that the Court should not interfere with the exercise of the Judge's discretion to grant the discharge without conviction.

The facts

- [4] Mr Maile is 38 years old. He has two children and is separated from his wife. In October 1999, he was convicted in the Magistrate's Court of theft and fined. In September 2001, he was convicted in the Magistrate's Court of house breaking and theft and sentenced to a total of 18 months imprisonment, of which 9 months was suspended.
- [5] On 13 March 2018, the Police executed a warrant to search for stolen goods at a property of AL at Halavave (Kolomotu'a). AL was not at the property. Some of his workers were present and they contacted AL. Whilst waiting for AL the Police searched the workers and found one of them to be in possession of cannabis. AL then arrived with three others, including Mr. Maile. They too were searched and Mr. Maile was found to have in his trouser pocket a small plastic bag containing methamphetamine weighing 0.52 grams.
- [6] When he appeared in the Supreme Court for arraignment Mr Maile pleaded guilty to the charge of possessing the methamphetamine at the first opportunity.
- [7] At sentencing Niu J had before him a pre-sentence report that recommended a suspended custodial sentence be imposed. Both counsel for the Crown and for Mr Maile supported that recommendation. The possibility of Mr Maile being discharged without conviction was not raised by the Judge with counsel

but in his written ruling of 26 November 2018 Niu J discharged Mr Maile without conviction.

The jurisdiction

[8] Section 204 of the Criminal Offences Act provides:

Discharge without conviction

(1) Where a court is of the opinion, having regard to the circumstances including the nature of the offence and character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate, it may make an order discharging him absolutely or alternatively discharging him subject to the condition that he commits no offence during such period, not exceeding 3 years from the date of the order, as may be specified therein.

(2) A discharge under this section is deemed to be an acquittal.

(3) A court discharging an offender under this section may —

(a) make an order for payment of costs or the restitution of any property; or
(b) make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered —

(i) loss of, or damage to, property;

(ii) emotional harm; or

(iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to property.

[9] In *R v Ala* (Unreported, Court of Appeal, AC 19 of 2019) we set out the approach that the Court is to take when considering an application for a discharge without conviction. For present purposes, the relevant extract from that judgment is at [10] – [12] as follows:

The correct approach that the Court must take in considering whether to grant a discharge without conviction under s. 204 is as follows. First, the Court must assess the seriousness of the offending including the gravity with which it is viewed by Parliament along with all aggravating and mitigating factors relevant to the particular case before it. Secondly, the Court must consider the character and circumstances of the offender which will include any previous offending, the effect of the entry of a conviction on his career, his finances, his reputation, any civil disabilities that flow from the entry of a

conviction as well as any indirect consequences. Thirdly, the Court must be satisfied that the consequences of entering a conviction are out of all proportion to the gravity of the offending. Finally, and only if the Court is so satisfied, it must still consider whether in all the circumstances of the case the granting of a discharge without conviction is the appropriate result.

Circumstances where it will be appropriate for the Court to grant a discharge without conviction will rarely arise and the Court should exercise its discretion sparingly. It will not be sufficient without more that an offender is generally a person of good character, has no prior convictions or is a young person. If those factors were sufficient discharges without conviction would be routinely given and that should not be the case.

In considering an application for a discharge without conviction the Court will not accept mere speculation about the consequences of the entry of a conviction. The Court can only act upon evidence and the offender will need to provide proof to satisfy the Court that there is a real and appreciable risk that adverse consequences will ensue (*DC (CA47/13) v R* [2013] NZCA 255 at [43] referred to in *Edwards* (supra) at [25]).

The decision under appeal

- [10] In deciding to grant Mr Maile a discharge without conviction Niu J relied upon several factors. We do not accept that any of them, individually or collectively, provided a basis for granting Mr Maile a discharge without conviction.
- [11] Niu J consider that it was inappropriate that Mr. Maile had been sentenced in 2001 when he was 20 years old to a period of imprisonment with 'hardened and experienced criminals, who have taught him to commit crimes'. The Judge had no information about that offending or the reasons a custodial sentence was imposed. There was also no evidence that Mr. Maile had been taught to commit crimes in prison. The fact that he had not offended for 17 years would suggest that he had not. There was therefore no basis for this finding. In any event, it was a matter that had no relevance at all to the decision the Judge had to make.

- [12] The Judge held that having not committed any offence since his release from prison in 2002, Mr Maile had been entitled to a certificate under the Rehabilitation of Offenders Act 'such that he is deemed to have no previous convictions'. He said that a conviction would mean that Mr Maile would need to wait a further seven years to apply for a certificate during which time he would have 'no right to a passport to travel or to apply for a visa'. The Rehabilitation of Offenders Act does not wipe a person's convictions and, under s. 10, a person is required to state their convictions for certain purposes notwithstanding that that a certificate has been granted to them. The Judge's conclusion that Mr Maile would as a result of his conviction have no right to a passport and could not travel was mere speculation and there was no basis for him to find that this was the case.
- [13] The third factor was that under s. 122 Tonga Police Act the search of Mr Maile by the Police was said by Niu J to be unlawful. Without hearing evidence as to the circumstances under which the search was conducted Niu J could not conclude that the search was unlawful. In any event, in circumstances where Mr Maile had pleaded guilty to the offence it was an irrelevant matter.
- [14] The Judge then said that if Mr Maile was ordered to undertake community work or pay a fine that would disrupt his family life. It is to be expected that punishment imposed for serious criminal offending will disrupt the offender's family life. That is not a reason to grant a discharge without conviction. In addition, the Judge wrongly assumed that community work can only be performed on Saturdays and there was no evidence that Mr. Maile paid maintenance for his children which might be affected by the imposition of a fine.
- [15] The Judge found that the quantity of methamphetamine was 'infinitesimal' and not enough to use. There was no evidence for such a conclusion and it is incorrect.
- [16] Finally, the Judge said that Mr Maile was a victim of drug dealers and if given a 'further chance' he may save himself by committing not to use

methamphetamine again. The pre-sentence report noted that Mr. Maile needed community support to make correct decisions in his life. Such support would not be provided by granting him a discharge without conviction in the hope that he might save himself. The pre-sentence report proposed a suspended custodial sentence subject to conditions that included that Mr. Maile undertake an alcohol and drug awareness program. We consider that was an appropriate recommendation.

[17] The Judge did not refer to the then leading case in Tonga which was *R v Tu'iba'ateiho* [2015] Tonga LR 44, or to any other authorities that have followed it. We do not accept Mr. Moale's submission that it could be inferred that Niu J did consider that the consequences of entering a conviction were out of all proportion to the gravity of Mr Maile's offending. It is quite clear that he did not properly consider this.

[18] The Judge also did not refer to recent cases where it has been held that those involved with methamphetamine in any capacity, and even small amounts, can expect to receive custodial sentences. Most recently in *R v Ngane* (Unreported, Supreme Court, CV 6 of 2018, 2 August 2018) at [5] and [6] Cato J said:

This judgement will serve as a warning to those who engage in Tonga with the drug methamphetamine, whether it be for possession only of small amounts or larger amounts, trafficking or supplying it to others, manufacturing, importing, exporting or dealing, in any way, with this extremely dangerous and addictive drug that the courts will sentence offenders to severe punishment. Even for possession of small amounts, offenders can expect to be sentenced to terms of imprisonment.

Methamphetamine is a scourge and has effected a great deal of harm and misery on society in countries such as Australia and New Zealand where it has become prevalent in the last couple of decades. It is highly addictive for users, is mind altering and is often accompanied by acts of serious violence as well as being causative of a good deal of collateral crime such as theft and burglary in order for the user to fund the acquisition of the drug. Significant markets are to be found for those who choose to manufacture or import the

drug and large profits can be made by criminals who choose to engage in such activity. The courts have responded by imposing very significant penalties on those who engage in this kind of activity.

- [19] In addition, the Judge reached his decision to grant a discharge without conviction in a procedurally unfair manner when he did not advise counsel, contrary to their submissions, that he was considering discharging Mr Maile under s. 204. Mr. Moale confirmed that the Judge's decision was a complete surprise to him. In circumstances where he intended to depart from what all parties proposed as the appropriate sentence the Judge was obliged to raise that possibility with both counsel.

Our assessment of the case

- [20] Although Mr Maile was found in possession of only a small quantity of methamphetamine his offending was serious as this is a Class A drug. In prescribing a maximum penalty of 30 years imprisonment for possession of methamphetamine the Legislature has expressed a clear intention that significant penalties are to be imposed. The distribution and use of methamphetamine in Tonga is a significant Government and community concern and we endorse the comments of Cato J made in *Ngau* (supra).
- [21] Mr Maile was not a first time offender and there is nothing relating to his character or circumstances to suggest that the entry of a conviction will have any direct or indirect consequences upon him other than those that ordinarily be expected for such offending. We note also that in granting him a discharge Mr Maile was effectively deprived of the benefit of the support that he needs, and the pre-sentence report recommended, to prevent further offending.
- [22] The consequences of entering a conviction against Mr Maile were not out all proportion to the gravity of the offence and the Judge was wrong to make an order discharging Mr Maile without conviction. That order was not within the range of outcomes that the Judge could have considered were open to him.

The appropriate sentence

- [23] Counsel are agreed that if the appeal is allowed the appropriate outcome is that Mr Maile should be convicted and sentenced to a fully suspended period of imprisonment subject to appropriate conditions. We will follow that course.
- [24] Mr. Kefu submitted that a term of imprisonment of 18 months should be imposed but the authorities do not support that submission. We consider the appropriate term is 9 months imprisonment which should be fully suspended subject to conditions.

Result

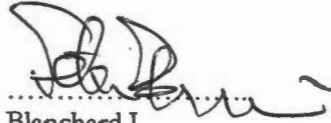
- [25] The appeal is allowed. The order discharging Mr Maile without conviction is quashed.
- [26] Mr Maile is convicted on the one count of possession of methamphetamine and is sentenced to 9 months imprisonment.
- [27] The sentence of imprisonment shall run from the date of this judgment but is fully suspended on the conditions that Mr Maile:
- (a) Shall not commit any offences punishable by imprisonment during the period of the suspension;
 - (b) Shall not consume alcohol or any illicit drug during the period of the suspension;
 - (c) Shall be placed on probation during the period of the suspension;
 - (d) Shall perform 50 hours community work on such days and times as he is directed by the Probation Service;
 - (e) Shall attend an alcohol and drug awareness course under the direction of the Probation Service.



.....
Paulsen P



.....
Handley J



.....
Blanchard J



.....
Randerson J