

IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY

AC 4 OF 2021
(CR 123 of 2020)

**In the matter of s.17B of the *Court of Appeal Act* and Order 10 rule 1 of the
*Court of Appeal Rules***

BETWEEN:

ATTORNEY GENERAL

Applicant

-and-

PAEA LEKA

Respondent

Attorney General's application for leave to appeal against sentence

RULING

Before: Whitten P
To: ✓ The Attorney General
The Respondent
Date of application: 28 January 2021
Date of ruling: 29 March 2021

The application

1. The respondent was originally charged with possession of 14.53g of methamphetamine and 0.72g of cannabis to which he pleaded not guilty on arraignment. At the commencement of his trial on 4 December 2020, the Crown amended the indictment to reduce the weight of the methamphetamines to 5.23g (found within 31 dealer bags). The accused then pleaded guilty to both counts.
2. On 18 December 2020, Acting Judge Langi sentenced the respondent for the possession of the methamphetamines to 2 ½ years imprisonment, fully suspended for two years, on conditions including 100 hours community service.
3. The Attorney General now seeks leave to appeal against the sentence pursuant to s.17B of the *Court of Appeal Act* on the grounds that:

- (a) the judge's decision to fully suspend the imprisonment term was wrong in principle, and that insufficient weight and consideration was given to the seriousness of the offence in light of the weight of the methamphetamine; and
 - (b) the judge erred in assessing the relevant mitigating factors against the overwhelming need and public interest to denunciate the respondent's offending and to deter others from committing the same offending.
4. The application is supported by the affidavit of Inoke Finau, who was the prosecutor who appeared on the sentence below. Mr Finau deposed to his belief that the sentence "was manifestly inadequate and requires correction by the Court of Appeal".

Crown's submissions below

5. In its submissions on sentence, the Crown proposed a starting point of three years imprisonment, with 12 months deducted on account of the respondent's late guilty plea, lack of previous convictions and expressed remorse. In relation to suspension of the resulting two years, the Crown submitted:

"... that the accused should receive a partial sentence and in the alternative if your Honour finds the accused is eligible for a full suspension then the Crown requests that as well as other conditions to include [sic] a substantial amount of community service."

The sentence

6. In her sentencing remarks, the Judge agreed with the Crown's starting point of three years. However, for his late guilty plea and lack of previous convictions her Honour deducted only six months imprisonment leaving a sentence of two years and six months imprisonment on the methamphetamines.
7. In relation to suspension, the Judge noted [33] that:

"... The Crown submits a partial sentence suspension of any sentence given. In the alternative, Mr for now for the Crown submits that if this Court is minded to grant a full suspension of the sentence, then a substantial amount of community service should be imposed."

8. After referring to the principles in *Mo'unga v R* [1998] Tonga LR 154, her Honour stated:

"35. In this case, the accused did not plead guilty at the earliest available opportunity and he did not cooperate with the police. However, he is a first-time offender and is remorseful for his actions. I am of the view that if given a chance the accused will take the opportunity offered by a fully suspended sentence to rehabilitate himself. I accept the probation officer's view that he is remorseful. I am also mindful that the accused has not had the benefit of being part of any kind of rehabilitation programs such as that offered by the Salvation Army drugs and alcohol courses. I believe that given the right tools through the assistance of such courses, the accused can turn his life around and become a law-abiding citizen. I therefore order that the head sentence on count 1 is fully suspended on conditions outlined below."

9. As noted, those conditions included 100 hours of community work.

Consideration

10. In *Rex v Misinale* [1999] TOCA 12, this Court identified the following principles on applications by the Attorney General for leave to appeal against sentence:

"First, for such an appeal to succeed, clear and compelling grounds for increasing the sentence need to be established. It is not sufficient for the appellate court to consider that a more severe sentence could properly be imposed, or that the sentence imposed is inadequate or inappropriate. For a sentence to be increased on a Crown appeal, the appellate court must be satisfied that the sentence is so inadequate or inappropriate that the sentencing judge erred in that he or she must have acted upon a wrong principle, wrongly assessed a relevant circumstance, took into account irrelevant factors, failed to take into account relevant factors, or has imposed a sentence that is inconsistent with sentences the court has imposed for like offending. In such a situation, the appellate court is left with no alternative but to impose a more severe or a different sentence. If the court is so satisfied, the sentence should be increased only to the lower end of the appropriate sentencing range. Indeed, the appellate court, in fixing the proper range for this case, should take into account that it is an added penalty to have to face sentence a second time, and to have hope deferred, and perhaps dashed, in the result.

*Secondly, the right of the Crown to appeal affects the course the Crown should take when the sentence is before the sentencing judge. As was said by the Full Court of the Federal Court in *R v Tait* (1979) 24 ALR 473, 476, after pointing out that a Crown appeal puts the defendant in double jeopardy:*

'It would be unjust to a defendant to expose him to double jeopardy because of an error affecting his sentence, if the Crown's presentation of the case either contributed to the error or led the defendant to refrain from dealing with some aspect of the case which might have rebutted the suggested error. The Crown has been said not to be concerned with sentence but when a statutory right of appeal has been conferred on the Crown, that proposition must be more precisely defined. It remains true that the Crown is required to make its submissions fairly and in an even handed manner, and that the Crown does not, as an adversary, press the sentencing court for a heavy sentence. The Crown has a duty to the court to assist it in the task of passing sentence by an adequate presentation of the facts, by an appropriate reference to any special principles of sentencing which might reasonably be thought to be relevant to the case in hand, and by a fair testing of the defendant's case so far as it appears to require it.'

Now that the Crown in Tonga has the right to appeal against sentence, these principles should be applied here. We emphasise the importance of counsel for the Crown carrying out this duty 'fairly and in an even handed manner'. He or she must never approach the task in an adversarial manner, nor press for a high sentence. Counsel's role should be to assist the judge to arrive at a proper sentence, consistent with other sentences imposed for like offences. In that latter respect, counsel for the Crown should supply to the judge details of such sentences, including, where appropriate, guideline judgments from this Court and other appellate courts."

11. In this matter, the sentencing judge in fact acceded to the Crown's alternative submission that if the sentence was to be fully suspended, it should be subject to a substantial number of hours of community service. That submission was an express statement on behalf of the Crown that full suspension of the sentence was open, meaning that it was within the range of appropriate outcomes from the Crown's perspective. Had the Crown's position then been, as it seeks to present now, that full suspension was not open in the circumstances, including, importantly the amount of the methamphetamines in question, then the alternative submission should never have been advanced.
12. Further, the Crown submissions below did not include the ground now advanced to the effect that "*the overwhelming need and public interest to denunciate the respondent's offending and to deter others from committing the same offending*", ought to have precluded full suspension.

13. In light of the amount of methamphetamines in question, had the Crown not left open the possibility of full suspension, leave to appeal would have been promptly granted. However, the Crown should not readily be permitted to resile from the position it presented below.
14. But there is another problem with the sentence. Even though it has not been articulated in the application for leave to appeal, it is arguable that the judge erred by suspending the sentence of 2 ½ years imprisonment for only two years. In *Misinale*, *ibid*, the Court held:

“... The suspension of the sentence for a period less than the balance of the sentence was an error. When a sentence is suspended, it must always be for not less than the unserved portion of the sentence.”

15. For that reason, and in order to ensure also that the Court of Appeal has an opportunity to review the sentence to determine whether, if undisturbed, it should be left as a potential precedent in future cases concerning possession of significant amounts of methamphetamines by young offenders with no previous convictions, I have reluctantly decided to grant leave to appeal.

Result

16. Leave to appeal is granted.
17. The Attorney General is to file and serve a copy of this Ruling and a Notice of Appeal within 14 days of the date hereof.

NUKU'ALOFA
29 March 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC LCJ
PRESIDENT