

JUDGMENT OF THE COURT

Introduction

- [1] This respondent, Mr Fua'eiki, pleaded guilty to two charges of possession of methamphetamine and one of possession of a bullet contrary to the Arms and Ammunition Act. He was sentenced by Justice Niu to one year and nine months imprisonment suspended for three years on conditions that he serve 80 hours of community service and attend and complete life skills, drug and alcohol awareness courses of the Salvation Army.
- [2] The Attorney General was granted leave to appeal against sentence on the grounds that the sentence was manifestly inadequate and the decision to suspend the term of imprisonment wrong in principle.¹

Facts

- [3] The first offence occurred on 23 January 2020. Acting on information received, the Police conducted a warrantless search of car wash premises at Pahu. Mr Fua'eiki was present. He was searched and found to be in possession of two packs of methamphetamine containing in total 1.99 grams of methamphetamine and \$813.50 in cash. When his home was searched, similar but empty packs were found and a weighing scale. A live bullet was found in the pocket of a coat hanging in his room.
- [4] On 28 October 2020, while on bail, Mr Fua'eiki was present when premises at 'Anana were visited by the police. He was found to be holding in his hand two plastic packets. One contained ten packs of methamphetamine, the other two packs. The methamphetamine weighed .61 grams in total. Mr Fua'eiki told the police the owner of the premises had just handed the packs to him. Telephones found in the possession of the pair contained a message from the owner to Mr Fua'eiki to come and pick up "ice".

Personal Circumstances

- [5] Mr Fua'eiki is a 43 year old man, married and living with his wife and their five children. He has no previous convictions. He has spent most of his working life in the building trade but was unemployed at the time of the offending. Unable to support his family, he said he agreed to suggestions by friends that he sell drugs to generate income.

¹ Leave to appeal was granted by Whitten LCJ on 12 May 2021 under s17B of the Court of Appeal and Order 10 Rule 1 of the Court of Appeal Rules.

Sentence

- [6] Justice Niu adopted a starting point for sentencing on the drug offences of two years three months imprisonment. He applied a discount of six months to reflect Mr Fua'eiki's guilty pleas and his unblemished record to arrive at a sentence of one year nine months imprisonment. He accepted Mr Fua'eiki's explanation that the bullet was left in his car by friends and convicted and discharged him on that offence.
- [7] Justice Niu found Mr Fua'eiki met some of the criteria laid down by the Court of Appeal in *Mo'unga v R*² for the imposition of a suspended sentence. He treated him as a first offender for the purpose of sentencing "because [his] two offences have been combined as one in this sentencing".³ He said he was satisfied that Mr Fua'eiki was not a drug user and would make use of the opportunity of a suspended sentence to rehabilitate himself. He found Mr Fua'eiki's guilty pleas to have helped the police, the prosecution and the Court and to constitute cooperation with the authorities for the purpose of the principles laid down in *Mo'unga*. On that basis, Justice Niu was satisfied that Mr Fua'eiki was eligible for suspension of the imprisonment sentence subject to conditions that would assist with his rehabilitation.

Grounds for Appeal

- [8] The Crown's appeal is concerned solely with the Judge's decision to suspend the entire sentence of imprisonment. The Crown takes no issue with the term of imprisonment imposed. It accepts that it is appropriate that the power to suspend is invoked. Its position is that a fully suspended sentence is manifestly inadequate, fails to give sufficient weight to relevant sentencing principles and is out of line with sentences for drug offending of similar gravity. Of particular concern to the Crown was that, by focussing on the aggregate quantity of drugs involved and treating the offending as a single offence, the Judge made the error of treating Mr Fua'eiki as a first offender.

Respondent's position

- [9] Mr Tu'utafaiva for the Respondent defended the Judge's decision. He argued that Justice Niu was not wrong to treat Mr Fua'eiki as a first offender, that the sentence overall appropriately reflected the seriousness of the offending and was not inconsistent with prevailing sentences for drug offending.

² [1998] Tonga LR 154.

³ Sentencing notes, 6 April 2021 at [33].

Discussion

- [10] The principles governing a Crown appeal against sentence are well established.⁴ There must be clear and compelling grounds for increasing the sentence. The appellate court must be satisfied that the sentence is so inadequate or inappropriate that the sentencing judge erred either by acting upon a wrong principle, wrongly assessing a relevant circumstance, taking into account relevant factors, failing to take into account relevant factors or imposing a sentence that is inconsistent with sentences imposed for like offending.
- [11] A consideration of whether the decision to suspend the entire sentence meets one or more of those criteria begins with the established approach to the exercise of the power to suspend. That is also well established. As a suspended sentence is intended to have a strong deterrent effect, it should be imposed only if the offender is capable of responding to a deterrent. Among the situations in which an offender may qualify are where he or she is young, has a previous good record or has had a long period free of criminal activity; where the offender is likely to take the opportunity offered to rehabilitate himself or herself; and where there has been cooperation with the authorities. Also relevant may be the seriousness of the offending, the need for any effective deterrence, the effect on the complainant (if any) and the personal circumstances of the offender or those dependent on him or her.⁵
- [12] It is clear that Mr Fua'eiki meets the relevant criteria. There is no reason to doubt that a suspended sentence will have a strong deterrent effect. The Judge was right to have regard to his previous good record and to conclude that he would take the opportunity to rehabilitate himself though we do not think his guilty plea can be truly characterised as cooperation with the authorities. For this purpose, the fact that by the time of the second offence, he was no longer a first offender is of no moment. What is clear is that a suspended sentence was appropriate.
- [13] However, we consider the Crown is right to contend that the suspension of the entire sentence was not in accordance with sentencing principles and the established approach of the Courts to sentencing for class A drug offending. Had Mr Fua'eiki's offending involved a single offence, it may have been arguable that the suspension of the full sentence was appropriate.⁶ But it is a serious aggravating factor that while on

⁴ *R v Misinale* [1999] TOCA 12; CA13/1999.

⁵ *R v Motulalo* [2000] Tonga LR 311 at 313.

⁶ As occurred in *R v Vasi* (unreported, Supreme Court, CR124 of 2020, 10 February 2021, Niu J).

bail for the first offence, Mr Fua'eiki engaged in exactly the same offending. The totality of his offending militated against suspension of the entire time of imprisonment.

[14] Moreover, more recent examples of sentencing for possession of methamphetamine for the purpose of supply referred to by the Crown in support of the appeal reflect a growing concern with the prevalence of methamphetamine use and a view that even first offenders should be required to serve part of their prison sentence.⁷ The importance of denouncing and deterring serious drug offending has been emphasised.⁸

[15] These considerations would have led us to allow the appeal and suspend only part of the sentence were it not for one important factor. Mr Fua'eiki has completed his sentence of community service and the Salvation Army courses. He has already fulfilled two of the three conditions attached to the suspension of his sentence. In the circumstances, we consider it would be unduly harsh to require him to serve, in addition, a sentence of imprisonment. The elements of the sentence combine to produce a result that is within the available range. The third condition of suspension is onerous. If Mr Fua'eiki fails to comply with it, he will be required to serve the full term of his imprisonment in addition to the sentence of community service.

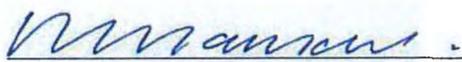
[16] For these reasons, we conclude that the sentence should stand. We emphasise, however, the exceptional circumstances. In declining to interfere with the sentence, we should not be understood as condoning an approach that would permit sentences for possession of methamphetamine to be routinely suspended in full. On the contrary, this Court accepts that the interests of the community and the importance of deterrence, will generally be served only by requiring an offender to serve at least part of his or her sentence.

Result

[17] The appeal is dismissed.



Whitten P



Hansen J



⁷ See for example *R v Tangata'O Pangai aka Pinomi Laveni* (CR 32 of 2021, 23 April 2021, Whitten LCJ); *R v Siua Palanite Hufanga* (CR 211 of 2020, 28 May 2021, Whitten LCJ).

⁸ *Hufanga* at [20]-[21].

J. Randerson

Randerson J

J. White

White J

