

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

ATTORNEY GENERAL'S OFFICE	
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AC 4 of 2021
CR 23 of 2020

BETWEEN:

ATTORNEY GENERAL

Appellant

-and-

PAEA LEKA

Respondent

JUDGMENT OF THE COURT

Court: Whitten P
Hansen J
Randerson J
White J

Counsel: ✓ Mr J. Lutui DPP with Mr I. Finau for the Appellant
Respondent in person

Hearing: 20 September 2021
Judgment: 28 September 2021

Background

1. In this matter, the Attorney General, with the leave of the Court,¹ appeals, pursuant to s 17B of the *Court of Appeal Act*, against the sentence pronounced by the Supreme Court in proceeding CR 123 of 2020.
2. The Respondent was originally charged with possession of 14.53 grams of methamphetamine and 0.72 gram of cannabis, to which he pleaded not guilty upon arraignment. At the commencement of his trial on 4 December 2020, the Crown amended the indictment to reduce the weight of the methamphetamines to 5.23 grams (found within 31 dealer bags). The Respondent then pleaded guilty to both counts.
3. On 18 December 2020, Acting Judge Langi sentenced the Respondent for the possession of the methamphetamines to 2½ years imprisonment, fully suspended for 2 years, on conditions including 100 hours community service. On the cannabis count, the Respondent was sentenced to 3 months imprisonment, to be served concurrently with the sentence on the methamphetamine count.
4. The appellant does not challenge the length of either sentence. The Attorney General does

¹ Leave to appeal was granted by Whitten LCJ on 29 March 2021.

contend, however, that in relation to the sentence for the methamphetamine charge:

- (a) the final sentence of 2½ years imprisonment, fully suspended, on conditions was manifestly inadequate;
- (b) the sentencing judge's decision to fully suspend the term of imprisonment was wrong in principle, in that insufficient weight and consideration were given to the seriousness of the offence in light of the weight of the methamphetamine;
- (c) the sentence is inconsistent with other sentences imposed by the Supreme Court and must be rectified to avoid an inconsistent approach being adopted by the Court; and
- (d) the decision to fully suspended the sentence for 2 years was wrong in principle, in that the Court cannot suspend an imprisonment sentence for a period less than the balance of the sentence.

Crown's submissions below

5. In its submissions on sentence in relation to the methamphetamine count, the Crown proposed a starting point of 3 years imprisonment, with 12 months deducted in mitigation for the respondent's late guilty plea, lack of previous convictions and expressed remorse. In relation to suspension of the resulting 2 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 3 years. However, for the Respondent's late guilty plea and lack of previous convictions, her Honour deducted only 6 months resulting in the sentence of 2 ½ years' imprisonment on the methamphetamine count.

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 Finau 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.”

Crown’s submissions on appeal

9. On behalf of the Attorney General, Mr Lutui submitted:
- (a) that even though the submissions of the Prosecutor below left open the alternative of a fully suspended sentence, as long as it was accompanied by a substantial amount of community service, it was up to the learned sentencing Judge to determine the appropriate sentence;
 - (b) the decisions referred to by the Prosecutor below clearly indicated that a custodial sentence was warranted given the substantial weight of methamphetamines involved and that an actual imprisonment term was to be served, meaning that a fully suspended sentence was "outside the sentencing range for convictions involving methamphetamines over 1 gram";²
 - (c) despite references in the sentencing remarks to statements of principle³ and the Judge’s own observations about the seriousness of the offending involving methamphetamines,⁴ the Judge should have given more weight to the seriousness of the subject offending, particularly having regard to the weight of the methamphetamines;
 - (d) the seriousness of that offending is reflected by the fact that the statutory maximum penalty at the time included 30 years imprisonment which is higher than the maximum penalty for manslaughter;
 - (e) the fully suspended sentence is inconsistent with comparable sentences such as those referred to below where *Hafoka* was sentenced for possession of 7.7 grams of methamphetamine to 3 years imprisonment with the final 9 months suspended and *Holani* was sentenced for possession of 1.15 grams of methamphetamine to 9 months imprisonment;
 - (f) as such, the full suspension was wrong in principle and, consistent with the approach taken to suspension in other decisions of the Supreme Court concerning significant amounts of methamphetamines,⁵ the sentence should only have been partially suspended;
 - (g) it is important that the Courts are seen to impose consistent sentences and that sentences are based on correct principles in order to instil public confidence in the judiciary;
 - (h) if the sentence is not corrected, it may be used as a precedent for like offending which would jeopardise the concept of parity and consistency of sentences by the

² *R v Mangisi* (CR 10/2018); *R v Fineasi Hafoka* (CR 205/2019); *R v Siu Holani* (CR 72/2020).

³ *Mo’unga v R* [1998] Tonga LR 154; *R v Maile* [2019] TOCA 17 endorsing the remarks of Cato J in *R v Ngaue* (Unreported, Supreme Court, CV 6 of 2018, 2 August 2018) at [5] and [6].

⁴ [24] to [29].

⁵ *R v Asaeli Teulilo* (CR 266 of 2020, 2 March 2021); *R v Tangata ‘O Pangai a.k.a. Pinomi Lavemai* (CR 32 of 2021, 23 April 2021); *R v Siua Palanite Hufanga* (CR 211 of 2020, 28 May 2021).

Court; and

- (i) the sentencing judge further erred by suspending the head sentence for a period of only 2 years which would have the effect that at the end of that suspension period, the Respondent would be required to serve the final six months of the sentence.⁶
10. During oral submissions, Mr Lutui confirmed that in the nine months since his sentence, Mr Leka has completed both the 100 hours community service and rehabilitation program ordered as conditions of his fully suspended sentence. In that circumstance, Mr Lutui submitted that if the appeal is allowed and a new sentence substituted, the head sentence of 2 ½ years imprisonment is already at the low end of the applicable range, but that the Respondent should be given credit of six months for the community service, resulting in a head sentence of two years. He added that consistency required that only the final nine to 12 months of that sentence be suspended for a period of 18 to 24 months.

Respondent's submissions

11. Mr Leka reminded us that it was the Crown which had suggested the possibility of his sentence be fully suspended.

Consideration

12. 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.”

13. We are satisfied that the *Mo'unga* analysis by the Judge (which was not all in favour of the Respondent) warranted some suspension of the head sentence.
14. However, in *Misinale*, after reciting the considerations for suspension discussed in *Mo'unga*, this Court observed that:

“These, as the reference makes clear, are not the only factors. Also relevant may be the seriousness of the offending, the need for an effective deterrence,

⁶ Referring to *Rex v Misinale* [1999] TOCA 12.

the effect on the victim, and the personal circumstances of the offender or those dependent on him or her. There may well be others. ...”

15. By deciding to fully suspend the sentence, we consider that the Judge failed to have sufficient regard to, or place sufficient weight upon, other relevant factors such as the seriousness of the offending, the sentencing objective of denunciation and the need for effective deterrence.
16. The seriousness of the offending was marked by the significant amount of methamphetamines (5.23 grams) and the fact that they were found in 31 dealer bags, suggesting possession for the purpose of supply. Full suspension of a sentence for that level of offending, even for a first offence, was unlikely to provide, or be seen to provide, an effective deterrent for members of the community involved with, or considering becoming involved with, an insidious illicit drug such as methamphetamine. Full suspension was also out of step with the approach developed by the Supreme Court in numerous comparable sentences, particularly, over recent years, in relation to suspension for similar drug-related offences. For those reasons, the sentence imposed was inadequate or inappropriate. In our view, suspension of the final 12 months of the sentence would have struck an appropriate balance between the considerations referred to above and an opportunity for rehabilitation.
17. But that is not the end of the matter. In *Misinale*, this Court continued:

“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.’”
18. In this case, the Judge 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 and within the range of appropriate outcomes. Had the Crown’s position then been, as it contends now, that full suspension was not open in the circumstances, the alternative submission should never have been advanced. An important element in ensuring consistency in sentencing is consistency in Crown submissions.
19. As such, we consider that the Crown’s submission below leaving open the alternative of full suspension with community service contributed significantly to the error we have identified in the sentence and has exposed the Respondent to double jeopardy.
20. In those circumstances, and as the Respondent has completed the required community service and rehabilitation program, and as far as we know, continues to abide by the primary condition of not committing any offence punishable by imprisonment, we

consider it would be manifestly unfair to the Respondent, and inimical to the interests of justice, to now require the Respondent to serve part of his sentence in prison.

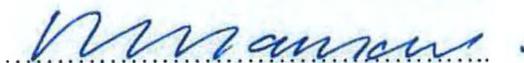
21. For those reasons, and subject to what follows, we do not propose to interfere with the sentence. However, it must be stressed that the outcome in this case should not be viewed as a precedent for sentencing in future cases of similar offending. But for the Crown's submission below and the Respondent's observance of the conditions of the sentence to date, the result would have been different.
22. As to the other substantive ground of appeal, we do not agree that the Judge suspended the 2 ½ year sentence for only 2 years. Her Honour's reference to the sentence being "fully suspended" necessarily meant that it was to be suspended for a period of not less than 2 ½ years. However, we accept that the reference in the first condition of suspension - that the Respondent not commit any further offences punishable by imprisonment for a period of 2 years – ought be corrected to align with the period of suspension.

Result

23. The appeal is allowed in part.
24. The sentences imposed in the Supreme Court of 2 ½ years imprisonment for the methamphetamine charge and a concurrent term of 3 months imprisonment for the cannabis charge are affirmed.
25. The terms of the suspension of the sentence are varied as follows: the sentences are fully suspended for a period of 2 ½ years, during which, the respondent is not to commit any further offences punishable by imprisonment. The other remaining conditions of the suspended sentence are affirmed.



Whitten P



Hansen J



Randerson J



White J

