

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

ATTORNEY GENERAL'S OFFICE	
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AC 27 of 2021
(CR 274 of 2020)

BETWEEN:

ATTORNEY GENERAL

Applicant / Appellant

-v-

SIUELI ANGILAU

Respondent

Application for a stay of execution of sentence pending appeal

RULING

BEFORE: PRESIDENT WHITTEN QC LCJ
Appearances: Ms 'E. Lui for the Applicant
The Respondent in person
Application: 1 November 2021
Hearing: 17 November 2021
Ruling: 18 November 2021

1. On 20 October 2021, Niu J sentenced the Respondent for possession of 0.55 gram of methamphetamine and 267.83 grams of cannabis to a head sentence of 2 ½ years imprisonment. The sentence was fully suspended, albeit for only 2 years, on conditions, including 80 hours community service.¹
2. On 1 November 2021, the Attorney General filed an application pursuant to s 17B of the *Court of Appeal Act* for leave to appeal against the full suspension of the sentence on the grounds that it was wrong in principle and manifestly inadequate. In particular, the Attorney General relies on the fact that the Respondent has previous convictions including for possession of illicit drugs in 2019 and 2020, for which, on each occasion, he was imprisoned without suspension.
3. On 2 November 2021, leave to appeal was granted.
4. With the application for leave to appeal, the Attorney General also filed an application for a stay of execution of the sentence pending the hearing and determination of the appeal. As far as Ms Lui was aware, and my research indicates, this is the first published decision on an application of this kind in the Kingdom.² For that reason alone, the rationale and impetus for the application requires explanation.
5. During the most recent sittings of this Court, the Attorney General brought several

¹ *R v Angilau* [2021] TOSC 164

² Compare *Taufa v R* [2005] Tonga LR 134.

appeals pursuant to s 17B. In *Attorney General v Leka* [2021] TOCA 13 and *Attorney General v Fua'eiki* [2021] TOCA 20, the grounds of appeal were similar to the instant case. In both, the Court held that full suspension of the sentences imposed was contrary to sentencing principles and the established approach of the Courts to sentencing for drug offending. However, in those cases, neither Respondent had any previous convictions. Further, the focus of the Court's decisions was on Class A drugs such as methamphetamines, and its acceptance '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'.³

6. Notwithstanding the Court's findings of error, the sentences in *Leka* and *Fua'eiki* were not disturbed, for one important reason. By the time the appeals were heard, both Respondents had completed a number of conditions of their suspended sentences, including, most relevantly, community service. Therefore, the Court considered that it would be manifestly unfair to those Respondents, and inimical to the interests of justice, to belatedly require them to serve part of their sentence in prison. The Court was at pains, however, to point out that those decisions were not to be viewed as precedents for sentencing in future cases of similar offending.
7. As at the date of the hearing of this application, Mr Angilau had completed 42 hours of community service.
8. Counsel for the Attorney General submitted, essentially, that the sentence here should be stayed to prevent a potential repeat of the outcomes in *Leka* and *Fua'eiki*.
9. During the hearing of the application, Mr Angilau addressed the Court in terms similar to his letter filed on 12 November 2021, by which he sought to support the reasons of the sentencing judge and urged this Court not to interfere with the sentence on the bases that, notwithstanding his past criminal activity, he had reformed his life, completed a Salvation Army drugs rehabilitation course and, as noted, above, was continuing to perform his community service on an almost daily basis.
10. The *Court of Appeal Act* is silent on the issue of a stay of execution of a sentence pending appeal by the Attorney General.⁴ However, s 22 provides that in the exercise of its criminal jurisdiction, and if considered necessary or expedient in the interests of justice, the Court of Appeal may exercise any other powers which may be exercised by the Court on appeals in civil matters.

³ *Fua'eiki* at [16].

⁴ Compare, for example, the automatic stay provisions of s 63 of the New South Wales *Crimes (Appeal and Review) Act* 2001, as discussed in *Director of Public Prosecutions (NSW) v Kmetyk (No 2)* [2018] NSWCA 195.

11. Order 9 of the *Court of Appeal Rules*, which is part of the Civil and Land Jurisdiction, provides that:

Unless otherwise ordered by the Court or the Supreme Court, an appeal shall not operate as a stay of execution or of proceedings in the court below.

12. Most applications for stays and the principles that have been developed in respect of such applications have arisen in civil matters and have been derived from Halsbury's Laws of England as found in the UK White Book.
13. For instance, in *AJ & E Ltd v FC Nichols (Wholesales) Ltd* [2006] TOCA 1, it was observed that on such applications:

"Two principles have to be balanced against each other as to whether a stay of execution pending appeal should be granted: first, that a successful litigant should not be deprived of the fruits of his litigation (The Annot Lyle (1886) 11PD 114, 116 (CA)); and secondly, that an appellant should not be deprived of the fruits of a successful appeal. Whether to grant or refuse a stay is within the Court's discretion. (Halsbury's Laws (4th Ed) Vol 37 para 699)."

14. Similar principles have been applied in other cases such as:
- (a) the jurisdiction of the Court to make an order preserving the status quo pending the hearing of an appeal 'rests upon the inherent power to preserve from futility the exercise of the Court's jurisdiction to allow an appeal';⁵
 - (b) the court will, as a rule, only grant a stay if there are special circumstances;⁶
 - (c) special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being rendered nugatory;⁷
 - (d) the so-called 'stringent test'⁸ which requires evidence of irreparable harm being suffered by the appellant if the stay is not granted such as damages and costs being paid in accordance with the terms of the judgment appealed from with no reasonable probability of recovering them if the appeal succeeds;⁹ and
 - (e) the 'more relaxed test' where 'if [an applicant] can say that, without a stay of execution, he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of

⁵ *Beljajev v Director of Public Prosecutions* (1991) 173 CLR 28 at [6], referring to *Chamberlain v. The Queen* (No. 1) (1983) 153 CLR 514 at 518.

⁶ *Thompson v Tonga Development Bank* [2004] Tonga LR 11, citing Halsbury's, Vol 17, at [455].

⁷ *Beljajev v DPP*, supra, at [7], referring to *Federal Commissioner of Taxation v. Myer Emporium Ltd.* (No. 1) (1986) 160 CLR 220 at 222-223.

⁸ Referred to by Ward CJ in *'Uta'atu v Free Wesleyan Church of Tonga*, No. 26/90, 12 August 1994, citing *Atkins v Great Western Railway* (1886) 2 TLR 400.

⁹ Or where there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed: *McBride v Sandland* (No 2) (1918) 25 CLR 369.

execution'.¹⁰

15. Having considered the sentencing remarks below, the submissions on the application and the principles referred to above, I am satisfied that it is necessary or expedient in the interests of justice to grant the stay. I have reached that view for three reasons.
16. Firstly, in light of the comments of this Court in *Leka* and *Fua'eiki*, the Respondent's recent previous convictions for drug offending and the oft-cited rule in *R v Misinale* [1999] TOCA 12 that 'when a sentence is suspended, it must always be for not less than the unserved portion of the sentence', the appeal has some prospect of success.
17. Secondly, even though the nature of an appeal by the Attorney General pursuant to s 17B is fundamentally different to those by defendants in criminal matters and appellants in civil cases, the content of the grounds of appeal here and the importance of consistency in the criminal law constitute special circumstances which favour the grant.
18. Thirdly, if the stay is not granted, and Mr Angilau goes on to complete his community service, then if the substantive appeal is allowed, there is a realistic prospect that the Court may feel compelled to adopt a similar course to the results in *Leka* and *Fua'eiki*. In that event, the appeal, if successful, will, in practical terms, be rendered nugatory.
19. If the appeal is allowed, it will then be a matter for the Court to consider what, if any, credit ought to be given for the community service performed by Mr Angilau to date.
20. Accordingly, I order that any further execution of the sentence imposed by Niu J in Supreme Court proceeding CR 271 of 2020 on 20 October 2021 is stayed pending the hearing and determination of the appeal in this proceeding.

NUKU'ALOFA
18 November 2021



M. H. Whitten QC LCJ
PRESIDENT

¹⁰ *Uta'atu v Free Wesleyan Church of Tonga*, supra, citing *Linotype-Hell Finance Ltd v Baker* [1992] 4 All ER 887, 888 (CA).