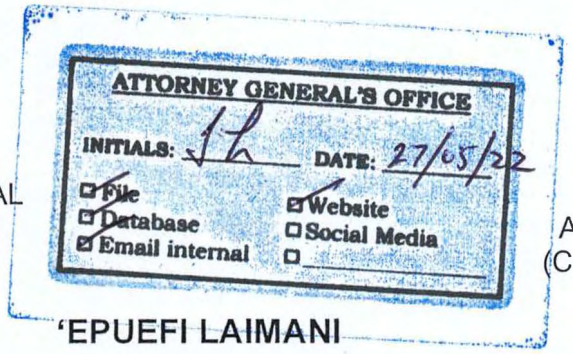

IN THE COURT OF APPEAL
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 12 of 2021
(CR 90 of 2020)

'EPUEFI LAIMANI

-v-

REX

JUDGMENT

Court:	Whitten P Blanchard J Randerson J
Counsel:	Mrs A. Tavo-Mailangi for the Appellant
Respondent:	Mr T. 'Aho with Mr F. Samani for the Respondent
Hearing:	18 May 2022
Judgment:	24 May 2022

The appeal

1. On 6 April 2021, following trial, Cooper J found the Appellant guilty of possession 5.15 grams of methamphetamine (count 1), 3.59 grams of cannabis (count 2), offering a bribe to police in the sum of $50 (count 3) and a further count of offering a bribe to police in the sum of $3,000 (count 4).

2. On 3 May 2021, the judge sentenced the Appellant to a total of 5 ½ years' imprisonment with the last 6 months suspended on conditions.

3. On 18 May 2021, the Appellant applied for leave to appeal against his conviction and sentence.

4. On 15 July 2021, Whitten P refused leave to appeal against the conviction but granted leave to appeal the sentence. The Appellant has proceeded solely in respect of that grant of leave.

5. The Appellant contends that the sentence was excessive and harsh on the grounds that:

(a) the judge added another year to the starting point of 3 ½ years "to reflect that [the Appellant] was plainly involved in supplying methamphetamine ";

(b) the sentence was inconsistent with other comparable sentences;

(c) the sentence was also excessive compared to the Appellant's sentence in proceeding CR 59 of 2019 where, for a larger amount of methamphetamine, the Appellant was sentenced to 2 years and 9 months imprisonment with the final 6 months suspended for 12 months on conditions; and

(d) the judge did not consider the totality principle having regard to the temporal relationship and/or difference in procedural handling of the offending in CR 59/19 and the instant offending which occurred a little over two months apart but which resulted in both matters being determined over two years apart with the instant sentence being imposed almost a year after the Appellant had completed his prison sentence for proceeding CR 59/19.

Background

6. On 10 October 2018, plain clothed police were travelling in an unmarked car along Vuna Road when they saw the Appellant, whom the lead officer knew from previous drugs operations, sitting in his vehicle. The Appellant ducked down out of sight in a suspicious manner. When the officer approached and spoke to him, the Appellant tried to hand a $50 note to the officer who refused it. The Appellant then reached into a compartment of his vehicle and pulled out a number of $100 and $50 notes and offered them to the officer, and the officer again refused them. The Appellant then took a small tin from his trouser pocket and threw it onto the floor of the vehicle. He was then removed from the car. The tin was inspected and was found to contain several small packets of what was later tested to be methamphetamine and cannabis. He said that they "*belonged to a group of friends who had used the car the night before*". En route to the police station, he asked two officers to stop at an ATM so that he could give them $3,000 each, which they refused.

Sentence

7. In his sentencing remarks, the judge recounted the facts and then set out the Appellant's criminal history:

(a) 2003, housebreaking and theft, one year imprisonment suspended for three years;

(b) 2003, wilful damage to property, $800 compensation or three months imprisonment;

(c) 2013, possession of suspected stolen property, fine; and

(d) 2019 (CR 59/19), possession class A drugs, 2 years and 9 months imprisonment.

8. The judge then considered the Prosecution submissions and comparable sentences referred to therein.[1] His Honour also considered the sentence in *'Amusia He 'A Mateni* (CR 213/2020, in which this Court's remarks in *Maile* [2019] TOCA 17 were considered) where, for 8.08 grams of methamphetamine, a starting point of 4 years' imprisonment was set.

9. When turning to consider sentence, the judge observed:

> *"26. The defendant was convicted of possession. But the evidence paints the clearest picture of someone who was dealing drugs, serving them up to customers outside the Tanoa hotel in Nuku'alofa, who would drive up to meet him parked in his car in the parking area by America Wharf.*
>
> *27. Detective Fifita gave evidence that there was of a line of vehicles parked next to his, each with someone inside.*
>
> *28. That the defendant had all the drugs ready to sell in dealer bags 14 methamphetamine and 8 cannabis, makes the reality of the situation undeniable.*
>
> *29. He may have been in possession of the drugs but in the circumstances it is clear that it was possession with intent to supply them, and that was what he was doing."*

10. His Honour then sentenced the Appellant as follows:

(a) on count 1, he set a starting point of 3 ½ years imprisonment but increased that by a further year "*to reflect that [the Appellant] was plainly involved in supplying methamphetamines that day*";

(b) 1 ½ years imprisonment on count 2 to be served concurrently with count 1;

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[1] *Nausaimone Kitekei'aho* (CR 36/2015), *Ma'ata Pouono* (CR 27/2019), *Piliote Uasike* (CR 161/2019), *Viliami Mangisi* (CR 10/2018, in which the sentencing bands in *Zhang v R* [2019] NZCA 507 were considered) and *Paula Moala* (CR 186 and 280/2020).

(c) 1 year imprisonment on count 3 to be served consecutively with the head sentence on count 1; and

(d) 1 year imprisonment to be served concurrently with the other sentences.

11. The net result was a sentence of 5 ½ years' imprisonment. "In the real hope" that the Appellant could be rehabilitated, the judge suspended the last 6 months for 2 years on conditions.

Appellant's submissions

12. In her written submissions, Mrs Mailangi developed the grounds of appeal as follows.

13. The judge's uplift of one year on the primary starting point, because he considered that the Appellant 'was plainly involved in supplying methamphetamine', contravened clause 13 of the Constitution, which prohibits any person being tried on a charge other than as appears in the indictment. The Appellant was not charged with supplying.

14. By comparison to starting points in the other sentences referred to (*Uasike*: 3.48 grams - 3 years; *Moala*: 7.63 grams – 3 years and 25 grams – 5 years; and *Mateni*: 8.08 grams – 4 years), and the Crown's submitted starting point below of 3 years, the total starting point here of 4 ½ years was excessive.

15. The resulting sentence was also greater than the sentence in CR 59/19, which involved a total of 10.38 grams of methamphetamine (the largest count being for just over 7 grams).

16. The offending in CR 59/19 occurred on 1 August 2018. The Appellant was sentenced (also after being found guilty at trial[2]) on 31 July 2019. The sentence was backdated to 10 October 2018. The Appellant was released from prison on 28 June 2020. Both matters could have been dealt with together. Instead, they were dealt with almost 2 years apart with the instant sentence imposed almost a year after the Appellant was released from prison for CR 59/19. Having regard to the proximity between the two lots of offending and the 'procedural handling' of the cases, the judge should have applied the totality principle to reduce the effective aggregate sentence when considering the instant sentence.

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[2] *R v Laimani* [2019] TOSC 23

17. Mrs Mailangi concluded by submitting that the sentence here should be reduced by one year and that 'some further concessions' should be made to the effective aggregate sentence for the two proceedings.

Respondent's submissions

18. On 1 April 2022, the Crown filed a notice of no opposition to the appeal. Before us, Mr 'Aho candidly explained that the sentence here was excessive due to the Crown below not bringing the timing and relationship of the Appellant's sentence in CR 59/19 to the attention of Cooper J. Mr 'Aho submitted that had the judge been made aware, he would have taken those matters into consideration and imposed a lower sentence for the instant offending.

19. Mr 'Aho also explained that the delay between the disposition of the two proceedings was due to a past police practice, by which suspected drugs were sent to New Zealand for analysis. For financial reasons, the authorities would wait until they had 10 to 20 cases worth before having them flown over in one batch. The drugs in CR 59/19 went on an earlier flight, resulting in a delay of some 6 to 9 months before the results of the subject drugs were available. Further delays were occasioned by delays in payment by Government of the analysis laboratory's invoice.

20. Mr 'Aho agreed with the judge's sentence formulation for the instant offending. He added that the overall sentence of 5 ½ years was further supported by the fact that the index offending occurred while the Appellant was on bail for CR 59/19. That, too, was something of which the judge was not made aware. However, Mr 'Aho submitted that the sentence should have been reduced by 25% to give effect to the totality principle in light of the sentence in CR 59/19.

Consideration

21. As there is a degree of common ground between the parties, our consideration of this appeal can be briefly stated.

22. For the reasons stated recently in *Attorney General v Leka* [2021] TOCA 13 and *Attorney General v Fua'eiki* [2021] TOCA 20, the judge was entitled to view the amount of the methamphetamine combined with the other drug related paraphernalia found in the Appellant's vehicle as evidence of possession for the purpose of supply. As such, an uplift on the primary starting point for possession

by reason of that circumstance of aggravation was warranted. That does not mean the Appellant was being sentenced for the discrete offence of supply. Had he been, the resulting sentence would likely have been even more severe.

23. However, having regard to the comparable sentences referred to above, we are persuaded that the total sentence for the methamphetamine was slightly excessive. We consider an appropriate sentence to be 4 years imprisonment, which we note is at the top end of the *Zhang* band for less than 5 grams. We appreciate that is still higher than the comparative results in *Moala* and *Mateni*. However, Moala pleaded guilty on arraignment and Mateni had no previous convictions. Here, also, the Appellant committed the index offences while on bail for CR 59/19, which showed a blatant disregard for the law and a proclivity for continuing to commit serious crime regardless of the opportunity afforded by the grant of bail.

24. There is no challenge to the sentences for the possession of cannabis or the offers to bribe. We agree that it was appropriate to add one year from the bribery sentences to the head sentence for possession with the balance of the sentences to be served concurrently. On our formulation, that produces a total sentence of 5 years imprisonment.

25. We also agree that had the sentencing judge been apprised of the circumstances of the offending and sentence in CR 59/19, considerations of totality would have resulted in a reduction of the overall aggregate sentence.

26. In rectifying that omission, we take into account the unfortunate circumstances that have resulted in the Appellant having been released from prison only to be returned almost a year later. We consider that the overall culpability for the two lots of offending and their temporal proximity requires that the aggregate of the two sentences of 7 years and 9 months imprisonment be reduced by 2 years. Accordingly, the sentence for the index offending will be 3 years imprisonment.

27. On account of the Appellant's relevantly and moderately good record prior to the 2020 offending, and that, as far as we are aware, he complied with the conditions of the suspended portion of his sentence in CR 59/19 (which expired in December 2020), we consider it appropriate to order that the final year of the sentence be suspended for 2 years.

Result

28. The appeal is allowed.

29. The sentence of the Supreme Court is quashed.

30. In substitution, the Appellant is sentenced to 3 years imprisonment, effective from 3 May 2021.

31. The final year of the sentence is to be suspended for a period of 2 years from the date of the Appellant's release from prison on condition that during that period, the Appellant is to:

    (a) not commit any offence punishable by imprisonment;

    (b) be placed on probation;

    (c) report to the probation office within 48 hours of his release from prison and thereafter as directed by his probation officer.

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Whitten P

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Blanchard J

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Randerson J

COURT OF APPEAL TONGA