

[2] The respondent was sentenced on four counts in separate indictments for offending that occurred in two incidents approximately five weeks apart. The first three arose from an incident at Sopa on 18 September 2020 and the fourth from an incident on 28 October 2020 at 'Anana. The details of the charges and the sentences imposed are:

- (a) A joint charge with another offender of possession of 0.13gms of methamphetamine - 9 months imprisonment;
- (b) interfering with evidence by breaking a glass pipe used to smoke methamphetamine – two years imprisonment;
- (c) obstructing a police officer by kicking him while the officer was attempting to arrest the respondent – six months imprisonment;
- (d) supplying 0.61gms of methamphetamine – eight months imprisonment.

[3] The cumulative total of these sentences amounts to three years and 11 months. Niu J arrived at the effective sentence of two years and four months by ordering that the sentences on the first three counts be served concurrently and that, in respect of the sentence on the fourth count, four months were to be served concurrently with the other three sentences and four months were to be cumulative.

The facts

[4] The respondent was convicted after trial on the first three charges but pleaded guilty on the eve of trial on the fourth charge. In respect of the charges arising from the first incident, Niu J found that the police approached and stopped a vehicle driven by the respondent. His co-offender was a passenger. Initially, there was some resistance by the respondent to police directions to turn off the vehicle's engine and to unlock the doors. During the course of the incident the respondent attempted to drive away but was stopped again. The police saw the respondent smash a glass pipe on the inside of the car window and, when a police officer was reaching into the vehicle to turn off the engine, the respondent kicked him on the shoulder. The vehicle was searched and particles of methamphetamine were found on the floor of the front passenger seat along with an empty pack lying on the floor. The particles were collected and were later weighed at 0.13gms.

[5] In the second incident, as a result of information received, the police approached the respondent who they found talking to another man, Mr Fua'eiki, who was holding two packs. One contained two small packs of methamphetamine and the other 10 packs. Mr Fua'eiki told

the police that the respondent had just given the packs to him and subsequent inquiries showed messages between the two men. The total weight of the methamphetamine came to 0.61gms.

The respondent's personal circumstances

[6] The pre-sentence report showed that the respondent is 42 years of age. Previous marriages had come to an end. He was in a new relationship with a woman who owned a business in which the respondent was working as a storeman. The respondent had a history of drug taking and had been sentenced in 2021 to imprisonment as we discuss further below. The respondent produced several references supporting a marked change in his behaviour since he had returned from prison. The probation officer recommended a suspended sentence with probation, community service and a requirement to complete an alcohol and drug awareness programme.

The Judge's approach to sentencing

[7] Niu J noted the Crown's submission that the offence of interfering with evidence should be the starting point with a sentence of two years imprisonment, increased by three months because the respondent had committed the last offence while on bail. Overall, the Crown submitted a sentence that the respondent should serve a total of two years and six months taking into account totality. The Crown submitted at sentencing that the sentence should not be suspended because of the breach of bail and because a Class A drug was involved. The respondent was not represented at sentencing but asked the Court to grant him community service.

[8] The Judge largely accepted the Crown's submissions although declined to increase the sentences for breach of bail. However, he did not accept the Crown's submission that there be no suspension of the sentence. Referring to *Mo'unga v R*,¹ the Judge considered that the respondent was likely to take the opportunity offered by a suspension to rehabilitate himself. He considered the respondent was making genuine efforts to transform his life and he ought to be given the opportunity to continue that rehabilitation while at the same time serving community service to ensure he did not break the momentum he now had in advancing to a better life for himself and his partner.

Grounds for appeal

[9] On appeal, the Attorney-General submits:

¹ *Mo'unga v R* [1998] Tonga LR 154.

- (a) The final sentence of two years four months imprisonment, fully suspended, was manifestly inadequate;
- (b) The Judge gave insufficient weight to the seriousness of the offending and ought not to have fully suspended the term of imprisonment;
- (c) The sentence was inconsistent with sentences for similar drug weights and offending.

[10] Addressing the first two grounds together, counsel submitted that the sentencing Judge had focussed largely on the issue of rehabilitation and had failed to have regard to the seriousness of the offending. It was submitted that the respondent had graduated from possession and using drugs to their supply; the respondent was not a first offender in respect of illicit drugs; the two sets of offending had occurred within a short space of time, the second while on bail for the first; he had not co-operated with the authorities; the respondent was not young. Proper consideration of those factors should have weighed heavily against a fully suspended sentence. Reliance was placed on a recent decision of the Lord Chief Justice in *R v Fekau*² but we consider that was a much more serious case than the present.

[11] Addressing the third ground of appeal, counsel referred us to the recent decision of *R v Kaufusi*³ in which the Lord Chief Justice reviewed a range of sentences for possession of relatively small quantities of methamphetamine. In that case, where the offending occurred prior to the amendments to the Illicit Drugs Control Act, effective from 8 December 2020, the appellant was convicted of unlawful possession of 0.12gms of methamphetamine and was sentenced to eight months imprisonment. The Lord Chief Justice considered that most of the considerations in *Mo'unga* did not favour suspension and took into account that deterrence in such cases was a very important consideration not only for the defendant but for the community as a whole. The Lord Chief Justice considered it appropriate to suspend the final four months of the eight month sentence for a period of 12 months.

[12] Finally, counsel for the Attorney-General referred us to this Court's recent decision in *Attorney-General v Fua'eiki*,⁴ in which the Court accepted the Crown's submission that the suspension of an entire sentence of imprisonment for Class A drug offending was not in accordance with sentencing principles and the established approach of the Courts in such cases.

² *R v Fekau* [2021] TOSC 102.

³ *R v Kaufusi* (CR 234 of 2020, 15 June 2021).

⁴ *Attorney-General v Fua'eiki* AC11/2021.

The Court considered that it was a serious aggravating factor, that while on bail for the first offences, Mr Fua'eiki engaged in exactly the same offending.⁵ The Court also observed that recent sentencings for possession of methamphetamine for the purpose of supply reflected a growing concern with the prevalence of methamphetamine use and the view was expressed that even first offenders should ordinarily be required to serve part of their prison sentence. The importance of denouncing and deterring serious drug offending was emphasised.⁶

[13] Counsel submitted that the sentence imposed in the Supreme Court was manifestly inadequate and should be quashed with a new sentence imposed. While acknowledging the respondent had undertaken a substantial part of the community service, it was submitted that the sentence should nevertheless be suspended only in part.

[14] When this appeal was first called the respondent appeared for himself and advised he wished to have counsel appear for him, The appeal was adjourned for two days and Ms Kafoa appeared to make oral submissions for the respondent. While accepting that there are a number of matters that may be considered in terms of *Mo'unga*, counsel submitted that in the present case the Judge was entitled to focus mainly on the prospects of rehabilitation as supported in the pre-sentence report.

Consideration

[15] A key factor in the present case is that the respondent is not young and had a history of repeated drug offending including while on bail.

[16] The respondent was previously sentenced by the Lord Chief Justice on 2 March 2021.⁷ He had been convicted of one count of possession of 1.3gms of cocaine and one count of possession of 0.1gms of cannabis. The Lord Chief Justice considered that the appropriate starting point was 18 months imprisonment from which four months was deducted for the respondent's good previous record and his late guilty plea. He was ultimately sentenced to 14 months imprisonment on that occasion with the final six months suspended on conditions. It is significant that the respondent was released on 28 August 2021, only the month before the first of the index offending. He was on bail for the first of the index offending at the time of the second in which illicit drugs were again involved.

⁵ At para [13].

⁶ At para [14].

⁷ *R v 'Asaeli Teuilo* (CR 266 of 2020, 2 March 2021).

[17] Contrary to the view of the Judge, offending while on bail should normally be regarded as an aggravating factor in cases such as this since it demonstrates a tendency to reoffend despite the intended deterrent threat of pending charges and punishment if convicted. It is also a factor that needs to be taken into account when considering suspension. Reliance on a breach of the Bail Act to deal with offending on bail is not a valid rationale to avoid taking such a breach into account as an aggravating factor in sentencing. We note that the only remedy for breach of bail under the Bail Act is to revoke bail with no additional penalty.

[18] We conclude that the sentence was manifestly inadequate to reflect the seriousness of the offending. These include the respondent's previous history for similar offending, his persistent offending in disregard of his previous sentence for which he had been released only a matter of weeks before the index offending, the commission of the fourth count while on bail for the first three, and his conviction on one count of actual supply rather than possession simpliciter. It should not need repeating that methamphetamine offending is a serious problem in the Kingdom and requires a strong deterrent response from the Courts.

[19] We also accept for similar reasons, that a fully suspended sentence was not appropriate but that a partial suspension was justified. A total effective sentence of two and a half years is appropriate with the last eight months suspended for 12 months on conditions. This allows some credit to the respondent for the community service he has partially completed.

Result

[20] The appeal is allowed and the sentences imposed in the Court below are quashed.

[21] In substitution, the following penalties are imposed:

- (a) Count 1: nine months imprisonment
- (b) Count 2: two years imprisonment;
- (c) Count 3: six months imprisonment;
- (d) Count 4: 12 months imprisonment.

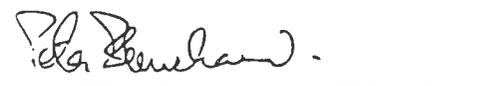
[22] The sentences on the first three counts are to be served concurrently. In respect of the sentence on count 4, six months is to be served concurrently with the other sentences and six months is to be cumulative on the other sentences.

[23] The effective sentence is therefore two and a half years. The last eight months of the sentence is suspended for a period of 12 months on condition:

- (a) The respondent is placed on probation and is to live and work where directed by the probation officer;
- (b) He is not to commit any offence which is punishable by imprisonment during the period of suspension of the sentence; and
- (c) He is to report to the office of the probation service within 24 hours of receiving a copy of this judgment.



Whitten P



Blanchard J



Randerson J

