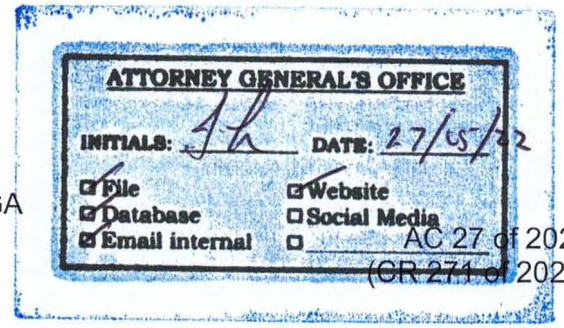

IN THE COURT OF APPEAL OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AC 27 of 2021
(CR 271 of 2020)

BETWEEN:

ATTORNEY GENERAL Appellant

-v-

SIUELI ANGILAU Respondent

JUDGMENT

Court:	Whitten P Blanchard J Randerson J
Appearances:	Mr J. Lutui DPP with Mr J. Fifita for the Appellant No appearance for or by the Respondent
Hearing:	16 May 2022
Judgment:	24 May 2022

The appeal

1. On 3 August 2021, the Respondent was convicted following trial of possession of 0.55 gram of methamphetamine (count 1) and a total of 267.83 grams of cannabis (counts 2, 3 and 4).[1]

2. On 20 October 2021, Niu J sentenced the Respondent to a head sentence of 2 ½ years imprisonment, suspended for two, on conditions including 80 hours community service.[2]

3. On 2 November 2021, the Attorney General was granted leave, pursuant to s. 17B of the *Court of Appeal Act*, to appeal against the sentence on the grounds that:

   (a) the sentence was manifestly inadequate;

   (b) the sentence was inconsistent with other sentences for similar drug

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[1] *R v Angilau* [2021] TOSC 125
[2] *R v Angilau* [2021] TOSC 164

offending; and

(c) the period of suspension was wrong in law.

The sentence

4. In his sentencing remarks below, the judge recorded the Respondent's previous convictions:

   (a) in 2013, for attempted armed robbery and grievous bodily harm, for which he was sentenced to seven years and three years' imprisonment respectively, to be served concurrently, with the final two years suspended for three;

   (b) in 2019, possession of illicit drugs, for which he was sentenced to nine months imprisonment; and

   (c) again in 2021, possession of illicit drugs, for which he was sentenced to three months imprisonment.

5. His Honour then referred to the presentence report and, briefly, to the Prosecution's submissions, both of which recommended partial suspension. The Respondent initially agreed with the Prosecution's submission but later asked the Court to fully suspend his sentence with community service instead.

6. The judge's analysis thereafter was devoted firstly, and almost entirety, to the issue of suspension.

7. He noted the commonly cited considerations for suspension discussed in *Mo'unga v R* [1998] Tonga LR 154 from *R v Petersen* [1994] NZLR 533 (CA) that:

> *"The suspended sentence is intended to have a strong deterrent effect, so that if the offender is incapable of responding to a deterrent, it should not be imposed"*

and the non-exhaustive factors such as where the offender 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 by the sentence to rehabilitate himself or herself; where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, the presence of

provocation or coercion by a co-offender; and, where there has been cooperation with the authorities.

8. His Honour then stated:

> *"One of those circumstances is where there is evidence that the offender has found and kept a steady job with sufficient income for himself and his family and has disassociated himself from his former associates with whom he had associated when he committed the present offence. He is therefore seen to be capable of responding to a suspended sentence and rehabilitating himself. That will truly be a strong deterrent effect of the suspended sentence on him. The suspended sentence will then be seen as a worthwhile sentence to be imposed."*

9. His Honour then referred to his own decisions in *Finau*[3] and *Moimoi*.[4] *Finau* was sentenced to two years imprisonment, fully suspended, for cultivation of 54 cannabis plants. *Moimoi* was sentenced to 2 ½ years imprisonment, fully suspended, for possession of 225.67 grams of cannabis and related offences.

10. In deciding whether to suspend all or part of the Respondent's sentence, the learned judge opined:

> *"[19] The purpose of the suspension of a sentence is to enable the offender to continue to build the new and better, and law abiding, life for himself, so that he would not re-offend. It is not given in favour of an offender only in the hope that he will build a new and better, and law-abiding life. It is given if the offender has shown or demonstrated that he has begun that new life. As Eichelbaum CJ said, 'If the offender is incapable of responding to a deterrent, it should not be imposed.' And the Court of Appeal has stated in guide no. (ii) in the Mo'unga Case, that suspension should be given 'where the offender is likely to take the opportunity offered by the suspension to rehabilitate himself or herself.'*
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> *[20] But if the suspension was to be only partial, that is, that the offender is to serve a part of the sentence first and then try and rehabilitate himself, or herself, afterwards, he would be more likely not to take the opportunity to*

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[3] [2020] TOSC 77
[4] [2020] TOSC 102

rehabilitate himself. This is especially so if the rehabilitation which the offender has begun is the finding of a well-paying employment of some permanence. It provides a stable income. It keeps the offender away from his former associates. He does not need the money from those associates or the drugs provided by them for him to sell to get his money. He can honestly work and earn his own money instead.

[21] If he is then sentenced to serve out in prison, a part of his sentence before he is given the partial suspension instead, then his hope and attempt at rehabilitating himself is dashed and lost, because he thereby loses his employment. That employment is not guaranteed to him when he comes back out of prison. His wife and children will also straightaway be without means of livelihood. He would then need to ask his 'former associates' for help with the maintenance of his family. He would be obligated to them. He will return from prison and go straight back and do what he had been doing before. There is no rehabilitation at all when there is such a partial suspension.

[22] I therefore consider that there must be a full suspension of the sentence in order that the purpose of suspension, namely, rehabilitation, is achieved."

11. His Honour considered that the Respondent had shown he was capable of responding to a suspended sentence because he had already completed a drugs awareness course with the Salvation Army, he was 'keeping a steady job' to maintain himself, his wife and children and because the Respondent's church bishop had confirmed that the Respondent had made changes in his life.

12. The judge then turned lastly to the issue of the sentence to be suspended. He held that it should be more than the two years submitted by the Prosecution because *Moimoi* was sentenced to 2 ½ years for 225.67 grams of cannabis. Accordingly, the judge sentenced the Respondent also to 2 ½ years, fully suspended, on conditions including 80 hours of community work.

Appellant's submissions

13. Here, the Appellant relies on the following statements of principle by this Court:

    (a) The factors in *Mo'unga* "are not the only factors. Also relevant may be the seriousness of the offending, the need for an effective deterrence, the effect

on the victim, and the personal circumstances of the offender or those dependent on him or her. There may well be others. But although these are factors that may be taken into account in considering whether, and if so for how long, to suspend part or all of a sentence, the major consideration is whether a suspension is likely to aid in the rehabilitation of the offender. If it is not, or if for any reason rehabilitation is not relevant to the sentence to be imposed, suspension of any part of the sentence is in general not appropriate.": *Misinale*;[5]

(b) "Two considerations need to be reconciled. First, the serious nature of the offending, coupled with the long criminal history, require a lengthy sentence that will be a deterrent to this appellant and to others, and will mark the community's condemnation of criminal conduct of this kind and degree. Secondly, it is in the community's interests for the sentence to be one which will encourage the appellant in his rehabilitation, and will help him to break the cycle of offending": *Mo'unga*, ibid;

(c) "The purposes of a sentence imposed on an offender are to punish so far as is just and fitting in the circumstances; the deterrence of criminal behaviour by the offender and others; the rehabilitation of the offender to fulfil a useful role in society; the vindication of society's standards; and the protection of law-abiding members of the community": *Fifita*.[6]

14. The Attorney General contends that in deciding to fully suspend the sentence, the judge failed to consider the seriousness of the offence and the aggravated features such as the Respondent's repeat offending.

15. As to the first, she points to the amounts of the illicit drugs involved and to the evidence that they were for supply. She also referred to *Tuita* [1999] Tonga LR 152 at 156, followed in *Vea* [2004] TOCA 7,[7] as authorities for the proposition that sentences for possession of significant amounts of cannabis, indicating a commercial scale operation or possession for the purpose of supply, should not normally be suspended in whole or in part unless there are good reasons relating to rehabilitation, even for a first-time offender.

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[5] [1999] TOCA 12
[6] [2000] Tonga LR 289
[7] As recently referred to by the Supreme Court in *Pangi & Huni* [2021] TOSC 118.

16. The Appellant further contends that by the judge failing to take those matters into consideration, the fully suspended sentence is inconsistent with sentences for similar offending, such as *Pangi*, ibid, who was also convicted after trial, for possession of 183.33 grams of cannabis and was sentenced to 2 years 4 months imprisonment with the final 12 months suspended on conditions.

17. On the third ground, the Appellant contends that the judge erred in law by suspending the 2 ½ year sentence for only 2 years.

Consideration

18. It is convenient to consider the last ground first.

19. As submitted by the Appellant, in *Attorney General v Leka* [2021] TOCA 13 and *Attorney General v Siale* [2021] TOCA 16, the Court reaffirmed the principle stated in *R v Misanale* [1999] TOCA 12 that when a sentence is suspended, it must always be for not less than the unserved portion of the sentence. Any sentence that is suspended for a period of less than the unserved portion of the sentence, as here, would then require the Respondent to serve the last six months of the sentence in prison. Such a result would not only be unfortunate, but also wrong in principle.

20. For that reason, the appeal must be allowed on that ground. If the substantive sentence is to stand, as fully suspended, an appropriate correction would simply be to suspend the head sentence for three years.

21. However, the real gravamen of the appeal lies in the first and second grounds by which the Appellant takes issue with the judge's decision to fully suspend the sentence.

22. The principles governing a Crown appeal against sentence are well established. 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.[8]

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[8] *R v Misinale* [1999] TOCA 12, referred to most recently in *Attorney General v Fua'eiki* [2021] TOCA 20 at [10].

23. It is clear from the sentencing remarks that the judge not only gave detailed consideration only to the issue of suspension, but within that, his Honour only considered the second of the *Mo'unga* factors, namely, whether the Respondent was likely to take the opportunity offered by a suspended sentence to rehabilitate himself. On that basis alone, we agree that the judge erred in his approach to the sentence.

24. In *Mo'unga*, this Court did not state that suspension 'should be given where the offender is likely to take the opportunity offered by the suspension to rehabilitate himself or herself.' Rather, the Court identified a number of situations, intended to be neither exhaustive nor comprehensive, in which the suspension of a sentence may be appropriate. The Court also reconciled the competing considerations in that case by ordering partial suspension of the four-year sentence. The Court explained that the first three years to be served in prison would be an effective deterrent, and that the last suspended year would hang over the offender as 'an added encouragement to put a life of crime behind him'. A similar interpretation should have been applied here.

25. To fully suspend a sentence for a serious crime solely because the offender has, since being charged for the offending, shown signs of rehabilitation, runs the very real risk of failing to consider, and formulate a sentence which gives effect to, other sentencing objectives such as punishment, specific and general deterrence, denunciation, recognition of the effects on, and protection of, the community, especially for offences involving significant quantities of illicit drugs. All of those must be balanced with the interests of the offender and the community in arriving at a sentence which also provides for rehabilitation - not one which *only* provides for rehabilitation.

26. In this case, those other factors or features included the following:

    (a) at 42 years of age, the Respondent was not young;

    (b) he did not have a previous good record:

        (i) his conviction in July 2013 for attempted robbery and grievous bodily harm resulted in a head sentence of seven years, the last two of which

were suspended for three;

(ii) the instant offences occurred in May 2020, that is, either within or very close to the expiry of that suspension period;[9]

(iii) his most recent convictions resulted in two sentences of imprisonment, without suspension, for possession of illicit drugs;

(iv) the instant offending occurred between the commencement of those two proceedings;

(c) there was no diminution of culpability identified and the offences clearly involved premeditation;

(d) he did not fully cooperate with authorities. When questioned by police, he only admitted to possession of empty dealer packs and not the drugs themselves;

(e) in relation to the seriousness of the offending, on 8 December 2020, s. 4 of the *Illicit Drugs Control Act* was amended so that possession of seven grams or more of cannabis is now deemed to be supply. However, the instant offending predated those amendments, and the Respondent was not charged with supplying. Notwithstanding, in terms of the differentiation between amounts for personal use and for commercial purposes, the total amount of cannabis found here was almost 40 times the new legislative amount for deemed supply;

(f) further, in relation to the Appellant's reference to 'evidence of supply', the summary of facts and the Crown's sentencing submissions below referred to more than 60 empty dealer packs and $200 in cash also being found during the search. Even though the Respondent was not charged with possession of utensils, at trial, the judge accepted the evidence of the police officers who found those items, and to which, as noted, the Respondent admitted ownership;

(g) he maintained his not guilty plea to the possession of the drugs through to

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[9] It would appear the Respondent was released from prison early as a result of remissions available under the *Prisons Act*. Neither the Prosecution below nor the Appellant on this appeal suggested circumstances which required the Respondent to be dealt with for breach of that suspended sentence in accordance with s. 24(3) of the *Criminal Offences Act*.

verdict; and

(h) even though the presentence report recorded the Respondent's professed remorse, he also told the probation officer that he was innocent on counts 2 and 3 (possession of cannabis totalling approximately 267 grams).

27. The judge's cursory reference to two of the comparable sentences referred to by the Prosecution below in relation to the cannabis counts (which included *Pangi*) did not reveal any apparent consideration of the factors considered and reasons for the partial suspension of those sentences. Instead, as noted above, his Honour considered two of his own decisions.

28. In *Finau*, the judge sentenced the Defendant there to two years imprisonment for cultivation of 54 cannabis plants. The sentence was fully suspended because his Honour considered the Defendant had led a productive and useful life, that he had shown that he had rehabilitated himself by continuing with his kava farming to maintain himself and his family, the offending was out of character and the judge believed the Defendant had realised that and would resume his law-abiding life in the years to come.

29. In *Moimoi*, the judge sentenced the Defendant for possession of 225.67 grams of cannabis, and related offences, to a head sentence of 2 ½ years imprisonment. That sentence, too, was fully suspended because the judge considered that the Defendant had shown rehabilitation by his active participation in the community, including village police activities and assistance to an elderly couple, and that he had thereby shown that he could be trusted not to reoffend in the future, "for which purpose the enactment of suspension of sentence was intended".

30. While not referred to by the judge in his remarks, and in contradistinction to the instant case, neither Finau or Moimoi (or Pangi) had previous convictions.

31. We consider that upon a proper reconciliation of those factors with the other sentencing objectives referred to above, full suspension of the sentence could not be justified.

32. It follows, in our view, that, at a minimum, only part of the sentence should have been suspended.

33. Recently, in *Attorney General v Leka* [2021] TOCA 13 and *Attorney General v*

Fua'eiki [2021] TOCA 20, both the grounds and results on analysis of those appeals were similar to the instant case. However, in those cases, the Court was confronted with the practical reality that in the time between sentencing and determination of the appeal, the Respondents there had completed most of the conditions of their suspended sentences, including community service and drugs rehabilitation courses. In *Leka*, where the Prosecution below had submitted a position on suspension which the judge there ultimately adopted, this Court considered it would be manifestly unfair to the Respondent, and inimical to the interests of justice, to require the Respondent to serve part of his sentence in prison. Similarly, in *Fua'eiki*, the Court considered that it would be unduly harsh to require that Respondent to serve, in addition, a sentence of imprisonment. In consequence, those sentences were not altered. The resulting, compelled full suspensions were still regarded as onerous, for if the Respondents failed to comply with the conditions thereof (principally, not to commit any offence punishable by imprisonment), they would be required to serve their full terms of imprisonment in addition to the community service already completed. However, it was stressed that those outcomes should not be viewed precedents for sentencing in future cases of similar offending.

34. Cognizant of the potential for similar complications in this case, when the Attorney General filed her application for leave to appeal on 1 November 2021, she also filed an application for a stay of execution of Nui J's sentence. On 18 November 2021, Whitten P granted the stay.[10] At that time, the Respondent had completed 42 of the 80 hours community service ordered.

35. Having regard to the seriousness of the offending, the significance of the Respondent's previous criminal history, and the imperative for consistency in sentencing for similar offending, we consider it appropriate to vary the suspension component of the sentence. Credit for the community service the Respondent has completed will be reflected in a greater period of suspension than would otherwise have been the case.

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[10] *Attorney General v Angilau* [2021] TOCA 24.

Result

36. The appeal is allowed.

37. The sentence of the Supreme Court of 9 months imprisonment on count 1 and 2 ½ years imprisonment for counts 2, 3 and 4, to be served concurrently, is confirmed.

38. The balance of the sentence in relation to suspension is quashed, and in substitution, it is ordered that the final 15 months of the head sentence be suspended, for a period of two years from the date of the Respondent's release from prison, on condition that during the period of suspension, the Respondent is to:

    (a) not commit any offence punishable by imprisonment;

    (b) be placed on probation; and

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

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Whitten P

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Blanchard J

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Randerson J

COURT OF APPEAL TONGA