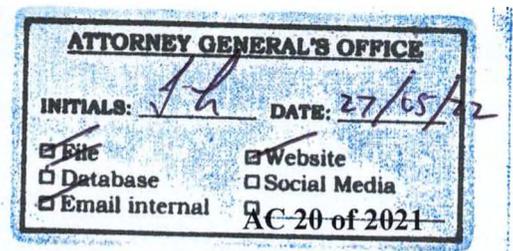


IN THE COURT OF APPEAL OF TONGA  
CRIMINAL JURISDICTION  
NUKU'ALOFA REGISTRY



(CR 236/20, 80/21, 81/21, 87/21)

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**BETWEEN** SOSEFO (a.k.a Sefo) LANGI MOALA  
Appellants

**AND** REX  
Respondent

Court: Blanchard J  
Hansen J  
Randerson J

Counsel: Ms A Kafoa for the Appellant  
Mr T Aho and Mr F Samani for the Respondent

Hearing: 19 May 2022

Judgment: 25 May 2022

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**JUDGMENT OF THE COURT**

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## **Introduction**

[1] On 4 June 2021 the appellant was sentenced by the Lord Chief Justice to imprisonment for eight years on a range of drug-related charges. He has been granted leave to appeal on the ground that part of the sentence should have been suspended.

## **The offending**

[2] The offending took place on four separate occasions between August 2019 and March 2021.

[3] On 31 August 2019, police searching the appellant's home found two packets of methamphetamine weighting .46 grams in total. The Police also located cash in Tongan, New Zealand and United States currency and weighing apparatus.

[4] On 12 November 2019, responding to information that the appellant was selling drugs from a vehicle parked at Longolongo, the Police searched two vehicles and detained the appellant, his wife and a third person. They found nine packets of cannabis in the appellant's car and quantities of methamphetamine (totalling 140 grams), cocaine (41.82 grams) and more cannabis on his person. A further quantity of cannabis (98.91 grams) in small packets was found when the Police searched the appellant's home. Electronic scales and plastic dealer bags were also found.

[5] On 13 November 2020 the Police again visited the appellant's residence. They searched his house and car. A package of methamphetamine weighing .81 grams was found in the glovebox of the car and 40 test tubes were located in his house.

[6] The Police carried out another search of the appellant's home on 4 March 2021. Small quantities of methamphetamine weighing 1.31 grams in total were found and bags used for packing drugs.

[7] The appellant initially denied the offending but in March 2021, as his trial on the November 2020 offending was about to begin, he entered pleas of guilty to all charges.

## **Sentencing**

[8] In his sentencing remarks the Lord Chief Justice noted that for the methamphetamine offending that occurred before 8 December 2020, the maximum term of imprisonment was 30 years imprisonment. After the amendment to the Illicit Drugs Control Act came into effect, the maximum term for possession of one gram or more of methamphetamine increased to life

imprisonment. The Lord Chief Justice identified the most serious offending as the November 2019 methamphetamine and cocaine charges. Referring to sentencing decisions that had adopted the sentencing bands recommended by the New Zealand Court of Appeal in *Zhang v R*<sup>1</sup>, he settled on starting points of eight years and six years respectively for those charges. He reduced both sentences by 12.5% to seven years and five years and three months respectively to take account of the late guilty plea. Lesser sentences were imposed on the remaining charges and greater discounts for charges the subject of early guilty pleas. This led to sentences of five months, 10 months and 15 months respectively for the offending that occurred in August 2019, 13 November 2020 and March 2021.

[9] The Lord Chief Justice, referring to *R v Latu*,<sup>2</sup> determined that cumulative sentences were appropriate, the offending having taken place on four separate occasions, on three of which the appellant was on bail. However, having regard to the totality of the offending, he reduced the lead sentence from the aggregate of nine and a half years to eight years.

[10] The Lord Chief Justice declined to suspend any part of the sentence. He noted that the appellant is 'not young' (he is 53) and has had an extensive criminal record. (He has served numerous terms of imprisonment since 1999 including lengthy terms for armed robbery). Against this, the Lord Chief Justice noted the appellant's limited cooperation with the Police and his guilty pleas.

[11] The Lord Chief Justice was asked to have regard to the appellant's personal circumstances. He has two young children and his wife, who was also facing charges arising out of the offending, was at risk of imprisonment. The Lord Chief Justice noted that the concern that the children would be left without the care of both parents was allayed by the suspension of the term of imprisonment to which the appellant's wife was sentenced. He acknowledged that the personal circumstances of the offender and those dependent on him or her may be relevant to the issue of suspension.<sup>3</sup> On the other hand he noted that in *Vea v R*<sup>4</sup> this Court endorsed the approach of the New Zealand Court of Appeal that personal circumstances are generally irrelevant when sentencing for drug offending. The Lord Chief Justice went on to say:

33. Even though this most recent period of criminality has seen the Defendant move away from property, violence and dishonesty offences, the harm done to the community though the supply for profit of illicit drugs is arguably greater and

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<sup>1</sup> [2019] NZCA 507; [2019] 3 NZLR 648.

<sup>2</sup> [2021] TOSC 81 at [33] and [34].

<sup>3</sup> *R v Misinale* [1999] TOCA 12.

<sup>4</sup> [2004] TOCA 7.

longer lasting than any of his previous misdeeds. As opined in *Latu*:

*'...those who import, manufacture, distribute or supply illicit drugs are currently one of the greatest threats to the physical, mental and spiritual health of the people of Tonga and its social fabric and cohesion. Therefore, although it is incumbent on the Courts to seek to fulfil all of the objectives of sentencing, in cases such as the present, the protection of the community and deterrence weigh heavily in that balance.'*

34. In discussing the *Mo'unga* considerations, the Court of Appeal in *Rex v Misinale* [1999] TOCA 12 stated:

*'...the major consideration is whether a suspension is likely to aid 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.'*

35. In my view, notwithstanding the Defendant's professed remorse, his long criminal history is overwhelming evidence that suspension is unlikely to aid in his rehabilitation.

[12] The Lord Chief Justice added that, as stated in the pre-sentence report, the appellant had been a long-term menace to society and unless and until he demonstrated a genuine desire and willingness for lasting rehabilitation, he was likely to continue to pose a threat to the community. He suggested that undertaking alcohol and drug counselling while in prison may be a significant step in that direction. However, the factors the Lord Chief Justice had referred to led him to the view that it was not appropriate to suspend any part of the sentence.

### **Discussion**

[13] In support of his application for leave to appeal, the appellant swore an affidavit that included information about his personal circumstances which appears not to have been made available to the Lord Chief Justice when he sentenced him. A letter from a physician (which post-dated sentencing) at Vaiola Hospital disclosed a number of longstanding medical conditions, the most serious of which is diabetes. The appellant's diabetes was said to have been 'poorly managed' and his status as a prisoner would not be 'conducive to the logistics of ensuring appropriate management of his diabetes'.

[14] The appellant's affidavit also exhibited two references written before sentencing but apparently not produced. One, from an ordained minister of the Free Wesleyan Church of Tonga who described himself as a close friend of the appellant for over three years, referred to him as a 'fine and responsible character'. He said he believed that the appellant, who had begun counselling with him, had every intention of improving.

[15] The second reference was signed by three senior managers of the Tokomololo Water Community Board. They described the appellant as a hard-working father whom they had known as a colleague for almost eight years. They said they had worked collaboratively with him in running the Water Board and that for three years he had undertaken voluntary work for the Board. The reference concluded:

‘We can say it with total confidence that a few men have contributed to the society in the way that [the appellant] has. We have known him well. Apart from being a good father but he is a kind, polite and a best contributor to our community.’

[16] In our view the additional information that has emerged on appeal warrants a re-evaluation of the case for suspension. We note, also, that the approach endorsed in *Vea v R*,<sup>5</sup> that personal circumstances are generally irrelevant when sentencing for drug offences, has been revisited by the New Zealand Court of Appeal in *Zhang v R*.<sup>6</sup> While the personal circumstances of the offender must be subordinated to the interests of deterrence, this does not imply excluding a consideration of personal mitigating circumstances relating to the offender.<sup>7</sup> Such an approach enables the Court to take personal circumstances into account when considering the issue of suspension in line with what was said by this Court in *R v Misinale*. In the appellant’s case we see that as appropriate. There are encouraging signs which suggest that he is by no means beyond redemption.

[17] Without in any way minimising his drug offending or his past criminal record, it is to his credit that it is now ten years since he committed an offence involving violence or dishonesty. The character references reveal commendable personal attributes and give cause for optimism that he can further advance his rehabilitation if he can address his alcohol and drug issues. While he may be assisted by counselling while in prison, we consider treatment in the community would be most effective. A period of suspension for this purpose would also incentivise the appellant to build on the positive, if limited, steps he has already taken. On the other hand, a period of suspension will not materially detract from the severity of the sentence. We do not see a period of suspension as compromising the needs of deterrence, denunciation, accountability, and public protection.

[18] For these reasons we have concluded that one year of the appellant’s sentence should be suspended for a period of one year on condition that he does not re-offend during the period and undertakes such drug and alcohol counselling as is directed by the appropriate authority.

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<sup>5</sup> Above n4.

<sup>6</sup> Above n1.

<sup>7</sup> At [130] – [136].

**Result**

[19] The appeal is allowed. We order that one year of the sentence of eight years imprisonment be suspended for a period of one year on condition that the appellant does not reoffend during the period and undertakes such drug and alcohol counselling as is directed by the appropriate authority.

*John Blanchard*

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Blanchard J

*John Hansen*

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Hansen J

*John Randerson*

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Randerson J

