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

AC 18 of 2021  
(CR 51 of 2021)

BETWEEN:

**BRUNO LATU**

Appellant

-v-

**REX**

Respondent

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## JUDGMENT

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Court: Whitten P  
Blanchard J  
Randerson J

Appearances: Mr D. Corbett for the Appellant  
Mr T. 'Aho with Ms Aholelei for the Respondent

Hearing: 18 May 2022  
Judgment: 23 May 2022

### The appeal

1. On 20 April 2021, the Appellant pleaded guilty to possession of 0.17 gram of methamphetamine. On 15 June 2021, Niu J sentenced the Appellant to three years' imprisonment with the final year suspended for three years, on conditions.<sup>1</sup>
2. On 9 July 2021, the Appellant was granted leave, pursuant to s. 16(c) of the *Court of Appeal Act*, to appeal against his sentence, on the grounds that it was manifestly excessive and inconsistent with other sentences imposed by the Supreme Court for similar offending.

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<sup>1</sup> *R v Latu* [2021] TOSC 99

## Background

3. On 25 October 2020, the Appellant and his co-accused, Fetokai Manioke, were parked in the Appellant's vehicle near a plantation at Havelu. When a police vehicle stopped, the Appellant started his engine to drive off. As he did, he threw out a test tube later found to contain methamphetamines. When Police searched the vehicle, they found other drug related paraphernalia including straws, 15 empty packs, and a weighing scale. They also found \$1,020 on Fetokai Manioke. When questioned, the Appellant remained silent.

## The sentence

4. In his sentencing remarks, the judge commenced by recording the Prosecution's submission below that the Appellant had no previous convictions.
5. His Honour then referred to the presentence report in which the probation officer described the Appellant as 27 years of age, single and that he had admitted to the officer that he was a drug dealer although he had a panel beating business which was a front and was financed by the proceeds of his drug dealing. According to the probation officer, the Appellant said that his father was a drug dealer, that he began taking drugs at age 8, and that drug dealing was the only work he'd ever known. When he was 12, the Appellant, his mother and other siblings moved to New Zealand where he attended high school. After he left school, the Appellant began living with others involved in drug dealing until 2020, when he was deported back to Tonga for dealing in drugs. The probation officer recommended a suspended sentence on conditions.
6. The judge then returned to the Prosecution's submissions which included reference to the comparable sentence in *Tupou* (CR134/2020). There, the Defendant, who had no previous convictions, pleaded guilty to possession of 0.041 gram of methamphetamines and was sentenced to 6 months imprisonment, fully suspended. The Prosecution below submitted the same sentence for the Appellant.<sup>2</sup>

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<sup>2</sup> Starting point of 9 months reduced by 3 for the guilty plea and good previous record.

7. His Honour then summarised the submissions of Mr Corbett, who also appeared for the Appellant below. By reference to the sentence in *Selu* (CR202/2020), Mr Corbett submitted a starting point of 12 months imprisonment, reduced by half on account of the Appellant's guilty plea, remorse and his 'admission of the offence in the probation report'. He further submitted that the guidelines for suspension in *Mo'unga*<sup>3</sup> supported full suspension of the resulting sentence of 6 months imprisonment for 12 months.
8. In considering sentence, the learned judge proceeded on the basis that by his admission to the probation officer that he was deported from New Zealand for drug dealing, the Appellant did have a record of possession of illicit drugs. His Honour then referred to the Appellant's further admission to the probation officer of being a drug dealer in Tonga and the presence of the other drug related paraphernalia found in his vehicle in forming the view that the Appellant's case was much more serious than simply having 0.17 gm of methamphetamine in his possession. His Honour regarded the case as being similar to *Puloka* (CR120 & 25/2020)<sup>4</sup> where Niu J sentenced that Defendant to three years imprisonment for possession of 4.34 grams of methamphetamine. His Honour there found that Puloka also operated an auto repair workshop at his home as a front for his drug dealing operation and that the amount in question was clearly for the purpose of supply.
9. The judge then noted that, at the time of the subject offending, the maximum statutory penalty for the offence was a fine of up to \$1,000,000 or imprisonment of up to 30 years imprisonment. He further noted that, in December 2020, less than two months after the instant offending, the penalty was amended "to enable the Court to sentence offenders to imprisonment for any period short of imprisonment for life" which showed:

*"... how serious and how bad drugs are regarded in this Kingdom, and this Court must uphold and apply that law in order that drugs are eradicated from this Country."*

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<sup>3</sup> [1998] Tonga LR 154 at 157

<sup>4</sup> *R v Puloka* [2021] TOSC 76

10. After reiterating that the Appellant had spent the last ten years of his working life as a drug dealer, his Honour concluded:

*"[21] ... You just do not have any regard for the misery which the drugs you sell have caused to the people. The more people there are who buy the drugs from you, the more money you have, which is all you care about.*

*[22] I am afraid that you cannot do that anymore. You will have to earn your living like everybody else through hard and honest work. In prison, you will learn to work as a mechanic, a carpenter, a farmer or poultry operator so that when you come out you will know something with which to make a living for yourself, honestly. If you cannot do that after you come out of prison, you will reoffend and you will go back to prison, for much longer, until you can do that."*

11. On that basis, and after stating that he had allowed for the guilty plea, the judge sentenced the Appellant to three years imprisonment. On account of the Appellant's relatively young age, and the possibility that he might take the opportunity of suspension to rehabilitate himself, his Honour suspended the final year for three years.

### **Appellant's submissions**

12. On this appeal, Mr Corbett submitted, in summary, that:
- (a) in *Vainikolo Selu*, *ibid*,<sup>5</sup> Langi J stated that the starting point for possession of less than one gram of methamphetamine should be 12 months' imprisonment;
  - (b) the judge here did not refer to the other comparable sentences referred to in *Selu*, namely, *Sakopo* (CR 176 & 179/19) and *Afu* (CR 177/2020), where for possession of 0.38 gram and 0.11 gram of methamphetamines respectively, sentences of 6 months' imprisonment were imposed and fully suspended;
  - (c) there was no evidence that the Appellant had been deported from New Zealand for drug dealing;
  - (d) the Appellant denied telling the probation officer that he was deported for drug offending and that he was actually deported for domestic violence;

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<sup>5</sup> [27]

- (e) there was no evidence of the Appellant having any criminal record in New Zealand;
  - (f) *Puloka* was charged with supply;
  - (g) the instant offending occurred prior to the amendments of *the Illicit Drugs Control Act*;
  - (h) the judge erred by considering the amendments where possession of 0.25 grams or more of a Class A drug is now deemed to be supply; and
  - (i) the judge further erred by failing to consider the above comparable sentences for amounts of methamphetamines under one gram as well as the fact that the probation officer recommended, and both the Prosecution and Defence submitted, that the sentence should be fully suspended.
13. During his oral submissions, Mr Corbett was asked why the Appellant had not sought to make good the assertions in his submissions by producing an official record from New Zealand on the issue of whether the Appellant had previous convictions and whether he was deported for drug dealing. No satisfactory explanation was forthcoming.
14. Mr Corbett also sought to impress upon us that apart from the instant offence, the Appellant had no other convictions.

### **Respondent's submissions**

15. On 31 January 2022, the Respondent gave notice that it did not oppose the appeal on the ground that the sentence was manifestly excessive but that it otherwise opposed the other 'grounds' raised by the Appellant.
16. Before us, Mr 'Aho explained that after receiving Mr Corbett's submissions on the appeal, the Crown sought and obtained a copy of the Appellant's New Zealand criminal record. It revealed that between 2011 and 2016, the Appellant had multiple convictions for violence related offences including threatening to kill and grievous bodily harm. For his last offence involving family violence, the Appellant was sentenced on 21 February 2016 to 2 ½ years imprisonment and deported. The

record did not contain any drug related convictions. The Appellant, through his counsel, confirmed the contents of the record.

17. Mr 'Aho also informed us, contrary to Mr Corbett's submission as to his client's otherwise unblemished record in Tonga, that the Appellant has since pleaded guilty to possession, in April 2021 (two months before the present sentence), of 1.5 grams of methamphetamines and an unlicensed firearm. Sentencing for those offences is pending before Niu J on 8 June 2022, after the conclusion of this appeal. After taking instructions, Mr Corbett confirmed those further matters.
18. In support of the Respondent's primary position that the sentence below was manifestly excessive, Mr 'Aho submitted the following substitute sentence formulation: a starting point of 12 months, reduced by no more than 25% for the appellant's early guilty plea, resulting in a sentence of nine months' imprisonment. On account of the Appellant's admissions in relation to drug dealing in Tonga, no part of that sentence should be suspended.

### Consideration

19. We have no hesitation in agreeing with both parties that the sentence was excessive. While the judge was fully entitled to take into account the presence of the other drug-related paraphernalia found in the Appellant's vehicle as a circumstance of aggravation or even evidence of possession for the purpose of supply,<sup>6</sup> there was no sound basis for comparing the offending here with that in *Puloka*. Contrary to Mr Corbett's submission, *Puloka* was not charged with supply.<sup>7</sup>
20. The judge's reference to the 2020 amendments to the Act to illustrate the seriousness of offences involving methamphetamines in Tonga, was benign in and of itself. However, his Honour erred when he referred to the new maximum penalty for possession of Class A drugs as including life imprisonment. Relevantly, the new maximum term of imprisonment for quantities of less than one gram is three years.

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<sup>6</sup> *Attorney General v Leka* [2021] TOCA 13

<sup>7</sup> At [11] of her reasons for verdict, Langi ACJ noted that the amount in *Puloka*'s possession could be regarded as for the purpose of supply and sale, even though he was not charged with and had not been convicted of supply.

To the extent that the reference influenced his Honour's approach to the task here, it led him into error.

21. In circumstances where the amount of the drug in question is the primary measure by which different sentences are imposed and ranges for similar offending are established, the resulting sentence here of three years imprisonment for 0.17 grams of methamphetamines was well outside the available range and therefore manifestly excessive.
22. We agree with Mr 'Aho's substitute sentence formulation as being appropriate in the circumstances of the case. We also consider that a sentence of nine months allows fair credit for the six days the Appellant spent in prison before being granted bail pending appeal.
23. It is a matter of some concern that Mr Corbett's submissions on sentence below were filed almost a month after the presentence report, and yet, his submissions did not engage whatsoever with what was contended on this appeal to have been a serious mistake by the probation officer in relation to the reason for the Appellant's deportation. It is equally troubling that Mr Corbett's submissions on this appeal did not reveal the truth of the Appellant's criminal history in New Zealand, which was clearly known to his client, when the sentencing judge had expressly relied on the presentence report in that regard. To convey the impression, either expressly or impliedly, that the Appellant did not have any criminal convictions in New Zealand, nor that had he had engaged in any other criminal activity here in Tonga since, was regrettable to say the least, and did not reflect the candour expected of an officer of the Court.
24. Despite the relatively small amount of drugs on this occasion, we consider that the Appellant's admission to being a drug dealer, which was consistent with the other items found in his vehicle at the time of this offence, and the need to therefore protect the community, weighs against any suspension of the sentence.

## **Result**

25. The appeal is allowed.

26. The sentence of the Supreme Court is quashed.

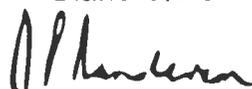
27. In substitution, the Appellant is sentenced to nine months' imprisonment.



Whitten P



Blanchard J



Randerson J

