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

AC 26 of 2022
(CR 96 of 2022)

BETWEEN:

ATTORNEY-GENERAL Appellant

-v-

UAINE PALESI FA Respondent

JUDGMENT OF THE COURT

Coram: Whitten P
White J
Morrison J

Appearances: Mr F. Samani for the Attorney-General
No appearance by or for the Respondent

Date of hearing: 24 March 2023
Date of judgment: 6 April 2023

Introduction

1. On 28 October 2022, Cooper J sentenced the Respondent for possession of 28.55 grams of cocaine, to 12 months' imprisonment, fully suspended, on conditions including 60 hours community service.

2. Pursuant to s 17B of the *Court of Appeal Act*, and by leave granted on 24 November 2022, the Attorney-General appeals against the sentence as being manifestly inadequate.

3. By further Order on 24 November 2022, execution of the sentence, including the community service, was stayed pending the hearing and determination of this appeal.

4. The Respondent was represented by counsel below who has been served with all documents pertaining to the appeal including the minute of call over dated 17 March 2023 listing the appeal for hearing. Neither the Respondent nor his counsel have participated at any stage of the appeal nor did either appear when the appeal was heard.

Background

5. On 22 April 2022, the Respondent was brought to the Neiafu police station in relation to a complaint by his wife of domestic violence. During questioning, the wife told police that her husband had been sniffing a white substance, which had caused their problems and that he stored it in a lightbulb at their house. While she was being questioned, the Respondent, who was in a different room, absconded. After he was found, police searched their house and found a t-shirt tied into knots which contained two plastic packs and a bulb like bottle containing white powder, which was later tested and found to contain cocaine. When questioned, the Respondent told police that the substance was watermelon pesticide and did not otherwise co-operate.

6. Upon his arraignment on 19 October 2022, the Respondent pleaded guilty to possession of cocaine, contrary to ss 4(1)(a)(iv) of the *Illicit Drugs Control Act*.

Crown's submissions below

7. The Crown submitted below that the aggravating features of the offending included the quantity of the drug, which suggested that the Respondent possessed it for the purpose of supply,[1] and that his consumption of the drugs led to him being violent towards his wife. Mitigating features were submitted as the early guilty plea and lack of any previous convictions.

8. The Crown then referred to a number of decisions which it described as 'comparable sentences', namely, *Viliami Mangisi* (CR 10/2018) for application of the sentencing bands in *Zhang v R* [2019] NZCA 507 ("***Zhang***"), *Ian and Brenda Cox* [2022] TOSC 90 ("***Cox***") and *Mo'unga v R* [1998] Tonga LR 154 ("***Mo'unga***").

9. The Crown sought to distinguish the subject offending from that in *Cox*, where, relevantly, for 87.83 grams of cocaine, a starting point of four years was set, on the basis that Mrs Cox only stored the drugs for a friend whereas the Respondent here "was a user", who was, as a result, violent towards his wife, and therefore more culpable. Then, by application of *Zhang* band two, where the range of starting points for up to 250 grams of methamphetamines was suggested as two to nine years imprisonment, the Crown submitted a starting point for the subject offending of five to six years.

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[1] Referring to ss 4(2)(b) of the Act which deems possession of 0.25 grams or more of a Class A drug to be supplying.

10. From that, the Crown submitted a reduction of 18 months for mitigation resulting in a sentence of three to four years.

11. In relation to suspension, the Crown agreed that most of the factors discussed in *Mo'unga* favoured some, but not full, suspension; and submitted that the final year be suspended for two years on conditions.

Defence submissions below

12. In addition to the mitigating factors acknowledged by the Crown, Mr Tatafu, who appeared for the Respondent below, submitted that the Respondent had found the cocaine along the seashore near his home and kept it there with no intention of selling it. Therefore, and in order to allow the Respondent to continue to provide for his wife and child, it was submitted that any sentence should be fully suspended.

Presentence report

13. Apart from the matters raised by Mr Tatafu, the probation officer relayed, relevantly, the Respondent's version of the offending as including that after he found the cocaine washed up at their local beach, he started using it to the point of suffering hallucinations and increased aggression.

14. Since being charged, the Respondent was reported to have been remorseful, abstained from all drugs and alcohol, and had taken steps towards rehabilitation by greater involvement with family responsibilities and church obligations.

15. The probation officer assessed the Respondent as a low risk of reoffending with good prospects for effective rehabilitation. The officer opined, however, that it was critical for the Respondent to undertake a drug and alcohol program and that therefore, a fully suspended sentence, with community service, was recommended.

The sentence

16. In his sentencing remarks, the judge recited the essential facts, and referred to the Crown's submissions, the presentence report and the maximum statutory penalty of a fine not exceeding $1 million, life imprisonment, or both. Thereafter, his Honour's approach to, and reasoning on, the sentence may be summarised as follows:

(a) he could not reconcile the Crown's submitted starting point with the *Zhang* band one for supply of methamphetamine up to 5 grams of community service to 4 years' imprisonment, and band two of less than 250 grams being two to nine years imprisonment, when the Respondent had less than 30 grams which was at the "bottom of that bracket";

(b) the halfway point of band two represented a sentence of 4½ years for 125 grams which was more than four times the amount for which the Respondent was charged;

(c) the starting point for Mrs Cox for 87.83 grams of cocaine was 4 years;

(d) in *Cox*, the Court adopted the two-step approach of considering where the amount of the drug fell within the *Zhang* bands and then assessing the role or level of culpability involved;

(e) further, in *Cox*, it was observed from *Zhang* that "Judges need to be willing to set starting points in sentences beneath the stated entry points where culpability is truly low; most likely where an offender plays a lesser role in offending."

(f) by reference to the categories of role discussed in *Zhang*, the Respondent's involvement was a "lesser" role;

(g) the differential in harm between methamphetamine and cocaine, as considered in *Cavallo v R* [2022] NZCA 276, represented a discount for cocaine on the applicable methamphetamine range of about 5%;

(h) the effect of ss 4(2)(b) of the Act deeming any amount over 0.25 grams to be supplying was rebutted by evidence from the Respondent's wife that the cocaine was only for the Respondent's personal use and the Crown's concession at arraignment that there was no evidence of supply;

(i) after weighing those factors, his Honour set a starting point of 18 months;

(j) which he then discounted by 30% for the Respondent's guilty plea, resulting in a sentence of 12 months imprisonment;

(k) the judge recorded that the Respondent had "found one of the packages on the beach",[2] that it was a significant point in his mind that the Respondent did not seek out the drugs but found them,[3] and that if that

[2] [59]
[3] [61]

had not been the case and the Respondent had deliberately acquired them, his Honour "would have been forced to take a different step";[4]

(l) he rejected the 'breadwinner plea' as a sole basis for suspension as discussed in *Wolfgram & ors*; [5]

(m) however, by reason of the lack of criminal intent by the Respondent finding the drugs as opposed to seeking them out; his good work record; the 'imminent birth a new child'; the way the Respondent had 'changed his life'; and the other favourable *Mo'unga* factors including the Respondent's young age, previous good character and ability to rehabilitate; the judge took the 'exceptional course' of fully suspending the 12 month sentence for a period of two years on the usual conditions plus 60 hours community service as a punitive element of the sentence.

Crown's submissions on appeal

17. On this appeal, the Crown submitted, that in arriving at a sentence which was manifestly inadequate, the sentencing judge erred in the following respects:

(a) not giving appropriate weight to the seriousness of the offending including that the Respondent used the drugs resulting in violence towards his wife;

(b) the Judge's application of *Cox* produced a starting point based only on the quantity of the drugs and not on criminality, which, in the case of the Respondent, was more serious than that of Mrs Cox;

(c) the sentence does not justly reflect the objectives of denunciation and effective deterrence;

(d) in fully suspending the sentence, the Judge gave too much weight to the Respondent's personal circumstances and failed to give sufficient weight to the seriousness of the offending or the principles recently stated by this Court in *Fua'eiki*[6] and *Angilau*;[7] and

(e) the resulting sentence was inconsistent with other sentences for like offending, including *Pole'o*,[8] where for possession of only 1.91 grams of cocaine and for a defendant with similar antecedents to the Respondent here, Cooper J applied the same sentencing formulation.

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[4] [62]
[5] [2020] TOSC 78 at [46] to [49]
[6] *Attorney General v Fua'eiki* [2021] TOCA 20; AC 11 of 2021 (1 October 2021).
[7] *Attorney General v Angilau* [2022] TOCA 9; AC 27 of 2021 (24 May 2022).
[8] *R v Pole'o* [2022] TOSC 31; CR 19 of 2022 (5 May 2022).

18. During his oral submissions before us, Mr Samani:

    (a) submitted that the Judge's statement that the Respondent found one of the packages on the beach (thereby leaving open a question as to where he procured the other package/s) was incorrect, and that it was all found on the beach;

    (b) conceded that as the Crown had earlier accepted that there was no actual evidence of supply, and that the Respondent had not been charged with using the drugs (a separate and specific particular of the offence provided for by ss 4(1)(a)) or with any violence towards his wife as a result of his drug use, he was only therefore to be sentenced for possession simpliciter; and

    (c) on that assessment of the Respondent's culpability, and by comparative analysis with the starting point for Mrs Cox, revised the Crown's suggested starting point, for the purpose of this appeal, to 2½ years.

Consideration

19. For over two decades, this Court has consistently approached Crown appeals against sentence by reference to the delimiting guidelines expressed in *Misinale*.[9] The first requirement is that for such an appeal to succeed, there must be clear and compelling grounds for increasing the sentence. It is not sufficient for the appellate court to consider that a more severe sentence could properly be imposed, or that the sentence imposed is inadequate or inappropriate. For a sentence to be increased on a Crown appeal, 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. In such a situation, the appellate court is left with no alternative but to impose a more severe or a different sentence.

20. By that measure, and for the reasons which follow, we are of the view that the sentencing Judge erred in the following respects.

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[9] [1999] TOCA 12.

21. Firstly, the Judge relied too dogmatically on *Cox* as a purported comparable sentence. As sentences are always fact-specific, caution is required before taking too much from sentences in other cases: *Foliaki v Rex* [2015] TOCA 12 at [16]. In adopting the starting point set for Mrs Cox's offending as a benchmark by which to calculate the starting point for the Respondent's offending, the judge failed to properly or adequately distinguish *Cox* on its facts. The Coxes came into possession of far greater amounts of cocaine as temporary custodians for a so-called friend. They too hid the drugs, but they did not consume any of them nor did they receive any form of reward for their role in that exercise. They were reported as intending to either return the drugs to their friend or turn them into police but were arrested before taking either step. Upon arrest, they fully co-operated with police. By contrast, the Respondent here found an unspecified amount of cocaine on a nearby beach; which he knew to be illicit drugs; which he sought to hide; of which he consumed an unspecified portion to the extent of suffering hallucinations and aggressive behaviour; resulting in him being in possession of the balance of around one third of that possessed by Mrs Cox; and when he was initially questioned by police, he lied about what they were. While it is unfortunate that, in its submissions below, the Crown only presented *Cox* as the single purported comparable sentence in terms of tariff, the Judge ought to have identified that apart from statements of principle and approach, the result in *Cox*, which was described by the sentencing judge there as "an outlier",[10] was of very limited assistance to the task before him.

22. Secondly, the Judge determined the starting point here by a linear mathematical approach to the guideline bands in *Zhang* as applied in the particular and very different circumstances in *Cox*. In fact, during sentencing, his Honour stated:[11]

> *"So if one is going to be mathematical about it, a 125 grams is going to give you some 4 ½ years and what there is here is a quarter of that, slightly less. So I think it's got to come right down and that is putting aside is it Ikavalu... ".*

We assume the Judge's reference to *Ikavalu* (assuming accurate transcription) was intended to be a reference to *Ikahihifo*.[12] If it was, and in any event, the

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[10] [52]
[11] Appeal book 253.
[12] *Ikahihifo v R* [2021] TOCA 21.

Judge should have been mindful of the caution by this Court in that case that 'in the absence of any statutory requirement, the broad discretion available to a sentencing judge can rarely ever be reduced to some form of linear mathematical exercise'.[13] That caution was referred to and applied in *Cox*.[14]

23. Thirdly, in the context of a case of possession simpliciter, the Judge's assessment of the level of the Respondent's criminality or culpability as being a "lesser role" was misguided. As discussed in *Cox*,[15] the guideline approach to identification of appropriate starting points for methamphetamine offending discussed in *Zhang* involves, firstly, placing the offending within the appropriate band according to the quantity of the drug (as a proxy for individual and collective social harm) and then, secondly, moving the point up or down either within that band or even to a lower band according to role in the offending (whether "lesser", "significant" or "leading", being directly relevant to culpability for the offending).

24. The concept of role in the offending must be viewed in context. By definition, the term involves playing a part in an exercise (e.g. a stage play) usually with others. The point is illustrated in *Zhang*. Even though *Zhang* has since been described in New Zealand as the guideline judgment for *all* methamphetamine related offending,[16] the principle object of the decision in *Zhang* was to review the approach to sentencing previously laid down in *Fatu*[17] for the importation, manufacture, supply, offering to supply, possession for the purpose of supply and other commercial dealings in methamphetamine. In that exercise, the Court of Appeal did not adopt the double axis approach of the United Kingdom Sentencing Council. However, it was noted that, in assessing role, sentencing judges may find it helpful to have regard to the Council's descriptions of roles and relevant indicia to be taken into account.[18] Within the descriptions of lesser, significant and leading roles, eight of the nine indicia of lesser roles involve varying levels of participation in a commercial enterprise or operation with others. The ninth is described as "if own operation, solely or primarily for own or joint use on non-commercial basis". The Respondent's possession here was

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[13] [25]
[14] At [62], citing *R v Latu* [2021] TOSC 81 at [26].
[15] [55]
[16] *Malolo v R* [2022] NZCA 399 at [23].
[17] *R v Fatu* [2005] NZCA 278; [2006] 2 NZLR 72 (CA).
[18] [126]

accepted as being for his own use, but it could hardly be described as an 'operation'.

25. Fourthly, the Judge's purported distinction between the Respondent's conduct of finding the drugs (and keeping them, hiding them and using them to the point of inducing an apparent drug problem), as being less serious than had he sought them out (such as in the case of an addict), did not provide a sufficient basis for the approach he took. It was also not supported by any identified authority. Further, as suggested in *Zhang*, in an appropriate case, a pre-existing addiction may be regarded as a circumstance of mitigation.[19] While there were clearly grounds for moving the Respondent to the lower end of band two, we do not consider that the Judge's assessment of culpability by the above comparison justified placing the Respondent effectively in the bottom half of band one (for amounts up to 5 grams).

26. Fifthly, the Judge's approach in setting the starting point here was significantly inconsistent with other sentences of the Supreme Court for similar offending. In *Ikahihifo*, ibid, this Court also stated:[20]

> *"... 'inconsistency in sentencing standards' is to be shunned strongly by the courts as an 'error in point of principle', a matter that was emphasized in Everett -v- The Queen [1994] HCA 49; (1994) 181 CLR 295 at 299. The consistency which is demanded is not to be equated to consistency of result but requires consistency of approach: Lowe -v- The Queen [1984] HCA 46; (1984) 154 CLR 606 at 609. For the same principle may yield different sentences where the facts relating to two offenders are different. ..."*

27. As observed by the Crown, in *Pole'o*, the sentencing judge imposed the same starting point and resulting sentence for possession of 1.91 grams of methamphetamine. His Honour's approach in that case was consistent with the range presented by comparable sentences then before him.[21] However, his approach in the instant case was demonstrably inconsistent with actual comparable sentences available through published decisions of the Supreme Court such as:

    (a) *Paula Moala*,[22] where the defendant pleaded guilty, relevantly, to possession of 25 grams of methamphetamine for which a starting point of five years' imprisonment was set;

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[19] [137]
[20] [20], citing *Fifita v Rex* [2000] TOCA 5.
[21] *Holani*, CR 65/2020; *'Uhila Tu'i*, CR 66/2019; *Harris Satini*, CR 227/2019.
[22] CR 186 & 280/2020

(b) *Siosifa Fotu*,[23] where, for possession of 25.5 grams of methamphetamine, a starting point of five years imprisonment was also set; and

(c) *Sifitani Afu*,[24] where, for possession of 14.34 grams of methamphetamine, and the facts strongly indicated possession for the purpose of supply, a starting point of four years was set.

28. Any differential between sentences for possession simpliciter and those based on the amount being deemed as supplying or, on the evidence, being for the purpose of supply, could not justify the very low starting point here. Further, insofar as those starting points may be seen as high by comparison to the position such weights might be placed in the *Zhang* bands, they also reflect the Tongan context as explained in *Cox* including different statutory maximum penalties, higher weights more often encountered in New Zealand and the greater potential for social harm through limited policing and medical resources to respond to the effects of illicit drug use in a much smaller population.[25]

29. Sixthly, the Judge erred in ordering that the resulting sentence be fully suspended. As stated recently in *Losalu*,[26] where the discrete considerations for suspension in *Mo'unga* are met (which the judge found here), it does not automatically follow that a sentence must or should be fully suspended. Those considerations are not the only factors. In *Fua'eiki*, ibid,[27] this Court observed that the suspension of an entire sentence for class A drug offending is not in accordance with sentencing principles and the established approach of the Courts. And, in *Angilau*, ibid,[28] it was held that 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.

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[23] [2021] TOSC 5
[24] [2021] TOSC 84
[25] [65]
[26] *Losalu v R* [2022] TOCA 24 at [9]
[27] [13]
[28] [25]

30. In *Leka*,[29] where the above approach was applied to a respondent who pleaded guilty to possession of 5.23 grams of methamphetamines. It was held that, inter alia, full suspension of a sentence for that level of offending, even for a first offence, was unlikely to provide, or be seen to provide, an effective deterrent for members of the community involved with, or considering becoming involved with, an insidious illicit drug such as methamphetamine.

31. Therefore, *a fortiori*, in the instant case for offending involving over 28 grams of cocaine, full suspension was inappropriate.

32. Accordingly, we consider the Judge misdirected himself and his sentencing discretion miscarried so as to require this Court to intervene and re-sentence the Respondent.

33. In doing so, we are cognisant of the second requirement stated in *Misinale*, namely, that the sentence should be increased only to the lower end of the appropriate sentencing range, and that in doing so, we take into account that it is an added penalty to have to face sentence a second time.

34. After considering all the factors discussed above, including, in particular, the quantity of the cocaine, that the Respondent is only to be sentenced for possession simpliciter, and the slight discount to be applied for cocaine cases over methamphetamine, we consider the appropriate sentencing formulation to be:

    (a) a starting point of three years imprisonment;

    (b) reduced by one third for the Respondent's early guilty plea and previous good record;

    (c) with the final year of the resulting sentence suspended for a period of two years on the usual conditions.

Result

35. The appeal is allowed.

36. The sentence imposed by Cooper J in Supreme Court proceeding CR 96 of 2022 on 28 October 2022 is set aside.

37. In substitution, the Respondent is convicted of possession of cocaine and sentenced to two years imprisonment.

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[29] *Attorney General v Leka* [2021] TOCA 13

38. The final year of the sentence is to be suspended for a period of two years from the date of the Respondent's release from prison on condition that he:

    (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 as directed thereafter; and

    (d) complete an alcohol and drugs awareness course with the Salvation Army as directed by his probation officer.

39. Failure to comply with any of the said conditions may result in the suspension being rescinded, in which case, the Respondent will be required to serve the balance of his prison sentence.

40. The Respondent is be given credit for any time spent remanded in custody in relation to the proceeding below.

41. In light of his failure to appear on this appeal, the Respondent is ordered to surrender himself to the Neiafu police station within 48 hours of service of this judgment. Should he fail to do so, a warrant is to be issued for his arrest, whereupon he is to be taken to the Vava'u prison to commence his sentence.

Whitten P

White J

Morrison J

COURT OF APPEAL
TONGA