DPP
AG's Office

IN THE SUPREME COURT OF TONGA
APELLATE JURISDICTION
NUKU'ALOFA REGISTRY

AM 4 of 2021

BETWEEN:

LAUTAIMI TU'ITAVAKE Appellant

-and-

POLICE Respondent

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN
Appearances: Mr S. Fili for the Appellant
Mr I. Finau for the Respondent
Date of hearings: 11 May 2021 and 15 June 2021
Date of judgment: 15 June 2021

The appeal

1. This is an appeal pursuant to s 74 of the *Magistrates Court Act* against the order of Senior Magistrate Pahulu-Kuli, on 19 March 2021, whereby the Appellant was sentenced to 20 months' imprisonment for unlawful possession of 0.08 grams of methamphetamine while he was serving a term of imprisonment.

Background

2. On 23 July 2019, in proceeding CR 32 of 2019, Cato J sentenced the appellant for possession of 182.05 grams of cannabis and 0.35 grams of methamphetamine to two years imprisonment for the cannabis and three months for the methamphetamine, with the last nine months of the head sentence suspended on conditions. In the ordinary course, taking into account time already served on remand and remissions available pursuant to Division 7 of the *Prisons Act* ("***the Act***"), the appellant was originally due for release on 27 June 2020.

3. On 12 April 2020, while he was preparing an umu at the Reverend's home near the prison gate, a passer-by reportedly asked the appellant for some leaves for tea, in return for which, he threw the appellant a matchbox which contained 0.08 grams of methamphetamine. Upon the appellant's return to the prison environs, he was searched and the methamphetamine was found. The prison authorities reported the matter to police who subsequently charged the

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appellant with unlawful possession of illicit drugs.

4. The appellant was placed in the maximum security facility at the prison where he remained until he was released on 24 July 2020, that is, some 96 days later.

5. On 17 November 2020, the appellant was arraigned in this court and pleaded not guilty. The matter was then remitted to the Magistrates Court for summary trial. On 12 March 2021, the appellant changed his plea in that court to guilty.

The Magistrate's decision

6. In her sentencing remarks, Senior Magistrate Pahulu-Kuli considered the following:

   (a) the decision of this court in *R v Afu* [2021] TOSC 84;

   (b) the circumstances of aggravation including, in particular, the appellant's criminal history including the sentence he was serving at the time of the subject offending as well as a previous conviction in CR 57 of 2016 for possession of 867.23 grams of cannabis plants for which he was sentenced to 18 months' imprisonment with the last nine months suspended;

   (c) the appellant's lack of respect for the rules of the prison and the law of Tonga;

   (d) the appellant's late guilty plea; and

   (e) the importance of not punishing the appellant twice.

7. On that basis, the learned Magistrate set a starting point of 12 months' imprisonment. However due to the appellant's previous conviction, that point was increased by six months and by reason of the offending taking place in prison, a further six months was added. On account of mitigating factors, the total starting point of two years was reduced by three months resulting in a sentence of 21 months' imprisonment. At paragraph 37 of her reasons for decision, the learned Magistrate stated:

   > *"The Court also takes into consideration that you were held in prison for more time then you were required to from June to July of last year."*

8. Therefore, a further month was deducted, resulting in the final sentence of 20 months' imprisonment from that day. By reason of the appellant's previous sentences, which included partial suspension, and the principles in *Mo'unga* [1998] Tonga LR 154 at 157, no part of the resulting sentence was suspended.

Grounds of appeal

9. By Notice of Appeal dated 20 March 2021 (but not filed until 20 April 2021), the appellant advances the following grounds of appeal:

(a) this is a rare and special case in that the prison authorities already imposed a penalty on the appellant for the offending by placing him in maximum security for three months;

(b) the subject sentence amounts to the appellant being punished twice by the Government for the same offence;

(c) his term of imprisonment ought to have expired on 27 June 2020 but he was unlawfully imprisoned by the authorities until discharged on 17 July 2020;

(d) the appellant was only released after his family were told to pay $280 "penalty fee" for his freedom;

(e) the appellant's detention in maximum security between 27 June 2020 and 17 July 2020 was unlawful since only the Court may sentence a person for a crime;

(f) the appellant's imprisonment in maximum security is forbidden by clause 2 of the Constitution (prohibition against slavery);

(g) the one-month discount by the learned Magistrate was insufficient given the penalty imposed by the prison authorities;

(h) the penalty/sentence by the prison is forbidden by clause 10 of the Constitution;[1]

(i) the Magistrate failed to consider other mitigating factors such as the appellant's guilty plea which "normally attracts a discount of one third in the Supreme Court but only three months considered by the judge which is not enough" and that the appellant was remorseful as described in letters from the Salvation Army, a church minister and town officer, but which the Magistrate did not accept.

Submissions

10. On 27 April 2021, Mr Fili filed submissions in which he referred to the following provisions from Part VI of the Act concerning breaches of discipline by prisoners:

> **61 Prisoner not to be punished twice**
>
> (1) A prisoner shall not be punished for doing something or failing to do something as a breach of discipline if the prisoner has been convicted or acquitted of an offence for the same act or omission.
>
> (2) A prisoner shall not be charged with an offence for doing something or failing to do something if the prisoner has been punished for the act or omission as a breach of discipline.
>
> **62 Commissioner to notify police**

[1] "No one shall be punished because of any offence he may have committed until he has been sentenced according to law before a Court having jurisdiction in the case".

(1) If a prisoner does or omits to do something which could be dealt with either as a criminal offence or as a breach of discipline, the Commissioner shall immediately advise the Police Commissioner of the act or omission.

(2) Proceedings for a breach of discipline under this section are stayed until the Police Commissioner advises that no criminal charge will be brought against the prisoner for the act or omission.

(3) The advice from the Police Commissioner shall be sent to the officer in charge of the prison where the prisoner is accommodated.

63 Procedures for breach of discipline

(1) A prison officer may bring a charge of a breach of discipline against a prisoner.

(2) As soon as practicable after a prison officer brings a charge of a breach of discipline against a prisoner, the prison officer shall provide written details of that fact to a prison officer, the hearing officer, who holds a more senior office than the officer bringing the charge.

(3) The hearing officer shall —

(a) inform the prisoner of any evidence that supports the allegation;

(b) allow the prisoner to cross-examine any witness called by the prison officer under subsection (1) and call witnesses within the prison to give evidence for the prisoner, unless the hearing officer considers the evidence may be given in writing;

(c) allow the prisoner a reasonable opportunity to make submissions in the prisoner's defence; and

(d) allow the prisoner a reasonable opportunity to make submissions in mitigation of punishment.

(4) If the prisoner refuses to attend the breach of discipline hearing, the hearing officer may hear and determine the proceedings in the absence of the prisoner.

(5) If the hearing officer determines that the prisoner charged does not understand the nature of the disciplinary proceedings or the alleged breach of discipline, the hearing officer may appoint a person nominated by the prisoner, or, in the absence of such nomination, someone else, to assist the prisoner at the hearing.

(6) The hearing officer may question the prisoner and anyone else who may be able to provide relevant information.

(7) Neither the prison officer who alleged the breach of discipline nor the prisoner is allowed any legal or other representation before the hearing officer.

(8) The hearing officer is not bound by the rules of evidence but may, subject to any regulation, inform himself about the matter in the way the officer thinks fit.

(9) If the hearing officer believes that the prisoner's act or omission constitutes a criminal offence, the hearing officer shall notify the Commissioner of that fact and not proceed further with the matter until advised otherwise by the Commissioner.

64 Punishment for breach of discipline

> (1) Where a prisoner charged with a breach of discipline admits the charge, or the charge is proved beyond reasonable doubt, the hearing officer may impose one of the following punishments —
>
> (a) reprimand the prisoner;
>
> (b) order the prisoner to forfeit privileges for up to 14 days; or
>
> (c) order the prisoner to serve a separate confinement period, not exceeding 7 days.
>
> (2) The hearing officer shall record the breach of discipline and the punishment in the breach of discipline register.
>
> (3) The hearing officer shall inform the prisoner of his right to appeal and the way in which the prisoner is to commence an appeal.
>
> (4) If the prisoner wishes to appeal, the prisoner shall inform the hearing officer within 7 days.
>
> (5) Where a prisoner appeals a decision of the hearing officer, the punishment appealed against, shall be suspended pending the determination of the appeal.

11. The upshot of Mr Fili's submission was that placing him in maximum security, the prison authorities punished the appellant for the offending without following the procedures for breaches of discipline and punishment set out in the above-mentioned provisions. Further, the punishment inflicted on the appellant amounted to "torture" and was "too outrageous" compared to the penalties provided by those provisions.

12. On 5 May 2021, the respondent filed the following submissions, in summary:

    (a) the appellant was not sentenced twice because being placed into maximum security was not a sentence;

    (b) the reason the appellant was placed into maximum security was because he was found to be a threat to the security or good order of the prison as provided for by s 37 of the Act;

    (c) there was no requirement on the prison authorities to comply with provisions such as s 61 because the appellant was not punished by the prison authorities for the offending; and

    (d) in sentencing the appellant, the Magistrate did not err in law, there was no breach of justice and the appeal should be dismissed.

13. After hearing from the parties on 11 May 2021, I expressed the preliminary view that, aside from any issues concerning the provisions of the Act referred to above, the sentence appeared to be excessive. Mr Finau, who appeared for the respondent, agreed. Further directions were therefore made for the filing of additional material in relation to the novel issues arising under the Act and the hearing was adjourned to 15 June 2021. In the meantime, having regard to s 4B(1)(a) of the *Bail Act*, I was satisfied that there was a reasonable prospect of the appeal succeeding, at least to some extent, and therefore granted the

appellant bail on conditions including a curfew and reporting.

14. On 25 May 2021, the respondent filed what was effectively an affidavit[2] by Laini Manuofetoa, the Deputy Commission of Prisons, who, in summary, deposed as follows:

(a) pursuant to s 49, as soon as a male commences serving his sentence in prison, he will receive, if the Commissioner deems fit, a remission of one quarter of the term of imprisonment;

(b) section 51 provides for the calculation of remissions for male prisoners with a marking system between 6 and 8;

(c) by the time the appellant was sentenced by Cato J, he had served 60 days on remand, of which, 56 days were at the prison;

(d) by application of the "Good Conduct & Industrial Marks Towards Remission" provisions referred to above, the appellant's initial release date, with remissions, was calculated as 27 June 2020;

(e) however, as a result of losing part of his marks for the sentence, his release date was extended to 24 July 2020. [As to how the appellant lost those marks was not explained.]

(f) the appellant was not disciplined by the prison authorities for the subject offending and there were no proceedings as contemplated by s 63 because it was not a disciplinary matter;

(g) the matter was referred to the police for their investigation and any charges they might lay pursuant to s 62;

(h) the prison authorities "*do not pass sentence or punish someone who was alleged to have committed a crime … as that is a matter for the Court*";

(i) the appellant "*was put into a separate facility for security purposes*";

(j) pursuant to s 17 of the Act, all prisoners are classified into three classes. Pursuant to s 18, each class is required to be housed in separate accommodation within the prison, "where practicable and suitable facilities exist". The Commissioner of Prisons has requested, on numerous occasions funding to build new prison accommodation to be able to cater for the different classes of prisoners. The prison is presently overpopulated. The authorities try to facilitate the prisoners' accommodation to the best of their ability with the current available resources. However, due to those limited resources, all three classes of prisoners are "*almost fully mixed*" so that when a person such as the appellant is found with illicit drugs, "*it is important for the safety and well-being of the running of the prison to separate him from the others*";

(k) pursuant to a recently introduced new policy entitled "new proposal for

[2] Described as a "sworn declaration made under oath".

prisoners paid employment rate", a prisoner may be permitted a leave of absence pursuant to s 46(3), at a rate of $35 per day. In this case, the appellant requested a leave of absence, and therefore, on 17 July 2020, he paid for the equivalent of his remaining eight days to be served prior to his scheduled release date of 24 July 2020.

15. On 26 May 2021, the respondent filed supplementary submissions in which it repeated the statements by the Deputy Commissioner to effect that the appellant had not been disciplined or punished by the prison authorities and that he was not placed in "maximum security" but rather into a "separate facility" for "security purposes" due to a "lack of facilities". The respondent also confirmed its earlier concession that the sentence below was excessive and submitted that an appropriate substitute sentence would be 8 months' imprisonment without any suspension.

16. On 8 June 2021, Mr Fili filed further submissions in response, in summary:

(a) in the 20 days between 27 June 2020 on 17 July 2020, the prison authorities "*recklessly continued to remand the appellant in the maximum facility is no good ground according to the Prison Act*";

(b) it was "*absurd*" for the appellant to be put into a separate facility for security purposes because there was no order given by the Prison Commissioner as required by ss 37(1)(c) and (3), which provides:

> **37 Maximum security orders**
>
> (1) The Commissioner may make a maximum security order that a prisoner be placed in a maximum security facility within a prison.
>
> (2) The Commissioner may only make the order if the Commissioner reasonably believes, that any or all of the following apply —
>
> (a) there is a risk the prisoner will escape, or attempt to escape;
>
> (b) there is a risk the prisoner will kill or cause serious injury to prison officers, other prisoners or another person that the prisoner may come into contact with; or
>
> (c) the prisoner is a threat to the security or good order of the prison.
>
> (3) The term of the order shall not be longer than 7 days, unless the Commissioner otherwise directs.

17. During the resumed hearing on 15 June 2021, I enquired as to whether any investigation was conducted to ascertain how the appellant came to be in possession of methamphetamine whilst in prison. The explanation provided from the Bar table was as per the background above.

18. Further, Mr Finau confirmed that there was no evidence of the existence of any direction by the Commissioner extending the seven day period proscribed by s 37(3).

Consideration

19. The primary issue on this appeal is whether the sentence below was excessive. The respondent concedes that it was. Consistent with the preliminary view expressed earlier in the proceeding, I agree.

20. It is not apparent from the learned Magistrate's sentencing remarks that she had sufficient regard to comparable sentences. Her Worship's reference to *Afu* identified, among the sentences imposed for the 16 drug-related offences dealt with in that case, the sentence of six months imprisonment for 0.16 of a gram of methamphetamine. However, they also included two months imprisonment for 0.05 of a gram of methamphetamine.

21. It is apparent that her Worship placed excessive weight on the circumstances of aggravation as she saw them. Apart from the discount of one month for the extended release date, it is also apparent that the learned Magistrate did not consider and did not have the benefit of any submissions in relation to, the lawfulness or otherwise of the appellant being placed into maximum security for 96 days, or the significance, if any, of that treatment in determining the appropriate sentence.

22. In those circumstances, and as the Respondent properly conceded, the Magistrate's discretion miscarried and the sentence must be set aside.

23. By reference to the range of other sentences in *Afu* and the comparable sentences referred to therein, as well as others such as:

    (a) *Ue'ikaetau Tapa'atoutai* [2021] TOSC 8, where for possession of 0.08 grams of methamphetamine, Langi AJ sentenced the Defendant, who changed his plea at trial and whose criminal history was unclear, to 6 months, fully suspended on conditions including 40 hours community service;

    (b) *Tama'a Takau* (CR 270 of 2020, 25 January 2021, Whitten LCJ), the Defendant, who had previous convictions only for dishonesty but pleaded guilty early, was sentenced for possession of 0.08 grams of methamphetamine to 4 months imprisonment, fully suspended on conditions including 40 hours community service; and

    (c) *Songo'imoli* [2021] TOSC 75, where Niu J sentenced the Defendant, who had previous convictions for possession and importation of cannabis and for which he was sentenced to imprisonment, upon his conviction for possession of 0.08 g of methamphetamine to 18 months' imprisonment, fully suspended for three years, on conditions including 40 hours community service,

    I substitute the following sentencing formulation:

        (i) a primary starting point of six months imprisonment;

        (ii) by reason of the aggravated offending occurring within prison while

serving a prison term for a previous drug-related offence, that starting point is to be increased by three months making a total of nine months;

(iii) one month off for the Appellant's late guilty plea;

(iv) resulting in a sentence of eight months imprisonment.

24. The secondary, and somewhat novel, issue on this appeal is whether, and if so, to what extent, any consideration should be given to the approximately three months spent by the appellant in maximum security. That now becomes relevant on the question of any credit for time served or suspension of the balance of the substitute sentence to be imposed.

25. It was common ground that the legal issues raised by the appellant on this appeal challenging the lawfulness of the prison authorities placing him in maximum security were not raised below. Notwithstanding the general prohibition against Courts of appeal entertaining issues not raised before the Court whose decision is appealed, the circumstances here are exceptional.[3] Further, it is unlikely that any evidence that could have been given below could possibly have prevented the point from succeeding.[4] Accordingly, I determined to consider the issue within this appeal rather than remit the matter back to the Magistrates Court for further consideration according to law thereby inviting the possibility (and attendant inefficiencies, time and cost) of a repeat appeal.

26. The information provided by the Deputy Commissioner of Prisons provided some valuable insight and assistance in understanding the relevant background to the appeal. However, I am unsettled by two matters.

27. Firstly, the rather oblique reference by the Deputy Commissioner to the appellant being "put into a separate facility", is not a term used in the Act. Similarly concerning was is failure (or reluctance perhaps) to expressly refute the appellant's assertion that he was placed in "maximum security", which is specifically provided for in the Act, albeit only in prescribed and limited circumstances.

28. Secondly, that the Commissioner of Prisons, assuming he was aware, permitted (or perhaps even directed) the appellant to remain in maximum security for approximately three months was never fully explained. As noted above, s 37 of the Act permits such an order where a prisoner is a threat to the security or the good order of the prison but that the term of the order for maximum security shall not be longer than seven days unless the Commissioner otherwise directs. Here, as noted, there was no evidence of such

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[3] For example, see *Cocker v Palavi* [1997] Tonga LR 203 citing *Vailala v Late Futu* (1958) 2 TLR 165; *Taufa v Tahaafe* [2015] TOCA 7 at [21]; *Fanua v Rex* [2020] TOCA 5 at [30].

[4] *Bond v R* (2000) 201 CLR 213 at [30] citing *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481; *Coulton v Holcombe* (1986) 162 CLR 1; *Water Board v Moustakas* (1988) 180 CLR 491 and *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473.

a direction nor any explanation as to why the appellant was retained in maximum security for longer than seven days.

29. I have no difficulty in accepting that any prisoner who procures or is given drugs, which are then taken within the prison, does pose a threat to the good order and security of the prison by the potential for distributing those drugs to other inmates or by consuming them, resulting in disruptive or even violent behaviour. But in this case, there was no evidence to support the continuing retention of the appellant in the maximum security facility. One would have thought that once the methamphetamine was detected and seized, the appellant could no longer pose a threat to the security of the prison, especially if he was unable to come into future contact with anybody outside the prison, as he did here, who could have given him any further illicit drugs. There is no evidence, nor even a suggestion, that it was necessary to place him in maximum security to achieve that. The only other indirect explanation proffered by the Deputy Commissioner was that the Hu'atolotoli prison is overcrowded, it has limited resources, and that whilst the Act prescribes three classes of prisoners, and how they are to be accommodated, the harsh reality is that most of the inmates have to be housed in mixed accommodation. That, however, still does not explain why the appellant was kept in maximum security for approximately three months. In the absence of any such explanation, it is impossible to dismiss entirely, and, at a minimum, I am left with reservations, as to the appellant's contention that he was punished by the prison authorities.

30. Although the making of the submission was perhaps understandable, I regard the fact of Mr Fili's characterisation of the appellant's time in maximum security as "torture" as somewhat of an exaggeration. That may be contrasted with whipping which presently remains, within Tonga, as a form of punishment available within the *Criminal Offences Act*. Nonetheless, having personally inspected the prison shortly after arriving in the Kingdom, including the maximum security facility, I do accept that any time in that place would be far more arduous and uncomfortable, to say the least, than even the ordinary cramped conditions the general population of prisoners are required to endure.

31. For those reasons, I consider it appropriate to order that credit be given for the three months served in maximum security towards the balance of the substituted sentence referred to above.

32. I was also informed by counsel that the appellant has served 1 ½ months imprisonment on the sentence the subject of this appeal before he was granted bail during this proceeding. Therefore, the appellant is to be given credit of a total of 4 ½ months served.

33. But for the striking and unusual circumstances of this case, no consideration whatsoever would be given to suspending any part of the balance of 3 ½ months imprisonment. However, in light of those circumstances, and the fact, according to Mr Fili, that the appellant only has one more week to complete the

drugs awareness course which formed part of the conditions of his suspended sentence imposed by Cato J, I consider it appropriate to order that the final 3 ½ months of this sentence be suspended for a period of 12 months, on the usual conditions but with the addition of a greater period of community service than has been applied in comparable sentences, as part of the balancing act to be achieved in any sentence.

Result

34. For the reasons stated above, the appeal is allowed.

35. The sentence in Magistrates Court proceedings CR 195 of 2020, dated 19 March 2021, is set aside.

36. In substitution therefore, the appellant is sentenced to 8 months' imprisonment.

37. The appellant is to be given credit for 4 ½ months served in respect of that sentence to date.

38. The remaining 3 ½ months of the sentence is to be suspended for a period of 12 months from today, on condition but during the said period of suspension, the appellant is to:

    (a) not commit any offence punishable by imprisonment;

    (b) be placed on probation;

    (c) report to the probation office within 48 hours hereof;

    (d) complete an alcohol and drugs awareness course as directed by his probation officer; and

    (e) complete 80 hours of community service as directed by his probation officer.

39. The appellant is reminded that if he fails to comply with any of those conditions, the suspension may be rescinded, in which case, he will be required to serve the balance of his prison term.

NUKU'ALOFA
15 June 2021

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE