

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

AM 3/2024

POLICE
-v-
SIONE PONGI

ATTORNEY GENERAL'S OFFICE	
INITIALS: <i>Jh</i>	DATE: <i>5/03/24</i>
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Appeal against sentence

BEFORE: THE HONOURABLE COOPER J
Counsel: Mr. Fifita for the Prosecution
Mr. Pongi was unrepresented
Date of
Hearing: 29 February 2024

ORDERS MADE BY: COOPER J

DATE OF ORDER: 29 February 2024

THE COURT ORDERS THAT:

1. Under section 80 Magistrates Court Act, the sentence imposed by the Learned Magistrate be replaced by a term of imprisonment for 16 months.

That is made up of 10 months' imprisonment on the suspended sentence CR 190/2020. Followed by a term of 6 months' imprisonment for the offences CR 607/23 and CR 608/2023.

Reasons for decision

1. On 8 December 2023 Mr. Pongi appeared before the Magistrates' Court at Fasi and pleaded guilty to two offences.
 - CR607/2023 that on 5 October 2023 he was in possession 0.16 grams methamphetamine contrary to section 4 (1) (a) (iii) Illicit Drugs Control Act; for which the maximum sentence is a fine of \$10,000 and, or 3 years' imprisonment.
 - CR608/2023 on 5 October 2023 he was in possession of a pipe to smoke illicit drugs, contrary to section 5 A Illicit Drugs Control Act; for which the maximum sentence is a fine of \$10,000 and, or 3 years' imprisonment.
2. His case was then adjourned for sentence to 15 December 2023.
3. On the information before me, Mr. Pongi already had two prior convictions.
 - CR 309/2020, an offence of possession 0.53 grams methamphetamine. There is no indication whether that was following a guilty plea or a finding of guilt after a trial. Nor am I aware what penalty was imposed.
 - CR190/2021 said to be an offence where Mr. Pongi "interfered with the work carried out by police" concerning an investigation into illicit drugs. On 28 July 2022, he was sentenced to 10 months' imprisonment, suspended for 2 years.
4. The offences committed in October 2023 put him in breach of the suspended sentence passed in July 2022.
5. On 15 December 2023 the Learned Magistrate passed a sentence of:
 - I. 6 months' imprisonment for possession of the methamphetamine, reducing the starting point of 12 months by half to reflect his cooperation with the police and the responsibility he has raising 3 young children.
 - II. 2 months' imprisonment concurrent for possession of the drug utensils.

- III. activated the 10 months suspended imprisonment sentence to run concurrent with the sentence for new offences.
 - IV. A total of 10 months' imprisonment.
6. The Crown have appealed against that sentence. In their Notice of Appeal, filed 8 January 2024, they submit there should be a different approach to the application of the totality principle in reaching the final sentence to be passed on Mr. Pongi.

The Appeal

This Court respectfully sets out the approach it takes in reaching the correct sentence.

- I. The purposes of sentencing are:
 - a) to punish;
 - b) reduce crime;
 - c) reform and rehabilitate; and
 - d) protect the public.
- II. First setting a starting point for the offence under consideration.

This is achieved by taking account of the statutory maximum, comparable sentences and any judgements of the Court of Appeal. It also takes into account the culpability of the offender and the harm caused.
- III. That starting point will then need to be adjusted depending on the aggravating and mitigating factors.
- IV. Relevant assistance to the prosecution should be taken into account and any necessary reduction stated as a separate and identifiable discount.
- V. Then any reduction for a guilty plea must be identified so to arrive at a final tariff.

- VI. The questions of totality and any possible suspension need be dealt with next, each in turn.

Possession methamphetamine

7. In this Court's respectful judgement, an offence of possession 0.16 grams methamphetamine merits a starting point of 6 months' imprisonment. Comparable sentences considered are
- CR 177/2020 R v Afu; possession 0.11 grams methamphetamine. 6 months' imprisonment fully suspended.
 - CR 185/2020 R v Lave; possession 0.11 grams methamphetamine. 6 months' imprisonment fully suspended.
 - CR 292/2020 R v Katoa; possession 0.12 grams' methamphetamine. 6 months' imprisonment.
8. To reflect Mr. Pongi's consistent involvement in, and his previous convictions for drug related offences, that starting point is increased to one of 9 months.
9. That he cooperated with the police I respectfully consider irrelevant when in reality he was caught red handed.
10. I take the view his having young children dependent on him needs to be considered bearing in mind his continued offending. He was father to these same children when he received his first conviction for illicit drugs, for an offence in 2020. His being a father has not caused him to mend his ways and he has deliberately put his own right to parent his family in jeopardy by his own, criminal decisions.
11. It is relevant that he pleaded guilty at the first available opportunity. The formula used consistently in this Court is a discount of up to 30 % for an early guilty plea. That is a sliding scale, reducing to 10 % discount for a guilty plea on the day of trial; less than 10 % if a defendant pleads guilty during trial.
12. In this case a 30 % discount is merited for his early guilty plea. That gives a sentence of 6 months' imprisonment.

Possession utensils

13. This court concludes that a starting point of 9 months' imprisonment is appropriate for the offence of possession of the drug utensil. In reaching that decision, the following cases were taken into account
 - R v Mahina & Wight, 93-94/2022. Mr. Wight was sentenced for possession of 4 straws, 3 sets of scales, a test tube and 112 dealer bags. The court adopted a starting point of 1 year, having considered R v Ha'isila CR/ 22/2022.
 - R v Namoa, Sekona & Finau 58, 59 & 61/ 2022 for 4 empty snap bags, and both counts of possession of a single test tube, a starting point of 6 months.
14. No mitigating or aggravating factors alter that.
15. 3 months discounted for his early guilty plea makes a sentence of 6 months' imprisonment.

Consecutive or concurrent sentences

16. Consecutive sentences are generally only appropriate for unrelated offences; Kolo v Rex [2006] TOCA 5 at [11].
17. The offences committed in October 2023 were very much part of the same set of facts, accordingly both sentences in this case are to run concurrent with one another.
18. The suspended sentence for CR190/2021 must be activated as he has breached its condition in committing an offence punishable by imprisonment by committing the instant offence.
19. The question is whether all or part of that 10-month sentence ought to run consecutive to the term of 6 months for the new offences.
20. Firstly, these are unrelated offences; the case law suggests the sentences should run consecutive.

21. The second point this Court is mindful of is this; Mr. Pongi was given a chance to reform with the imposition of a suspended sentence in 2022. That was for his second criminal offence involving illicit drugs, committed in a relatively short period of time.
22. If a defendant under a suspended sentence re-offends, there is a real need to consider the sentence for the new offence, or offences, being made consecutive to any activated portion of the suspended sentence. To do otherwise would tend to diminish the deterrent effect a court aims to achieve by imposing a suspended sentence in the first place.
23. Consideration will have to be given next to whether that sentence be made fully or in part consecutive.

Totality

24. I have gone on to consider the question of totality in imposing concurrent terms.
25. In *R v Selupe* [2021] TOSC 47 at [25] Lord Chief Justice Whitten KC said this:

“The totality principle requires the court to have regard to the totality of the offending, particularly where the offences are a series of related offences. According to the principle, a court, which has correctly fixed a series of consecutive sentences as the appropriate periods, is obliged at the end of the process to consider whether the aggregate figure represents a proper period of incarceration to be imposed for the total criminality involved: *McDonald v The Queen* [1994] FCA 956; (1994) 48 FCR 555 at 563. Further, in cases where the prisoner has not previously been sent to gaol, the accumulation of sentences to be imposed ought not to result, unless there is no alternative, in a total which is a crushing first period of imprisonment.”

Given Mr. Pongi has continued to commit offences concerning illicit drugs and when considering the harm, they cause, I conclude there is nothing excessive about serving both terms in full and consecutive to one another.

Suspension

26. Next I have considered the principles in *Mo'unga* [1998] Tonga LR 154.
27. Those principles are aimed at promoting rehabilitation.

28. The key points being whether the defendant was young, of previous good character, or passed long time without offending; whether the defendant would take the opportunity to rehabilitate.
29. Given Mr.Pongi offended during a suspended sentence it would be perverse to suspend any portion of his sentence.

Conclusion

30. Mr. Pongi's suspended sentence of 10 months is activated in whole and he is ordered to serve that term before he serve his 6-month sentence for the new offences.
31. That is an overall sentence of 16 months.
32. His sentence is to take effect from the date the Learned Magistrate originally committed Mr. Pongi to prison; 15 December 2024.

**Supreme Court
Nuku'alofa.**



29 February 2024
Cooper J