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

CR 119 of 2018

BETWEEN:

REX

Prosecutor

AND:

MAIKA MAILE

Accused

BEFORE HON. JUSTICE NIU

Counsel : Ms. L. Fakatou for the Crown
Mr. V. Mo'ale for the accused

Plea & date : Guilty, 24 October 2018

Hearing : 19 November 2018

Sentence : 26 November 2018

SENTENCING

The facts

- [1] On 13 March 2018, a search warrant was issued by a Magistrate for search of stolen goods, namely, some 17 pieces of machinery and equipment, tools, cabinets, bench, desk, table, wooden bowls, etc., altogether valued at \$10,350.00 believed to hidden or kept at the residence, land and vehicles of one 'Aisea Langi and others at Halavave (Kolomotu'a). A list of the items was attached. All items were big and could not be hidden in the trouser pocket of anyone.

redgpl

- [2] When the police arrived 'Aisea Langi was at work and some of his workers were at his home. They contacted 'Aisea to come. Whilst waiting, the police searched the workers there, one of whom against his wish and without his consent and found in his trouser pocket bits of cannabis wrapped with a cigarette paper.
- [3] When 'Aisea Langi came, he came with 3 of his workers to have lunch there, one of whom was the accused. The police searched them too and found in the accused's trouser pocket a small plastic bag with a bits of methamphetamine weighing 0.52 grams.
- [4] None of the stolen items listed in the search warrant was found in 'Aisea Langi's house or vehicles.
- [5] The accused readily admitted that he had purchased and smoked what had been in the small plastic bag. He did not contest his committal hearing in the Magistrate Court. He pleaded guilty when charged before me.

Previous convictions

- [6] The accused has 2 previous convictions, one on 8 October 1999 in the Magistrate Court for theft for which he was fined \$100 or 6 months imprisonment, and the other on 2 September 2001 for house breaking and theft for which he was sentenced concurrently for 18 and 9 months of which 9 months was to be served and 9 months to be suspended. He just turned 20 years old then.

Personal circumstances

- [7] The accused is the eldest of 3 children of his parents. He attended Tupou High School but left whilst in form 5 in 1996 because he said he was not doing well and he was lazy.
- [8] He was married in 2011 and had 2 sons (twins) but he and his wife broke up and were separated in 2016. The wife lives with a partner and has the 2 children but the accused has them in the weekends and school holidays. He himself lives alone.
- [9] His father had died in 2011 and his mother remarried. He works well as carpenter but he presently works for a water tank cleaning business where he can

earn up to \$300 per week, depending on the number of tanks he cleans. When there is no tank to clean he goes and works in the plantation where he earns up to \$200 per week.

- [10] He says he is not addicted to the drug and only takes the drug from time to time. He says that one small plastic bag has only enough drug for one use. It costs \$50.

Probation report

- [11] The probation officer says that the accused cousin says that the accused had suffered when he was in prison in 2000 and has now changed to a better situation and is still progressing. He says that the accused seemed responsible and hard working to provide for himself and for his two sons.

- [12] The officer recommends that a suspended imprisonment sentence be imposed and that the accused be required to serve 100 hours of community service and to attend drug and alcohol awareness courses, and to be on probation supervision during the period of suspension.

Crown Submissions

- [13] The Crown's submissions agree with that recommendation. Ms. Kafa for the prosecution submits that based on principles for suspension in *Mo'unga v Rex* the accused deserves a suspended sentence. She says that the accused is likely to take the opportunity in such sentence to rehabilitate himself, and also because the accused cooperated with the authorities.

Accused's submissions

- [14] Mr. Mo'ale for the accused also agrees with those submissions. He stated that the accused is remorseful for what he had done, especially with such an offence as possession of drugs and he readily admitted his offence and cooperated with the police and the Courts. He also agreed with the probation officer and the sentence he recommended.

Considerations

- [15] There are other considerations which I believe are relevant in this case. Firstly, the imprisonment of the accused in the year 2000 when he was only 20 years old for a property offence of housebreaking and theft. That was not an appropriate

sentence for a young offender, to spend 9 months imprisonment in prison together with other hardened and experienced criminals, who would have taught him how to commit crimes. The cousin told the probation officer that the accused is progressing. I think he meant, trying to get over his experience whilst he was in prison for that period of 9 months – a period that may appear short but I believe to him must have been, at the time, like a life-time.

[16] Secondly, the accused has maintained an offence free life since he came out of prison in 2002. That is some 16 years. Under the Rehabilitation of Offenders Act, a person who has maintained a criminal conviction free life for more than 7 years may be eligible to be granted, with the consent of Cabinet, a certificate such that he is deemed to have no previous convictions. So that he would have been entitled to apply for such a certificate before he committed this present offence. Now with his present offence, he would have to wait for another 7 years free of criminal conviction. In the meantime he would have no right to a passport to travel or to apply for a visa to travel overseas.

[17] Thirdly, the finding of the drug in his trouser pocket by the police in the search of his person may be said to be unlawful because such search is required to be by warrant issued by the court (and there was no such warrant), unless the police officer doing the search was satisfied on reasonable grounds, that the accused had drugs in his pocket (and that there was no time to obtain a warrant to search him): S.122 Tonga Police Act 2010. It is true that the police had found bits of cannabis wrapped in a cigarette paper in the pocket of the trousers of another person at the house. It may be claimed that because of that finding, there was reasonable grounds for believing that there would be drugs in the trouser pocket of the accused as well. But the finding of the cannabis would have been unlawful because there were no grounds upon which the police was satisfied that there was drug in that person's trouser pocket. And the police could not have been satisfied, that is, sure, that there were drugs in the accused's trouser pocket. All that the policeman would have had was a suspicion, and that is not enough to search a person without warrant.

[18] Fourthly, the accused is now 38 years old. He is a father of 2 five year old sons who must adore him because of his constant and responsible attention for their well-being. He only has the weekends to be with them. If the accused is to serve

community service he has to work those hours on the Saturdays for several months and would disrupt the family life he must have with the 2 children in the weekends for the 2 children's well-being.

[19] Fifthly, if a fine is imposed, the accused would be at difficulty to pay it due to the uncertainty of the means of his income and would also affect his maintenance of the 2 children.

[20] Lastly, the amount of methamphetamine found on the accused was so infinitesimal, 0.52 of one gram, that it was not enough for smoking or use by the accused. He was not a dealer or traffika. He is rather a victim of the drug dealers and traffikas (who make the money out of persons like the accused) who have fallen for them. With a further chance given to the accused, he may save himself, by committing himself not to use the substance again.

[21] Considering all those matters, and the probation report, the submissions of both counsel, I consider that in the circumstances of this case, a discharge without conviction under s.204 of the Criminal Offences Act is appropriate but with a condition that the accused is not to commit any further offence.

Sentence

[22] Accordingly, I order that the accused is discharged without conviction under s.204 of the Criminal Offences Act but subject to the condition that he shall not commit an offence for a period of 2 years from today.

NUKU'ALOFA: 26 November 2018.



A handwritten signature in black ink, appearing to read "L. M. Niu", is written over the judge's name.

L. M. Niu

J U D G E