

BETWEEN: R E X - Prosecution

AND: VILIAMI MANGISI - Accused

BEFORE THE HON. JUSTICE CATO

Counsel: Mr. T. 'Aho for the Prosecution  
Mr. S. Tu'utafaiva for the Accused

SENTENCE

- [1] The Prisoner, Viliami Mangisi, was convicted after trial by jury of two counts of serious offences under the Illicit Drugs Control Act;
- a) Possession of an illicit drug contrary to section 4(a) of the Illicit Drugs Control Act;
  - b) Attempted export of an Illicit Drug contrary to section 4 of the Criminal Offences Act and section 3 of the Illicit Drugs Control Act.
- [2] He appears for sentence today.
- [3] Mr Mangisi is a first offender. He is aged 60 and was born in Tonga. He came from a well-respected Tongan family and his father had been a doctor at the Vaiola Hospital. He was the youngest of 9 siblings, 6 of whom including the accused became permanent residents of the United States, 2 in New Zealand and three remained in Tonga. At aged 18, having left school early in the third form he was taken by a relative to America.
- [4] He worked as a cleaner at a restaurant and then worked 10 years for American airlines before retiring from that position and starting a construction company, which

he operated for a number of years before retiring. He was said, in the probation report, to be retired and remained at home in Los Angeles. He is a frequent traveller enjoying a discount because his daughter works now for American airlines.

[5] It is said that his two daughters and his wife are contributing to the family financial income. I questioned the accused at the hearing about his domestic financial situation because it seemed strange to me that the prisoner should engage in so substantial drug dealing as this involving the possession of nearly 2 kilos of methamphetamine, and the attempted export of the drug to New Zealand at his age and with no previous criminal offending. He told me that there was a substantial mortgage on the family home of about \$300-400,000 dollars which the family was meeting. I gained the impression the prisoner may well have been struggling in retirement to meet his commitments, and this may have been a reason or motive for his offending. He continues in his probation report however to maintain his innocence of the offending, and denied to me that financial hardship was the reason for his offending.

[6] The circumstances of the offending are very serious. Mr Mangisi, as a consequence of a police operation involving an accomplice who had co-operated with the police, was arrested at Fua'amotu airport in Nuku'alofa about to board a plane to New Zealand on the 8<sup>th</sup> May 2018. Earlier his accomplice, a long term employed cleaner at the airport by the name of Fonua gave evidence for the Crown. He said that he had been arrested by the police after he had confessed to placing small bags of the drug in a bin in a room closed to the public beyond customs and border facilities so that they could be retrieved by Mr Mangisi after he had passed through customs and airport control before he boarded the plane. Mr Fonua had secreted these bags in a rubbish container as he went through the control area and had deposited the bags in a container in the room off limits to the public. A more senior cleaner became suspicious of Mr Fonua and the fact he had told her that the parcels would be collected for Mangisi from an area to which the public had no access. Shortly after, she opened one of the bags and saw what was later analysed to be methamphetamine and promptly advised her airport superiors who contacted Police. Shortly after this, Police arrested Mr Fonua who told them of the plan. He agreed to co-operate with the Police. Mr Fonua had already arranged to bring Mr Mangisi from his residence later that evening to the airport. He did this after he had assured Mangisi that all was in order. Mr Fonua had been placed under surveillance from Mr Mangisi's home to the airport, and police remained on surveillance after Mr Mangisi arrived at the airport. Meanwhile, police had arranged for the bags of methamphetamine to be

returned to the container in the locked room awaiting Mr Mangisi's appearance and maintained surveillance of the room. Mr Fonua was given the key and allowed to unlock the door. Mr Mangisi appeared shortly before his plane was to depart to New Zealand and entered the room where the drugs had been placed. Shortly after, Police, who had been watching, entered the room and, on finding the bags had been removed from the bin, searched the bag Mr Mangisi was carrying and located the bags containing the drug. Mr Mangisi told police that it was Tongan tobacco he was carrying. No Tongan tobacco was, however, located in the bag.

- [7] Mr Mangisi was arrested and charged and duly was committed for trial. Meanwhile Mr Fonua pleaded guilty to possession of methamphetamine and was sentenced. He received a substantial discount for agreeing to give evidence at Mr Mangisi's trial. There was no evidence that Mr Fonua was given or expected a reward for his assistance to Mangisi. He seems to have been played his role as a foolish gesture of friendship towards Mangisi. For his part, Mangisi no doubt fostered this relationship, knowing that Fonua was a long term cleaner at the Airport who would have easy access to areas as a trusted employee that the ordinary public would not have. Not only did Fonua lose his long term employment as a consequence of Mangisi's actions but also his liberty for his role and participation in his corrupt dealings with Mr Mangisi.
- [8] Mr Mangisi gave evidence at trial denying any corrupt behaviour with Fonua. He maintained that all he had been carrying in his bag was Tongan tobacco and that the Police had switched this with bags of the drugs it seems in the room when he had been arrested. It was a defence that the jury quickly rejected, and that came as no surprise. He was found guilty on both counts. The prisoner in his probation report continues to maintain his innocence and, in my view, in this respect he is disingenuous. He has failed entirely to co-operate with the prosecution in the face of very strong Crown evidence. Further since his conviction, Mr Aho has informed me on sentence that his attempt to gain intelligence about the offending through Mr Tu'utafaiva was unsuccessful.
- [9] In terms of a starting point for this serious drug offending, I will take the possession charge as the head sentence, carrying with it a maximum sentence of a fine not exceeding \$1,000,000 or imprisonment for a term not exceeding 30 years or more. This Court has applied *Fatu* [2006] 2NZLR 72 (CA) bands as guidelines in previous sentencing although this is the first case of very significant methamphetamine

offending to come before the Court in Tonga since *Fatu* was decided. Since *Fatu*, the New Zealand Court of Appeal in *Zhang v R* [2019] NZCA 507 has revised aspects of *Fatu* and I summarise these changes here as they are relevant.

	<u><i>Fatu</i></u>	<u><i>Zhang</i></u>
Band one; less than 5 grams;	2-4.5 years	community based - 4 years
Band two; less than 250 grams;	3-11 years	2-9 years
Band three; less than 500 grams;	8-15 years	6-12 years
Band four; less than 2 kilos;	10 years to life	8-16 years
Band five; greater than 2 kilos;	10 years to life	10 years to life

[10] New Zealand has a maximum sentence for significant offending of this kind of life imprisonment whereas the maximum for Tonga is 30 years; however, that will mean little difference in practice in Tonga because there is ample room for Courts to impose lengthy finite sentences within the *Zhang* guidelines for very serious offending. It is important in my view that the guidelines set out in *Zhang* be adopted here. Drug dealing is an international activity and, as this case demonstrates, drugs are commonly carried across borders. As such comity with New Zealand drug sentencing for methamphetamine recognizes the importance of maintaining similar sentencing regimes so that Pacific Island nations such as the Kingdom of Tonga are not seen as soft or relatively benign jurisdictions from which drug dealers can risk exporting, importing into or dealing in class A drugs and in particular methamphetamine. The prime sentencing considerations in this case are deterrence, the protection of Tongan society from this evil trade, and indeed denunciation of it.

[11] In this case, the amount of drug involved was more than 1.9 kilograms. This brought the prisoner plainly within the top end of the range of 8 years to 16 years imprisonment in *Zhang*. It is plain that Mr Mangisi was the mastermind who corruptly co-opted Mr Fonua into his plan it seems for little or no reward. Mr Tu'utafaiva submitted that 12 years should reflect an adequate starting point; Mr Aho suggested about 13. In my view, where the amount involves is just under 2 grams and where the offender is the mastermind or principal and has sought to inveigle another to assist, a condign sentence is required as deterrence and to protect society from offenders who participate in and promote this evil trade. But for the prompt actions of the senior airport cleaner and her suspicions, Mr Mangisi may well have achieved his goal assuming he successfully also passed undetected through controls in New Zealand. This was an amount of drug that had the potential to not only earn the

prisoner a large sum of money, but to cause significant harm for consumers in New Zealand. I consider that the starting point must adequately reflect the actions of Mr Mangisi which demonstrated a high level of planning, possession of a large amount of drug and his corrupt manipulation of a long term serving employee of the Airport to assist him to avoid airport control. I consider that a starting point of 14 years would be in order here as I suggested to counsel, and having reflected upon the matter since, I consider that this is the appropriate starting point.

[12] I have read the probation reports and other documents from his wife, his church and his doctors. Mr Tu'utafaiva, correctly, in my view, mentioned that the principal, if not the only mitigating factors would be his age and the fact he had no previous convictions. Standing on its own, I do not think that his age is a mitigating factor. However, I consider the fact that he has reached 60 and has not previously been convicted is an important mitigating factor. I also consider that I should allow him some mitigation for the fact that, although he has relatives in Tonga who may visit him, his life in prison will be made harder by the fact that his wife and family reside in America and probably will visit him only occasionally. I allow him 18 months mitigation of the 14 years imprisonment I adopt as the starting point, meaning that he is sentenced to 12 years and six months imprisonment for possession of methamphetamine, backdated to the date of his remand in custody. Appropriately in my view, his counsel did not ask me to suspend any part of this sentence. He has not co-operated with authorities and has not accepted responsibility for his actions. In my view, he does not merit any part of his sentence being suspended.

[13] As for the attempted export charge, an attempt brings with it in Tonga a maximum sentence that is half the maximum penalty for the completed substantive offence, relevantly here 15 years. (Section 5 Criminal Offences Act, section 3(c) Illicit Drugs Control Act). But for the timely intervention of the senior cleaner and the Police in all likelihood the prisoner would have achieved his goal. In these circumstances, I consider that the starting point must reflect this. The offending must be regarded as having a starting point towards the top of the range appropriate within *Zhang*. I do not disagree with the Crown that 6 years adequately represents this upper range for an attempt to export slightly less than 2 kilograms of methamphetamine that is an upper limit of 8 years under *Zhang* for an attempt to export this amount. I reduce that by a year for the mitigating factors I have mentioned. I have considered whether I should accumulate a part of this sentence to reflect the fact that the prisoner intended to export the drug, but taking into the account the totality principle, and the

fact that the sentence of 12 and half years imprisonment is already a lengthy sentence for a man of his age, I make this sentence of five years imprisonment for an attempt to export a class A drug concurrent with count one, the possession charge.

[14] I have not overlooked the case of Kata CR 196 / 2009, referred to me by Mr Aho, where Ford CJ imposed a starting point of 15 years ( 14 years imprisonment after mitigation) upon a customs officer who had corruptly facilitated the importation of a very large amount of methamphetamine 17.6 kilograms secreted in wine bottles and foil bladders into Tonga. Ford CJ suggested that a much higher sentence would have been imposed on the principal or mastermind, suggesting a sentence of at least 20 years. In my view, it is appropriate now that methamphetamine is more prevalent in Tonga to follow Zhang guidelines for reasons which I have given. In practical terms, in any event, the principal, in a case like Kata, under Zhang guidelines could also expect a very lengthy sentence of imprisonment quite possibly at the level Ford CJ considered would have been appropriate for a principal engaged in this kind of offending at a very high level as in Kata. This sentencing serves to remind those who are engaged with this kind of offending against the drug legislation of the Kingdom of Tonga that this Court will impose severe sentences and if they do so, they do so at their peril.

[15] I observe that the prisoner suffers from some medical conditions none of which would seem, if medicated appropriately, to be life threatening. I would ask the Commissioner of Prisons to arrange for a medical examination by his physician Dr Latu or other qualified medical practitioner as soon as possible and for his doctor to prescribe appropriate medication that is to be made available to him with possible revision for the period he is in custody. I would ask Mr Aho and Mr Tu'utafaiva to both make sure the Commissioner is aware of this request.

[16] As requested by the Crown, there is an order for the destruction of the methamphetamine.

NUKU'ALOFA: 22 November 2019

The seal of the Supreme Court of Tonga is circular, featuring a central emblem with a crown and two lions, surrounded by the text "SUPREME COURT TONGA" and a star at the bottom.  
C. B. Cato  
JUDGE