

REX

-v-

FAINGA LAVULO TENGANGE

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**SENTENCING REMARKS**

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**BEFORE:** LORD CHIEF JUSTICE WHITTEN  
**Appearances:** Mr 'Aho for the Crown  
Accused in person  
**Date of sentence:** 6 March 2020

**The charge**

1. The Defendant is a 32-year-old male.
2. On 17 December 2019, the Defendant pleaded not guilty to one count of possession of illicit drugs, namely, that on 8 December 2018 he knowingly and without lawful excuse possessed a Class A drug, methamphetamine, contrary to section 4(a) of the *Illicit Drugs Control Act*.
3. On 23 January 2020, the Defendant was rearraigned and pleaded guilty to the said count.

**The offence**

4. On or about 8 December 2018, police officers were on patrol duty in the village of Ngele'ia. As they approached the Ngele'ia Government Primary School, the officers saw the Defendant with several other males standing in front of the school. The police officers then told the Defendant and the others they would be searched. Prior to searching the Defendant, the police officers told him that they had reasonable grounds to believe that he was in possession of an illegal substance.

5. As a result of the search, the Defendant was found in possession of a packet of methamphetamine. The packet was shown to the Defendant and the police legally cautioned him for possession of illicit drugs. The Defendant told police officers that the packet of methamphetamine was his. He was then arrested and taken to the police station together with the packet of methamphetamine. The packet of methamphetamine was kept with the police and then taken to New Zealand for scientific testing. The Defendant was later interviewed by police, admitted to the offence and expressed regret for what he had done. The weight of the methamphetamine was 0.38 grams.

### **Crown's submissions**

6. The Crown submits, as circumstances of aggravation in this case, that possession of methamphetamine is a serious crime and a concerning public issue. It submits that the only mitigating factors are that the accused has pleaded guilty, is a first-time offender and that he cooperated with the police.
7. The comparable sentences submitted by the Crown present a range from a recognizance of good behaviour with probation and community service<sup>1</sup> to nine months imprisonment fully suspended on conditions.<sup>2</sup> I do not regard the sentence in *John Thorn Ngaue*, CR 6/18 of three years and six months with the last nine months suspended for 14.15 grams of methamphetamine to be of assistance.
8. From that, the Crown contends that the appropriate sentence here is a recognisance of good behaviour for 12 months or conditions including probation, abstention from alcohol or drugs, course on drugs and 30 hours community service. The submissions did not descend into particularity as to why the circumstances of the instant case align with those in *Pulotu* or *Heleta* so as to warrant a sentence at the lowest end of the spectrum.

### **No presentence report**

9. On 23 January 2020, I directed that a presentence report and any submissions on sentence including character references upon which the Defendant wishes to rely were to be filed by

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<sup>1</sup> *Efitoni Pulotu*, CR 199/19 and *Tuita Heleta*, CR 177/19.

<sup>2</sup> *Maika Maile*, AC 23/18 and *Alifeleti Katoa*, CR 19/18.

28 February 2020. On 28 February 2020, the probation office advised that they had not been able to prepare a presentence report because they have not had any contact from the Defendant.

### Reference

10. However, on the same day, a reference was filed on behalf of the Defendant from the Honourable Siaso 'O. Sovaleni, a Member of Parliament and People's Representative of Tongatapu 3 Constituency. He wrote that in the past few months he had seen changes in the Defendant who had started to do "positive things for the community likes playing around with the boys at our community police". He added that if the Defendant is given a chance, he believed he could be a positive influence on those affected by illicit drugs and that he could continue to do good things for the community and the country.

### Consideration

11. I respectfully decline to adopt the Crown's suggested approach to the sentence in this case for two reasons:
  - (a) virtually none of the factors in s.198 of the *Criminal Offences Act* favour that course here; and
  - (b) it would be inconsistent with the Court of Appeal's decision in *R v Maile* [2019] TOCA 17.
12. Section 198 permits the Court to release an offender on probation, and make an order discharging the offender conditionally on his entering into a recognizance with or without sureties to be of good behaviour where the Court is of the opinion that it is expedient to do so having regard to the character, antecedents, age, health or mental condition of the person charged or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed.
13. The only one of those factors clearly in the Defendant's favour here is his lack of any previous criminal record. I do not consider the nature of the offence, regardless of the amount of methamphetamine in question, to be "trivial". Which brings me to the next reason.

14. In *Maile*, the Court of Appeal endorsed previous decisions ‘where it has been held that those involved with methamphetamine in any capacity, and even small amounts, can expect to receive custodial sentences’<sup>3</sup> and the following remarks of Cato J in *R v Ngaue*:<sup>4</sup>

*“This judgement will serve as a warning to those who engage in Tonga with the drug methamphetamine, whether it be for possession only of small amounts or larger amounts, trafficking or supplying it to others, manufacturing, importing, exporting or dealing, in any way, with this extremely dangerous and addictive drug that the courts will sentence offenders to severe punishment. Even for possession of small amounts, offenders can expect to be sentenced to terms of imprisonment.”*

*Methamphetamine is a scourge and has effected a great deal of harm and misery on society in countries such as Australia and New Zealand where it has become prevalent in the last couple of decades. It is highly addictive for users, is mind altering and is often accompanied by acts of serious violence as well as being causative of a good deal of collateral crime such as theft and burglary in order for the user to fund the acquisition of the drug. Significant markets are to be found for those who choose to manufacture or import the drug and large profits can be made by criminals who choose to engage in such activity. The courts have responded by imposing very significant penalties on those who engage in this kind of activity.”*

15. In my view, those sentiments apply equally today, if not more so.
16. The Court of Appeal also observed<sup>5</sup> that even though, as here, Mr Maile was found in possession of only a small quantity of methamphetamine (0.52 grams), his offending was serious as it was a Class A drug. Their Honours opined:

*“In prescribing a maximum penalty of 30 years imprisonment for possession of methamphetamine the Legislature has expressed a clear intention that significant penalties are to be imposed. The distribution and use of methamphetamine in Tonga is a significant Government and community concern...”*

17. In allowing the Crown’s appeal in that case, the Court of Appeal set aside the discharge ordered below and sentenced Maile to 9 months imprisonment fully suspended subject to conditions. Maile was not a first time offender and there was nothing relating to his character or circumstances to suggest that the entry of a conviction would have any direct or indirect

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<sup>3</sup> [18]

<sup>4</sup> Unreported, Supreme Court, CV 6 of 2018, 2 August 2018 at [5] and [6].

<sup>5</sup> [20]

consequences upon him other than those that ordinarily be expected for such offending.

18. Having regard to the seriousness of the offence, prevalence of methamphetamine in Tonga and its threat to the community, that the Defendant is a first time offender, the amount of methamphetamine is slightly less than in *Maile* and the Defendant's cooperation with police and slightly belated guilty plea, I consider the appropriate sentence to be six months imprisonment.

### **Suspension**

19. I am satisfied by the positive remarks expressed by the Honourable Sovaleni that the Defendant should be afforded an opportunity to rehabilitate himself and that the other considerations in *R v Mo'unga*<sup>6</sup> favour full suspension on conditions.

### **Sentence**

20. The Defendant is convicted and sentenced to six months imprisonment.
21. The sentence will be fully suspended for one year on conditions that, during the said period of suspension, the Defendant:
- (a) not commit any offence punishable by imprisonment;
  - (b) be placed on probation;
  - (c) report to the probation office within 48 hours;
  - (d) live where directed by his probation officer;
  - (e) not consume any alcohol or drugs;
  - (f) undertake and complete a course on drug awareness at the Salvation Army or otherwise as directed by his probation officer; and
  - (g) perform 30 hours of community service at the direction of probation.

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<sup>6</sup> [1998] TLR 154

22. The Defendant is advised that if he fails to comply with any of the conditions of his suspended sentence, he may be required to serve the sentence of imprisonment I have imposed.
23. Pursuant to s.32 of the *Illicit Drugs Control Act*, I order that the methylamphetamine seized from the Defendant be destroyed.

NUKU'ALOFA  
6 March 2020



A handwritten signature in blue ink, appearing to read "M.H. Whitten".

M.H. Whitten QC  
LORD CHIEF JUSTICE