

DPP
Crown Law

Sen + Ahe

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

CR 311 of 2020

BETWEEN: R E X
-Prosecution

AND: SIOSIFA FOTU
-Accused

SENTENCE

BEFORE: JUSTICE LANGI

Counsel: Mr. 'Inoke Finau for the Crown Prosecution

Mr. Sifa Tu'utafaiva for the Accused.

Date of Sentence: 27 January, 2021

A. THE CHARGE AND PRELIMINARY MATTERS

1. On 15 December 2020 the Accused was arraigned before Lord Chief Justice Whitten where he pleaded guilty to one count of possession of illicit drugs contrary to section 4 (a) (iii) of the Illicit Drugs Control Act;
2. He appears before me today for sentencing;

B. THE OFFENDING

3. On or about 26 May 2020 the Police received reliable information that the Accused is currently supplying illicit drugs from his vehicle at his residence in Fo'ui. The Police went to the Accused's residence and found him sitting in a vehicle parked at his residence. The Police search the Accused and the vehicle and found the following items:
 - a. \$900TOP in the Accused's hand and \$670TOP inside a bag he was also holding;
 - b. 1 packet of methamphetamine;
 - c. A white straw;
 - d. 1 scale;
 - e. 2 passports in the name of Siosifa Paea he Lotu Fotu; and
 - f. 1 Samsung mobile phone.
4. The Accused was arrested and admitted to the offending when the charge was put to him.
5. The Accused does not have any previous convictions.

C. CROWN'S SENTENCING SUBMISSIONS

6. The Crown submits the following as aggravating factors in this case:
 - a. Substantial amount of methamphetamine seized – 25.5 grams;
 - b. The circumstances indicate possession for the purpose of supply;
 - c. Possession of illicit drugs is a huge issue in Tonga.
7. The Crown submits the following as mitigating factors:
 - a. Early guilty plea;
 - b. Lack of previous convictions; and
 - c. The Accused cooperated with the police.
8. The Crown also submitted following comparable cases to assist me in determining the appropriate sentence:
 - a. In *R v Mangisi* CR 10/2018 - Cato J discussed sentencing bands previously applied in New Zealand under *Fatu* (supra) and then later revised by the Court of Appeal in *Zhang v R* [2019] NZCA 507. In *Fatu*, the sentencing band for possession of illicit drugs less than 250 grams was 3 – 11 years. In *Zhang*, this was reformed to 2 - 9 years' imprisonment.

9. *Rex v John Thorne Ngaue CR 6/2018* – The Accused pleaded guilty to possession of 14.5 grams of methamphetamine and 43.89 grams of cannabis. He had cooperated with the police and had one previous conviction for possession of illicit drugs at the Magistrate court. Justice Cato adopted the sentencing bands given in *Fatu* and set a starting point of 4 years and 6 months imprisonment for possession of 14.5 grams of methamphetamine. For the mitigating factors of early guilty plea and professed remorse, Justice Cato deducted 12 months from the starting point leaving 3 years and 6 months imprisonment. The final 9 months of the sentence was suspended on conditions.
10. *Rex v Paula Moala CR 186 and 280/20* – In CR 186/20, the Accused pleaded guilty to one count of possession of 7.63 grams of methamphetamine and possession of 2.43 grams of cannabis and in CR 280/20 the Accused also pleaded guilty for possession of 25 grams of methamphetamine and possession of unlicensed ammunition. For possession of 25 grams of methamphetamine (count 1) the sentencing judge set a starting point of 5 years imprisonment. For the mitigating factors the judge deducted 15 months leaving total of 3 years and 9 months imprisonment. The final 18 months of the sentence was suspended on conditions. For the second count in CR 186 for possession of 7.63 grams of methamphetamine the starting point was 3 years imprisonment. For mitigating factors the judge deducted 9 months which left 2 years and 3 months. One year of the sentence was cumulative to the sentence in CR 280/20 making a total of 4 years and 9 months imprisonment with the final 18 months suspended on conditions. The remaining 2 years and 9 months for CR 186/20 was to be served concurrent with the sentence in CR 280/20.

D. PRE-SENTENCE REPORT

11. The Accused is 37 years old and is the second of three children born to Rocky and Masina Fotu of Fo'ui. He is married to Teuila Fotu and they have 4 children aged 16, 14, 11 and 8 years old. All the children are still in school.
12. The family's source of income is derived from farming at his parent's bush allotment and remittance from family overseas.
13. The Accused grew up in a stable environment with his father being the town officer of Fo'ui for several years. Being the son of the town officer, he was taught to lead a good example and to become a good role model to the rest of the youth in the village. He told the probation officer

that with this offending he has caused embarrassment to his family who were all shocked when they found out about the offending.

14. The Accused told the probation officer that on the day he was arrested, he was ashamed to face his family, especially his father, who had always taken pride in him. His family overseas called him and scolded him for what he had done but also counselled him to learn from this and to change his ways. He now realizes that what he had done has not only affected him personally but has also affected his family.
15. In terms of education, he completed primary school and completed Form 5 at the Tupou College before he quit of his own will to assist his parents.
16. The Accused is employed by the Koko Head company which is a lawn mowing company that looks after school compounds. He earns roughly \$1000-\$1500 per month depending on the amount of work required.
17. The Accused's father described him as a well-mannered child growing up who would always help his mother with the chores at home. He told the probation officer that he believes the reason for this offending is due to the Accused socializing with the wrong crowd.
18. The current town officer of Fo'ui described the Accused as a good kid who had not shown any type of bad attitude and it came as a shock to him when he heard of the offending. He believes that the Accused will be able to turn his life around for his family.
19. The Accused admitted to the offending and is deeply ashamed of what he had done. He told the probation officer that he has turned his life around. Throughout the interview, he repeatedly emphasized to the probation officer how deeply ashamed he was of what he had done and that he regrets the shame he has brought upon his family.
20. The Accused seeks the mercy of the court and asks for an opportunity to turn his life around to become a better person, a better son and husband and most importantly to be a more responsible father.
21. The probation officer recommended a term of imprisonment but fully suspended on conditions.

E. DISCUSSIONS

22. The maximum penalty for possession of illicit drugs contrary to section 4 (a) (iii) of the Illicit Drugs Act is a term of imprisonment not exceeding 30 years or a fine not exceeding \$1000000.
23. The alarming increase in drug-related offences in our country is of great concern to the courts, the government and the general public. It is no secret that methamphetamine is becoming

increasingly common in Tonga. Our communities are starting feel the effects of this insidious drug through the commission of serious offences such as burglary by those who use drugs, to fund their addiction.

24. In *R v Ngaue* [2018] TOSC 38; Criminal Case 6 of 2018 (2 August 2018), Cato J stated that:

“methamphetamine is a scourge and has affected 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 chose 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”

25. The comments by Cato J in *Ngaue* were endorsed by the Court of Appeal in *Maile* (above) when it stated that:

“Although Mr. Maile was found in possession of only a small quantity of methamphetamine his offending was serious as this is a Class A drug. 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...”

26. The Crown submits that in light of the authorities referred to above, an appropriate starting point in this case is 5 years imprisonment with 15 months deducted for the mitigating factors. The Crown further submit a partial suspension of no more than 18 months. I agree that a starting point of 5 years imprisonment is appropriate and in line with *Moala* and sentencing bands in *Zhang* which was adopted by Cato J in *Mangisi*.

27. For the mitigating factors of early guilty plea, having no previous convictions, being remorseful and cooperating with the police, I deduct 15 months from the starting point. This leaves a total of 3 years and 9 months imprisonment.

F. SUSPENSION

28. I now turn to whether the circumstances in this case warrant a suspension of part or the whole of the overall sentence. Section 24(3) of the Criminal Offences Act gives the Court jurisdiction to suspend the whole or part of the sentence for any period of up to three years, but it is silent on the criteria to be considered in deciding whether a sentence should be suspended. Some guidance on whether or not to suspend a sentence for drug offending can be found in the case of *Tuita v R* [1999] Tonga LR where the Court of Appeal stated:

“In our view, a conviction for growing any significant amount of marijuana should carry a sentence within the range of three to five years imprisonment. That sentence would not normally be suspended in whole or in part unless there are good reasons relating to rehabilitation, along the lines of the judgment of this court in R v Misinale (CA 13/99 & 23 July 1999)”

29. *Tuita* involved possession of cannabis, however, I believe the views of the Court of Appeal in relation to suspension are also applicable in cases for possession of Class A drugs. In this case, the possession of 25.50 grams of methamphetamine is a significant amount and a much more serious offence compared to *Tuita*. Suspension or partial suspension should only be considered if there are good reasons relating to rehabilitation.

30. I accept the probation officer’s view that he is genuinely remorseful and from the pre-sentence report, this offending was quite out of character for the Accused. He had grown up in a stable and respectable family. His father is a reliable man having been trusted by their community to be the town officer of Fo’ui for several years. I have no doubt that this offending was due to strong influence from being around the ‘wrong crowd’ as his father put it and most likely the financial attraction of dealing in drugs. His young children who are still all in school will obviously be negatively affected and sadly, may already be subjected to teasing and ridicule by their peers as a result of their fathers’ offending.

31. However, the Accused is a fully-grown man and would have appreciated the danger he was putting himself and his family in and the consequences of his unlawful actions. Had he not been caught, I believe he would have still continued with his illegal action. I accept that he is deeply remorseful and that he is a good candidate for rehabilitation. With the right tools given to him through drug and alcohol courses and with the support of his family, I believe he has a good chance of turning his life around and becoming a more responsible person in the community. However, the substantial amount of Class A drugs seized and the need for

deterrence, in my view, outweighs the mitigating factors and the justice of this case warrants only a partial suspension.

32. I therefore order that the final 18 months is suspended on conditions outlined below.

33. The Accused is to serve 2 years and 3 months effective today.

G. SENTENCE

34. On the count of possession of a Class A drug the Accused is convicted and sentenced to 3 years and 9 months imprisonment;

35. The final 18 months of the sentence is suspended for three years on the following conditions:

- a. Not to commit any further offences punishable by imprisonment for the period of his suspension;
- b. The Accused is to be placed on probation during the period of his suspension;
- c. The Accused is to complete the Salvation Army Drugs and Alcohol Awareness Program and Life Skills Course upon his release;
- d. The Accused is not to drink alcohol or take drugs during the period of his suspension;

H. FURTHER ORDERS SOUGHT BY THE CROWN

36. The Crown seeks the following orders from the Court pursuant to sections 32 and 33 of the Illicit Drugs Control Act:

- e. That the methamphetamine seized from the Accused is destroyed;
- f. That the total amount of \$1,570 is forfeited to the Crown into the Forfeiture and Confiscated Assets Funds Act;
- g. That the bag which had contained the cash and other items is forfeited to the Tonga Police;
- h. That vehicle L23911 is forfeited to the Tonga Police;

I. DEFENCE SUBMISSIONS ON ORDERS SOUGHT BY THE CROWN

37. Mr. Tu'utafaiva for the Accused did not make any submission in relation to sentencing and accepts the submissions on sentencing by the Crown.

38. However, counsel did file submission in respect of an order sought by the Crown to forfeit motor vehicle L23911.

39. The order sought by the Crown to forfeit the motor vehicle (van) is based on section 33 of the Illicit Drugs Control Act which provides:

“Where a person is convicted of an offence under this Act all articles, goods or property if any, in respect of which the offence was committed and in the possession of such person, shall be forfeited in addition to any penalty imposed under this Act”

40. Defence counsel does not dispute that the van falls within the meaning of “goods or property” and that it was in the possession of the Accused. However, he submits that the issue is whether the van is proved to be “goods or property in respect of which the offence was committed”. Counsel submits that the van was not used by the offender for the purpose of possessing the illicit drugs. He was only found sitting inside the van with the illicit items in his hand.

41. Counsel further submitted that the allegation in the summary of facts that the offender was “supplying illicit drugs from his vehicle” and at his residence at Fo’ui is not relevant because he is not convicted of supplying illicit drugs. The phrase “in respect of which the offence was committed” is not defined in the Act but counsel submitted that it is intended to cover “goods or property” used for the purpose of committing the offence. Counsel therefore submitted that the van was not used for the purpose of possessing the illicit drugs.

J. JUDGMENT ON ORDER SOUGHT BY THE CROWN TO FORFEIT VEHICLE

42. As requested by the Crown pursuant to section 32 of the Illicit Drugs Control Act, I order that the methamphetamine seized from the Accused is to be destroyed;

43. Pursuant to section 33 of the Illicit Drugs Control Act, I order that the total amount of \$1,570 seized from the Accused is forfeited to the Crown into the Forfeiture and Confiscated Assets Funds Account;

44. In relation to the order sought by the Crown pursuant to section 33 of the Illicit Drugs Control Act to forfeit the bag which had contained cash and other personal property and vehicle L23911 to the Police, I order that the bag and its contents are forfeited to the Police.

45. However, in relation to the vehicle that was also seized from the Accused, I accept the submission by Defence counsel that the vehicle has not been proved to be property in respect of which the offence was committed. The phrase “in respect of which the offence was committed” is not defined in the Act but a simple dictionary translation of the words “in respect of” means in regards to or in relation to.

46. The Accused was not charged or convicted of supplying illicit drugs from his vehicle. He was charged only with being in possession of illicit drugs and it cannot be said that he was using the vehicle to be in possession of illicit drugs. The drugs were found on his person and even if they were found in his vehicle, the application to forfeit the vehicle would still be unreasonable as this would also mean that the Crown should also seek to forfeit the houses of every Accused found in possession of illicit drugs in his house. A house would fall within the meaning of 'property' just as a van falls within the meaning of "goods or property".

47. As a result, I refuse the order sought by the Crown to forfeit the van and order that it is returned to the Accused's family.

NUKU'ALOFA: 27 January 2021



E. M. L. Lang

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JUDGE