

Sean + A/C

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

CR 195 of 2020

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BETWEEN: R E X -Prosecution  
AND: UE'IKAETAU TAPA'ATOUTAI -Accused

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SENTENCE

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BEFORE : JUSTICE LANGI  
Counsel : Ms Halaevalu Aleamotu'a for the Crown Prosecution  
: The Accused In Person  
Date of Sentence: 1 February, 2021

A. THE CHARGE

1. The Accused was charged with two counts of possession of illicit drugs namely 0.08 grams of methamphetamine, contrary to section 4 (a) of the Illicit Drugs Control Act and one count of possession of a Class B drugs namely 0.43 grams of cannabis;
2. On 24 September 2020 the Accused was arraigned and he pleaded not guilty to both counts. The matter was adjourned for trial to commence on 30 November 2020.
3. On the date of trial, the Accused informed the Court that he wished to change his plea. He was re-arraigned and pleaded guilty to both counts on his indictment. The matter was adjourned to 11 January 2021 for sentencing. However, the Accused submitted a sick leave certificate on that date. The Crown further requested an adjournment in order for an updated criminal record to be received as it is believed that the Accused has previous convictions for drug related matters which is not reflected in the current criminal record submitted to the court. The matter was then adjourned for sentencing on 1 February 2021.
4. The Crown was to file an updated criminal record today to confirm whether the Accused has criminal convictions for drugs as this would be crucial to the issue of suspension. However, they have not provided such record and to adjourn this matter any further would be an injustice to the Accused as

this matter has been adjourned since November 2020 and the Crown has had ample opportunity to file the updated criminal convictions. As such, I will continue to sentence the Accused today and refuse to adjourn this matter any further.

## B. THE OFFENDING

5. On or about 3<sup>rd</sup> February 2020, officers of the Drug Enforcement Taskforce were returning from Tofoa after responding to a drug related matter. On their way back to the Nuku'alofa Police station, they drove through a short cut into Tu'atakilangi to get to the Bypass Road. They saw the Accused walking towards them and when they slowed down the Accused turned and ran.
6. Suspecting that the Accused had something unlawful on him, the police chased after him. As he was running, the Accused threw something into the bushes before he was caught and brought back to the vehicle. The police searched the area where the Accused had thrown something into and found one test tube containing one pack of cannabis and one pack of methamphetamine.

## C. CROWN'S SENTENCING SUBMISSIONS

7. The Crown submits the following as aggravating factors:
  - a. The Accused was in possession of both Class A and Class B drugs;
  - b. Possession of illicit drugs is a serious offence;
8. They submit the following as mitigating factors in support of a reduction of sentence:
  - a. The Accused's late guilty plea;
  - b. He has indicated remorse and a willingness to change;
  - c. He is a widow with four children who are dependent on him;
9. The Crown also submits the following comparable cases to assist me in determining the appropriate sentence:
  - a. *R v Vilimoa Afu* CR 177/2020 – the accused pleaded guilty to possession of 0.11 grams of methamphetamine. He was a first-time offender and had cooperated with the police. The Crown had recommended a non-custodial sentence but this was not accepted by Whitten LCJ who was of the view that the imposition of a good behaviour bond under section 198 of the Criminal Offences Act is where the offence is of a trivial nature and possession of methamphetamine will rarely ever be regarded as a trivial offence. His Honour emphasized the views of the Court of Appeal in *Maile* where it was stated that in prescribing a maximum penalty of 30 years imprisonment, the legislature has expressed a clear intention that significant penalties are to be imposed, therefore those involved with methamphetamine in any capacity, and even small amounts, can expect to receive a custodial sentence.

- b. *R v Inoke Hu'akan* CR 247/20 – the Accused pleaded guilty to possession of 0.06 and 0.04 grams of methamphetamine. This court set a starting point of 12 months imprisonment. This was reduced by six months for the mitigating factors resulting in 6 months imprisonment for each count with the second count to be served concurrent to count 1. The sentence was fully suspended on conditions.
  - c. *R v Zhang* [2019] NZCA 507 – The New Zealand Court of Appeal identified three particular issues requiring consideration:
    - i. The weight that should be given to the role played by the offender when assessing culpability;
    - ii. The relevance of an offender's personal circumstances, particularly addiction issues; and
    - iii. The approach to be taken to imposing minimum periods of imprisonment for methamphetamine offending.
- The Court also introduced new sentencing guidelines for sentencing for methamphetamine charges to replace the sentencing guidelines used in *R v Fatu*. The new range for possession of methamphetamine less than 5 grams ranged from community service to 4 years imprisonment.
10. *R v Nazif Ali* CR 196/20 (Unreported, Supreme Court of Tonga) – The Accused pleaded guilty to three counts of possession of 0.86 and 1.07 grams of methamphetamine and 0.86 grams of cannabis. He was sentenced to 12 months imprisonment on both the methamphetamine charges with count 2 to be concurrent to count 1. On the cannabis charge the Accused was sentenced to 1-month imprisonment.
  11. The Crown submits that a custodial sentence is appropriate and recommends a starting point of 12 months imprisonment for the head sentence on Count 1. They further submit that the starting point is reduced by six months in light of the mitigating factors.
  12. In relation to the issue of suspension, the Crown submits that in light of the criteria for suspension outlined in *Mo'unga v R* AC 15/1997 the Accused in this case is entitled to a full suspension. He is a first-time drug offender, pleaded guilty and cooperated with the police. The mitigating factors are similar to those in *Hu'akan* above and so the same sentence should be adopted in this case.

#### **D. PRE-SENTENCE REPORT**

13. According to the pre-sentence report, the Accused is the second of three children. His parents have both passed away. He married Loata Tapa'atoutai in 2000 and they have 4 children. Unfortunately, his wife passed away from cancer and the Accused was left to look after their young children alone. His eldest son is 19 years old and has just completed Form 7 at Tonga College. The second child is 16 years

old and is in Form 5 at Tonga College. The third child is 13 years and she is in Form 2 at Tonga High School. The youngest is still 9 years old and is in class 5 at the Tofoa Primary School.

14. The Accused is employed by the Tutoe Construction as a builder and receives approximately \$215 per week. This is his only source of income which pays for their needs at home. He sometimes receives financial assistance from his brother who lives overseas.
15. In relation to the offending, the Accused did not wish to provide any further details to the probation officer except to say that he is truly remorseful for what he has done. He told the probation officer that he has served imprisonment and that when he was separated from his children that first time he had felt sorry for leaving them on their own.
16. He told the probation officer that he regrets what he did and that he feels sorry for his children as a term of imprisonment will mean that they will be left on their own.
17. The probation officer submitted that the court take into consideration that the Accused is truly remorseful, he has pleaded guilty, and the young children have already lost their mother and the Accused is now carrying out both the roles of mother and father to their children.

#### E. DISCUSSION

18. As has repeatedly been stated in our courts, the rapid rise of methamphetamine in Tonga is very concerning. 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”*
19. 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...”*
20. The Crown submits a starting point of 12 months imprisonment based on the comparable cases discussed above. In previous sentences for possession of methamphetamine under 1 gram I have set

the starting point at 12 months imprisonment even for very minimal amounts (*R v Tafuna* CR 198/20, *R v Angilau* CR 103/20, *R v Suasau* CR 120/20, *R v Lave* CR 185/20). This is to reflect the views of the courts towards this destructive and dangerous drug and to emphasize the views stated by the Court of Appeal in *Maile* and *Cato J in Ngane*.

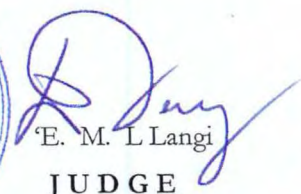
21. I therefore set a starting point of 12 months imprisonment in this case for possession of 0.08 grams of methamphetamine.
22. I reduce the starting point by six months in light of the mitigating factors of guilty plea, showing remorse and according to the criminal record filed by the Crown, this is his first drug offending. Although he entered a late guilty plea, he did save the court's time and resources and also the Crown from having to call witnesses. The final sentence is therefore six months imprisonment.
23. Turning to the question of whether I should suspend any part of the sentence, I have considered the principles in *Mo'unga v R* [1998] Tonga LR 154 in relation to suspensions and I agree with the views of the Crown that in light of the mitigating factors in this case a fully suspended sentence is warranted. I accept that the Accused is remorseful and I am prepared to give him an opportunity to rehabilitate with the assistance of drugs and alcohol rehabilitation courses offered by the Salvation Army.

#### F. SENTENCE

24. On the count of possession of a Class A drug the accused is convicted and sentenced to 6 months' imprisonment;
25. On the count of possession of a Class B drug the Accused is convicted and sentenced to 1 month imprisonment to be served concurrent to Count 1;
26. The sentence is fully suspended for 12 months on the following conditions:
  - a. Not to commit any further offences punishable by imprisonment during the period of suspension;
  - b. Placed on probation;
  - c. Undertake and complete the drugs and alcohol awareness program by the Salvation Army;
  - d. Complete 40 hours of community work under the direction of the Probation Officer.
27. As requested by the Crown, I further order that all illicit drugs seized from the Accused be destroyed.

NUKU'ALOFA: 1 February 2021



  
E. M. L. Langi  
JUDGE