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

CR 216 of 2020

BETWEEN: R E X

Prosecution

AND: TEVITA TALIA'ULI FATONGIATAU

Accused

SENTENCE

BEFORE: JUSTICE LANGI

Counsel: Ms. 'Aleamotu'a for the Prosecution
The Accused in person

Date of Sentence: 2 February, 2021

1. The Accused was charged as follows:
 - a. Count 1 – Possession of Illicit Drugs contrary to section 4 (a) (iii) of the Illicit Drugs Control Act;
 - b. Count 2 – Interfering with Evidence contrary to section 37 (b) of the Illicit Drugs Control Act;
 - c. Count 3 – Possession of Illicit Drugs contrary to section 4 (a) (iii) of the Illicit Drugs Control Act;

2. The Accused is jointly charged on Count 3 with the co-accused Sesilia Uaisele. However, the two matters were heard separately due to continued failure by the co-accused to appear in court. I convicted both Accused persons on the offences charged and adjourned the matters to be sentenced together. The co-accused again failed to appear for sentencing and a bench warrant is issued for her arrest.

03 FEB 2021
[Signature]

3. The First Accused Tevita Fatongiatau now appears before me for sentencing.

A. THE OFFENDING

4. On 02 February 2020, the Police Drugs Enforcement Taskforce received reliable information that the Accused was selling illicit drugs from his vehicle at the bus station in town.
5. The search team was formed and the Police went to the bus station and found the Accused inside his car. The second Accused, Sesilia Uaisele, was at an ice-cream truck nearby.
6. As the police approached the vehicle the Accused saw them and he put something into his mouth and chewed it. Suspecting that he was trying to destroy illicit drugs, the police pulled him out of his car and pried the Accused's mouth open. He spat out plastic packets commonly used for packing illicit drugs.
7. Police informed the Accused why they were there and proceeded to search the Accused and his vehicle. Inside the vehicle the police found the following items:
 - a. A partially opened packet of methamphetamine at the floor of the drivers' side with crystal fragments inside the packet and some fragments had fallen out onto the rug;
 - b. A test tube in the passenger side of the car containing fragments of methamphetamine;
 - c. Cash totalling \$2,290.
8. The crystal fragments tested positive for methamphetamine.

B. CROWN'S SENTENCING SUBMISSIONS

9. The Crown submits the following as aggravating features of this case:
 - a. Drug offending is an issue in Tonga;
 - b. The Accused has previous convictions for drug offending;
 - c. The circumstances in this case suggests that the Accused was a drug supplier;
 - d. The Accused demonstrated a direct condescension to the course of justice by destroying evidence during his apprehension;
10. The Crown submits that there are no mitigating factors in this case.
11. The following comparable cases were also submitted for consideration:

- a. *R v Vainikolo Selu* CR 202/2020 – The Accused pleaded guilty on arraignment to possession of 0.11 grams of methamphetamine. He had previous convictions for drug offending. This Court adopted a starting point of 12 months imprisonment. This was further increased by another 12 months in light of the aggravating factors making a total of 2 years imprisonment. Three months was deducted for the mitigating factors of early guilty plea resulting in a total sentence of 1 year and 9 months imprisonment. In this case, the Accused had breached a partial suspension granted to him in his previous convictions. He was therefore ordered to serve 12 months from that suspension cumulative to the sentence of 1 year and 9 months imposed for the current matter. The Accused is now serving two years and 9 months imprisonment with no suspension.
- b. *R v Vilimoa Afu* CR 177/2020 – the accused pleaded guilty to 0.11 grams of methamphetamine. He had no previous convictions and had cooperated with the police. The Crown had recommended a non-custodial sentence by suggesting good behaviour bond but this was not accepted by the Lord Chief Justice Whitten who reinstated the view of the Court of Appeal in *R v Maile* [2019] TOCA 17, whereby they endorsed the view expressed by Cato J in *R v Ngaue* CR 6/2018 that:
 - i. *Methamphetamine is a scourge to societies everywhere that has affected a great deal of harm and misery; and*
 - ii. The distribution and use of methamphetamine in Tonga is a significant government and community concern;

The Court of Appeal in *Maile* further commented that in prescribing a maximum penalty of 30 years imprisonment, the legislature has expressed a clear intention that significant penalties are to be imposed and therefore those involved with methamphetamine in any capacity, and even small amounts, can expect to receive a custodial sentence. Whitten LCJ further opined that the prime pre-requisites for 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 that in light of the Court of Appeal’s remarks in *Maile* above, possession of methamphetamine will rarely ever be regarded as a trivial offence. The accused was therefore sentenced to 6 months imprisonment which was fully suspended for 12 months on conditions.

12. The Crown submits that an appropriate starting point in this case is 12 months imprisonment for the head sentence in Count 1 which is the charge of possession of 0.09 grams of

methamphetamine. This should be further increased by 12 months in light of the aggravating factors, resulting in an overall sentence of 2 years imprisonment for Count 1.

13. The Crown submits that there are no mitigating circumstances in this case which would warrant a partial suspension. The Crown further submits that the sentence of 2 years imprisonment should be cumulative to the current sentence that the Accused is serving for CR 138/19 which will be completed by March 2021.

C. PRE-SENTENCE REPORT

14. The Accused is 34 years old and is the fifth child of nine children born to Meletea and Tevita Mahe Fatongiatau of Koloa, Vava'u. His mother passed away in 2012 and shortly thereafter his father left for the United States.
15. He is married to Salote Fatongiatau and they have four children aged 14, 11, 6 and 4 years. His wife and children currently reside at Afa with her sister.
16. The Accused told the probation officer that his parents made the decision to move from Vava'u to live in Tongatapu in search of better opportunities. Their main source of income was through his father's fishing and his mother's handicrafts. Unfortunately, their mother passed away in 2012 and shortly after her death their father travelled to the United States.
17. He and the rest of his siblings were left to fend for themselves. He later married and was determined to work hard to take care of his family. He claims to have started a security company called Brother Security. He told the report writer that he had also bought a piece of land at Sia'atoutai and had planned to build a house there.
18. The Accused's wife told the probation officer that at the beginning of their marriage the Accused had been a hard-working husband and father and had always managed to provide for the family needs. This all changed when the Accused began to take drugs. He eventually became unfaithful during their marriage. She stated that the children are aware of his illegal dealings and that the money and gifts he brings home are from his unlawful activities.
19. The Accused is currently serving an imprisonment term for a separate offending. She hopes that the time he is spending in prison will help him.

20. The Accused accepts the verdict of the court and is remorseful for what he had done. He feels sorry for his wife who has had to provide for the children on her own, especially now that school has started. He believes that doing time in prison will distance him from the negative impacts of people in his life.
21. The report writer recommends a fully suspended term of imprisonment on conditions.

D. DISCUSSIONS

22. I consider the fact that the Accused has previous convictions for possession of illicit drugs, a serious aggravating feature in this case. However, whilst previous convictions are relevant to establish the character of an Accused for sentencing purposes and whether he has a predilection to commit a particular type of crime, a sentencing Judge should be on guard against sentencing the Accused twice for the same offences on which he had previously been convicted and sentenced. In *R v Casey* [1931] NZLR 594 Sir Michael Meyers CJ stated at 597 *“The Court should always be careful to see that a sentence of a prisoner who has been previously convicted is not increased merely because of those previous convictions. If a sentence were increased merely on that ground it would result in the prisoner being, in effect, sentenced again for an offence which he has already expiated. We agree that the sentence passed ought to bear some relation to the intrinsic nature of the offence and gravity of the crime. But it by no means follows that the previous convictions must be ignored. It is necessary to take them into consideration, because the character of the offender frequently affects the question of the nature and gravity of the crime, and the prisoner’s previous convictions are involved in the question of his character. Further the previous convictions of a prisoner may indicate a predilection to commit the particular type of offence of which he is convicted, in which case it is the duty of the Court, for the protection of the public, to take them into consideration and lengthen the period of confinement accordingly”*.
23. This view was re-affirmed in *R v Ward* [1976] 1 NZLR 588 where it stated that views of the court in *Casey* quoted above was an authoritative statement of the policy which the court should adopt where it thinks it necessary to protect the public from the depredations of persistent offenders. The Court of Appeal in *Ward* further stated that *“regard may be had to an offender’s record when imposing sentence. This matter is not without its difficulties as the Court has to reconcile two principles: on the one hand the acceptance of the preventive purpose of punishment, and, on the other, the rejection of punishing an offender again for earlier offences”*.
24. I am mindful that any additions made to the sentence in this case does not punish the Accused twice for offences which he has been convicted and sentenced, but his previous convictions for possession of illicit drugs do indicate a predilection to commit the particular type of

offences of which he is convicted, in which case it is the duty of the Court, for the protection of the public, to take them into consideration and lengthen the period of confinement accordingly.

25. 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 or “ice” as it is most commonly known is becoming increasingly common in Tonga. Our communities are starting to feel the effects of this insidious drug through the commission of serious offences such as burglary by those who use them to fund their addiction. Methamphetamine has wreaked havoc in many overseas communities and as evidenced by the number of cases that have come before the courts, it has now made its way into our small island Kingdom and we are now feeling its destructive nature.

26. In *R v Ngaue* [2018] TOSC 38; Criminal Case 6 of 2018 (2 August 2018), Cato J described the nature of methamphetamine as follows:

“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”

27. 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...”

28. The seriousness of drug offending was also emphasized by Whitten LCJ in *Afu* when His Honour declined the Crown’s submission for the accused in that case to be given a non-custodial sentence for possession of methamphetamine. His Honour re-instated the views of

the Court of Appeal in *Maile* where it was stated that even for small amounts of a Class A drug one can expect to receive a term of imprisonment.

29. I agree with the Crown that an appropriate starting point for the head sentence in Count 1 is 12 months' imprisonment for possession of 0.09 grams of methamphetamine.
30. I further increase the starting point by 12 months for his previous convictions for possession of methamphetamine as an aggravating feature relating to him and for which he was convicted twice. The starting point is therefore two years imprisonment.
31. The Crown submits that there are no mitigating factors in this case. However, after reading the probation report I believe that he is remorseful and genuinely wishes to reform himself. He told the probation officer that he regrets what he has done and accepts the verdict of the court. For his remorse, I deduct 3 months from the starting point. His total sentence is therefore 1 year and 9 months imprisonment.
32. 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 suspension and note that a suspended sentence is not warranted in this case. He has been given several opportunities to rehabilitate but it is clear that the efforts by the rehabilitation centre and imprisonment sentences he has received has done nothing to dissuade him from a life of drugs and crime.
33. The Crown made no submissions in relation to the second count of interference with evidence. The maximum penalty for interference with evidence contrary to section 37 of the Illicit Drugs Act is 10 years imprisonment. In *R v Tafuna* CR 198/2020 I had sentenced the Accused to 3 months imprisonment for the same charge of interference with evidence. In that case he had swallowed the plastic item he put in his mouth. However, *Tafuna* had pleaded guilty at the earliest available opportunity. In this case, the Accused did not plead guilty. I therefore believe an appropriate sentence for Count 2 is 6 months imprisonment to be served concurrent to Count 1;
34. I take the fact that the offender has continuously committed drug offences even after having been convicted twice to indicate here that for the offender here, the benefits of committing

drug-related offences far outweigh the punishment. The Court has a duty to protect the community from repeat offenders like the offender here who think they will just do their time and come out and do the same thing again.

E. SENTENCE

35. On the count of possession of a Class A drug, the accused is convicted and sentenced to 1 year and 9 months imprisonment;
36. This sentence is to be served consecutive to the current sentence he is serving for CR 138/19;
37. Count 2 – The Accused is convicted and sentenced to 6 months imprisonment to be served concurrent to Count 1;
38. Count 3 – The Accused is convicted and sentenced to 12 months imprisonment to be served concurrent to Count 1;
39. As requested by the Crown, it is further ordered that the drugs seized from the accused, namely methamphetamine, be destroyed. The cash seized from the accused totalling \$2290.00 is forfeited to the Crown.

NUKU'ALOFA: 2 February 2021

The seal of the Supreme Court of Tonga is circular, featuring a central emblem with a crown and a star, surrounded by the text "SUPREME COURT TONGA" and a decorative border.
A handwritten signature in blue ink, appearing to read "E. M. L. Langi".
E. M. L. Langi
J U D G E