

Sean + AL

DPP
Crown Law

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

CR 210 of 2020

BETWEEN: R E X

-Prosecution

AND: SIONE SIUELI ANGILAU

-Accused

SENTENCE

BEFORE : JUSTICE LANGI

Counsel : Mr. 'Aunofu 'Aholelei for the Crown Prosecution
Mr. Sunia Fili for the Accused

Date of Sentence: 15 February, 2021

A. THE CHARGE

1. The Accused was charged with one count of possession of a Class A drug, namely 0.07 grams of methamphetamine, contrary to section 4 (a) (iii) of the Illicit Drugs Control Act and one count of possession of a Class B drugs namely 9.26 grams of cannabis contrary to section 4 (a) (i) of the Illicit Drugs Control Act;
2. On 11 January 2021 the Accused was re-arraigned and he pleaded guilty to both charges. He now appears before me for sentencing.

B. THE OFFENDING

3. On or about 5th December 2019, the police received reliable information that the Accused was selling drugs from his residence. They went to the Accused's house to conduct a search without a warrant pursuant to section 122 and 123 of the Tonga Police Act.

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4. The Accused was searched and the police found 8 packets of cannabis in the right pocket of his trousers.
5. The police then searched the Accused's bedroom and further found 4 packets of cannabis inside the pockets of one of his trousers and in the rear pocket of the same pair of trousers the police found one packet of methamphetamine.
6. The Accused admitted to the police that the cannabis belonged to him but that he had found the packet of methamphetamine on the road.
7. The Accused was arrested and confessed to possessing the illicit drugs.
8. The Accused has one previous conviction for possession of illicit drugs in 2019.

C. CROWN'S SENTENCING SUBMISSIONS

9. 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;
 - c. The Accused has previous conviction for possession of illicit drugs and therefore illustrates no signs of being rehabilitated. He was sentenced for his previous drug offending in May 2019 and within a few months he re-offended again on 5 December 2019;
 - d. A test tube was found inside the Accused's house indicating that he is a user;
 - e. The amount of cannabis found in small packets indicates supply and an intention to sell.
10. The Crown submit the following as mitigating factors in support of a reduction of sentence:
 - a. The Accused's guilty plea;
 - b. The Accused is married and has a family;
 - c. The amount of illicit drugs found is minimal;
 - d. The Accused cooperated with the police.
11. 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 LCJ Whitten 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 Kitione Finau* CR 33/2019 – the Accused pleaded guilty to possession of 0.03 grams of methamphetamine. He was a first-time offender, pleaded guilty at the first available opportunity and cooperated with the police. He was sentenced to 4 months' imprisonment, fully suspended on conditions.
- c. *R v Siaso Kalonihea* CR 306/2020 and CR 258/2020– The Accused pleaded guilty to possession of 0.07 grams of methamphetamine for 306/20 and possession of 0.57 grams of cannabis and possession of 0.38 grams of methamphetamine. Both matters were sentenced together. A starting point of 12 months' imprisonment was set for CR 306/20 and a further 6 months added for his offending in CR 258/20. Six months was deducted for his guilty plea and mitigating factors which included his young age and that he had a family. The Accused was ordered to serve 6 months' imprisonment and the final six months was suspended on conditions.
- d. *R v Ma'ulupe Soakimi* CR 130/20 – The Accused pleaded guilty to one count of possession of 0.05 grams of methamphetamine and one count of possession of 0.41 grams of cannabis. For both counts the Accused was sentenced to a bond of good behaviour for 12 months pursuant to section 198 of the Criminal Offences Act, put on probation for 12 months and he was to complete the Salvation Army Drug and Alcohol rehabilitation under the direction of the probation office.
- e. *R v Fainga Lavulo Tengange* CR 231/19 – The Accused pleaded guilty to possession of 0.38 grams of methamphetamine. Lord Chief Justice Whitten opined that section 198 of the Criminal Offences Act does not apply to offences of methamphetamine regardless of the amount. This is because possession of methamphetamine is not of a 'trivial nature'. His Lordship further endorsed the decision of the Court of Appeal in *R v Maile*, where it had been held that those involved with methamphetamine in any capacity, and even small amounts, can expect to receive custodial sentences. The Accused was sentenced to 6 months' imprisonment which was fully suspended on conditions.

f. *R v Viliami Mangisi CR 10/2018* – The Accused was convicted by a jury to possession of 1969.14 grams of methamphetamine and one count of attempted export of illicit drugs. On the possession charge he was sentenced to 12 years and six months’ imprisonment and for the attempted export charge he was sentenced to five years’ imprisonment which was concurrent to the first count. In this case, Cato J adopted the sentencing guidelines in *Zhang v R* [2019] where the New Zealand Court of appeal revised the guidelines in *Fatu* [2006] 2 NZLR 72 (CA). The band in *Fatu* have been applied in Tonga as guidelines. However, in this case, Cato J adopted the revised guidelines in *Zhang* which were as follows:

- i. Band 1 for less than 5 grams – community service – 4 years
- ii. Band 2 for less than 250 grams – 2 – 9 years;
- iii. Band 3 for less than 500 grams – 6 – 12 years;
- iv. Band 4 for less than 2 kilos – 8 – 16 years;
- v. Band 5 for more than 2 kilos – 10 years to life;

12. 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 3 months in light of the mitigating factors leaving a total of 9 months’ imprisonment and for the last six months to be suspended in light of the factors outlined in *Mo’unga v Rex* AC 15/1997 in relation to suspension.

D. PR-SENTENCE REPORT

13. The Accused is 41 years old and he is the eldest of two children. He migrated to the United States with his parents in 1986 where he lived for most of his young life in Hawaii. He comes from a well-respected family who are known for their commitment to the Kailua Mormon Church.
14. The Accused attended Kailua High School where he completed Year 12. His parents relocated to the mainland in 1993 but the Accused chose to remain in Hawaii. He then married Ms. Verily Fotu but that marriage ended in divorce.
15. The Accused was convicted in Hawaii for a charge of aggravated police assault where he served a total of 8 years’ imprisonment. Upon release he was deported back to Tonga in 2009.
16. He later married Seneti Ma’u of Haveluloto and they have two children aged 9 and 3 years.

17. The Accused informed the probation that he accepts the charges and that he is guilty. He told the officer that he is remorseful for what he has done.
18. The probation officer recommended that the Accused is ordered to undertake rehabilitation courses in addition to any sentence given.

E. DEFENCE SUBMISSIONS

19. Mr. Fili for the Accused submitted that the court takes into consideration the Accused's guilty plea and his remorse. Counsel informed the court that the Accused has voluntarily signed up with the Salvation Army Drugs and Alcohol courses and has been working with them for the past month. Counsel stated that this is an attempt by the Accused to help himself turn his life around
20. Counsel also submitted that he does not agree with the Crown that the Accused cannot be rehabilitated because the Accused has shown signs of wanting to change. He said that this is supported by the views of the probation officer who stated in the report that the Accused is genuinely remorseful and the officer recommended the Accused is sentenced to take rehabilitation courses.

F. DISCUSSION

21. 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”

22. 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...”

23. 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 Ngaue*.
24. I therefore set a starting point of 12 months’ imprisonment in this case for possession of 0.07 grams of methamphetamine.
25. As highlighted by the Crown, the Accused has previous conviction for possession of illicit drugs. This is particularly concerning because the Accused was sentenced for his first drug offending in May 2019 and only a few months later he re-offended in December 2019. This demonstrates a blatant disregard for the laws of this country and also tells me that the rehabilitation courses undertaken had no effect on him at all. 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. 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 do indicate a predilection to commit drug-related offences, 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. I therefore increase the starting point in this case by 6 months’ imprisonment making a total of 18 months’ imprisonment.
26. For the mitigating factors of an early guilty plea, cooperation with the police and showing some remorse for his actions, I deduct 6 months. This leaves a total of 12 months’ imprisonment for Count 1.
27. 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 partial suspension of the

sentence is warranted in this case. I accept that the Accused is remorseful and am prepared to give him an opportunity to again undertake the rehabilitation courses, hopefully this time he will take the courses seriously in order to avoid a life of crime. I order that the last 9 months of the sentence is suspended for 12 months. He will therefore serve 3 months' imprisonment.

28. For Count 2, the Accused is sentenced to 3 months' imprisonment to be served concurrent to Count 1;

G. SENTENCE

29. On the count of possession of a Class A drug the accused is convicted and sentenced to 12 months' imprisonment;

30. On the count of possession of a Class B drug the Accused is convicted and sentenced 3 months' imprisonment to be served concurrent to Count 1;

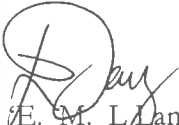
31. The last 9 months of the sentence is suspended for 12 months on the following conditions:

- a. Not to commit any further offences punishable by imprisonment during the period of suspension;
- b. Placed on probation;
- c. Undertake and complete drugs and alcohol awareness program as directed by the Probation Office;
- d. The Accused is to report to the Probation Office within 48 hours of his release from prison.

32. As requested by the Crown, I further order that all illicit drugs seized from the Accused be destroyed.

NUKU'ALOFA: 15 February 2021




E. M. L. Langi
JUDGE