

Seen & Filed

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

CR 191 & 192 of 2020

BETWEEN: R E X
-Prosecution
AND: (1) 'EPELI TAIONE
(2) GREED TONGAMOA
-Defendants

SENTENCING REMARKS

BEFORE : ACTING JUSTICE LANGI
Counsel : Mr. Tevita 'Aho for the Crown Prosecution
Mr. Sifa Tu'utafaiva for the First Accused
Mr. Sione Taione for the Second Accused

Date of Sentence: 26 February, 2021

A. THE CHARGE

1. The First Accused was charged with one count of supply of an illicit drug namely 0.01 grams of methamphetamine, contrary to section 4 (a) of the Illicit Drugs Control Act;
2. The Second Accused was charged with one count of possession of an illicit drug namely 0.01 grams of cocaine contrary to section;
3. Both Accused persons were convicted after a defended hearing and they now appear before me for sentencing.

B. THE OFFENDING

4. On or about 25 January 2020 at around 3:50am, the Drugs Enforcement Taskforce received reliable information that the First Accused, Kuliti Tongamoa, was selling illicit drugs from his vehicle repair shop at 'Umusi.

next 02/03/21
[Signature]

5. At around 4.05am, members of the Taskforce and the Tactical Response Group went to the repair shop to conduct a search. They found a bag containing empty dealer bags and white powder. Another bag was found containing cash and more dealer bags. The total amount of money found inside the bags was TOP\$3724.
6. Inside one of the rooms the Police found the Accused 'Eveli Taione sleeping on a mattress. Next to the mattress the Police found an Ipad. On top of the Ipad the Police found a straw and white powder residue. The Police also seized a total of \$1470 from the Second Accused's wallet.
7. The white powder seized from the workplace was analysed and tested positive for cocaine.

C. CROWN'S SENTENCING SUBMISSIONS

8. The Crown submits the following as aggravating factors in this case:
 - a. The possession and supply of a Class A drug is a scourge on our society and the Courts should impose sentences which deters and denunciates its use;
 - b. The Courts should impose harsh sentences on individuals who supply or use illicit drugs;
 - c. Cocaine is rarely seen in Tonga and a sentence should be imposed which reflects the danger and harm of using this substance;
 - d. The Accused Tongamoa has previous convictions:
 - i. In 2000, he was convicted for assault in the Magistrate Court and fined \$50;
 - ii. In 2010 he was convicted of possession of illicit drugs and sentenced to 3 years' probation, 120 hours of community service and enrolment in a drugs course;
9. The Crown submit the following as mitigating factors in support of a reduction of sentence:
 - a. This is the Second Accused's first drug offence;
10. The Crown also submit the following sentencing comparable to assist me in determining the appropriate sentence:
 - a. *R v Maile* AC 23/2018 – in this case respondent pleaded guilty to possession of 0.52 grams of methamphetamine. He was discharged without a conviction by the sentencing judge. The Court of appeal allowed the Crowns appeal on sentence and imposed a sentence of 9 months imprisonment which was fully suspended on conditions;

- b. *R v Mangisi* CR 10/2018 – in this case Cato J discussed sentencing bands previously applied in New Zealand under *R v Fatu* [2006] 2NZLR 72 (CA) 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 5 grams was 2 – 4.5 years. In *Zhang*, this was reformed to community – 4 years’ imprisonment;
11. In relation to the First Accused, the Crown submits the following sentence is imposed:
 - a. 9 months imprisonment fully suspended on conditions to be set by the Court;
 - b. The Crown ask that one of the conditions be that the Accused make a payment of compensation pursuant to section 25 of the Criminal Offences Act of \$3000 to the Government of Tonga made out to the Forfeited and Confiscated Assets Fund;
 - c. That the cash seized from the Accused is forfeited to the Crown pursuant to section 33 of the Illicit Drugs Control.
12. In relation to the Second Accused, the Crown submits the following sentence is imposed:
 - a. 6 months imprisonment to be fully suspended on conditions to be set down by the Court;
 - b. The Crown ask that one of the conditions be that the Accused make a payment of compensation pursuant to section 25 of the Criminal Offences Act of \$1500 to the Government of Tonga and made out to the Forfeited and Confiscated Assets Fund;
 - c. That the cash seized from the Second Accused is forfeited to the Crown pursuant to section 33 of the Illicit Drugs Control Act;
 - d. Lastly, the Crown seeks an order for the illicit drugs to be destroyed;
13. In addition to the written submissions by the Crown, Mr. ‘Aho also made oral submissions in support of the proposed sentences outlined above.
14. He submitted that the sentence of 9 months was arrived at after considering the approach taken in *Maile*. In that case the Accused was charge with possession of 0.56 grams of methamphetamine which is a lot more. Additionally, counsel submitted that a charge of supply is completely different from possession and the rarity of cocaine also makes it more serious.
15. Despite the sentence proposed, counsel submitted that any sentence passed will not be opposed because at the end of the day the Crown is recommending a fully suspended sentence.

16. In relation to the suggestion for compensation to be one of the conditions of the suspension of the sentence, Counsel rightly corrected his written submission and stated that an order for compensation cannot be added as a condition of the suspension. This is because section 25 (3) states that the order for compensation may be in addition to or in substitution of any other punishment. As such, the order for compensation should be a separate sentence.
17. Mr. 'Aho submitted that in this case the word 'person' in section 25 is not limited to just a person but the context is wide enough to include the state. He submitted that the court has seen the loss suffered and has ruled in previous cases that drugs has been a scourge in society and therefore accepting that the country is entitled to compensation for the loss suffered.
18. In addition to the written submissions on forfeiture of the money, Mr. 'Aho referred me to paragraph 82 (ii) of my verdict in this case where I had stated that "*I am satisfied beyond a reasonable doubt that the first accused supplied cocaine to Mr. Taione for the following reasons:*
- ii. *A bag containing substantial amounts of money (\$2734) were found at the first accused's workplace. He admitted to the officers that the bag belonged to him. Inside the bag were his driver's license and identification card. The cash included a number of \$100 (x14) and \$50 (x25) bills which Officer Leveni stated was consistent with the market price for cocaine and methamphetamine. Also, inside the bag were empty packets commonly used for packing of illicit drugs. Officers Leveni and Fifita both gave evidence that they have frequently seen these same packs in nearly all the places they raid for illicit drugs.*
19. Mr. 'Aho submitted that in light of the above passage, the circumstances fall within section 33 of the Illicit Drugs Control Act and the money seized from the First Accused should be forfeited to the Crown;
20. In relation to the Second Accused, the text messages on the Accused's phone indicating that he was sniffing cocaine at Creed's, and the evidence of Officer Leveni in relation to the price of cocaine and the Accused's conviction for possession is enough to find that the money seized is materially associated with the buying or purchasing of illicit drugs and therefore falls squarely with what section 33 of the Act says should be forfeited.

D. DEFENCE SUBMISSIONS

FIRST ACCUSED: CREED TONGAMOA

21. Mr. Tu'utafaiva for the First Accused made oral submissions on sentencing in reply to the submissions by the Crown.
22. Firstly, counsel submitted that the 9 months' imprisonment recommended by the Crown is too excessive taking into consideration the minimal amount of the illicit drugs (0.01grams). He said that there was no evidence that the Accused had received money for that quantity of cocaine.
23. Counsel also submitted that there was evidence from the police officers about the information received from informers alleging that the Accused was selling drugs to people in his workshop. Counsel submitted that for the purpose of sentencing no weight should be given to those evidence because they were made in the context of the Crown justifying the search without a warrant.
24. Counsel submitted that 9 months' imprisonment would usually be imposed in cases where the weight of methamphetamine or cocaine would be around .3 to .4 grams. He submitted that 0.01 grams was a very small amount and although it is unlawful, it is questionable whether it is useable for consumption or use. Additionally, counsel submitted that the Crown submission that supply is a separate more serious offence is wrong as the law makes no differentiation as far as penalty is provided in the Illicit Drugs Control Act.
25. In relation to the Crowns request for compensation, Mr. Tu'utafaiva submitted that there is no evidence to support this recommendation. He stated that section 25 (1) of the Criminal Offences Act gives the court discretion to order compensation to any person convicted of an offence if the offence injured someone. However, in this case there is no such evidence. He conceded that the Courts of have made statements to the effect that drugs are scourge to Tonga, but we are only talking about 0.01 grams of cocaine. How is 0.01 grams of cocaine seen as a scourge to Tonga?
26. Counsel also stated that there is no rationale for a claim of compensation especially in light of the weight of the drugs when compared to other cases involving huge amounts of illicit drugs (Lisiata 'Otuhouma case for 3kgs and Kini Mangisi case for about 2kgs) but no order for compensation was made.
27. Moreover, it is unclear how the Crown had arrived at an amount of \$3000 as compensation for the people of Tonga. Counsel submitted that this was an unrealistic submission by the Crown

and should not be taken into consideration. There is simply no evidence that the 0.01grams of cocaine had caused any harm to anyone in Tonga;

28. In respect of the application by the Crown to forfeit the cash seized from the First Accused, Mr. Tu'utafaiva submitted that this court considered the issue in respect of section 33 in the case of *Rex v Siosifa Fotu*. In the current case, there is no evidence to link the money seized by the police to the supply of 0.01 grams of cocaine to Mr. Taione. There is also no evidence that Mr. Taione gave any money to the First Accused which would be relevant to deciding whether to make an order to forfeit the money. In short, there is no evidence that any money was exchanged for the purpose to supply. As such, the money does not fall within the meaning of the phrase "goods or properties in respect of which the offence was committed".

SECOND ACCUSED: 'EPELI TAIONE

29. Mr. Sione Taione for the Second Accused conceded that a custodial sentence is expected in light of *Rex v Maile*. However, he submitted that length or period of imprisonment should reflect the minimal amount of 0.01 grams. He submitted that six months' imprisonment is too excessive especially given that the Accused is a first offender.

30. In relation to the issue of compensation, counsel took on the submissions made by Mr. Tu'utafaiva and further submitted that there has been no known case of where compensation has been ordered for such a minimal amount;

31. In relation to the issue of forfeiture of the cash seized, counsel also took on the submissions by Mr. Tu'utafaiva and further submitted that there is no evidence to link the money seized from the Accused to the offence that was committed.

E. PRE-SENTENCE REPORT

FIRST ACCUSED: CREED TONGAMOA

32. The Accused is the youngest of 8 children. He is married to Halaevalu Lasitani Tongamoa and they have four children. They rent a house at Fangaloto

33. The Accused left with his family to the United States when he was just two years old. He had a good upbringing but unfortunately, he became involved with the wrong friends and ended up committing criminal offences in the U.S. He was deported back to Tonga in 1998 where he met his wife and married her in 1999.

34. His eldest daughter attends the University of the South Pacific and two are still in High School. The youngest child is a toddler.
35. The Accused is the sole breadwinner for the family. Their main source of income is derived from the Accused's mechanical services.
36. The Accused and his family are members of the Assemblies of God church located at Vuna Road at Fasi.
37. In relation to the offending, the Accused maintained his innocence and told the probation officer that the drugs did not belong to him and that he does not know how it got to house.
38. His wife told the probation officer that she has never seen the Accused use illicit drugs neither has she found any illicit drugs on him.
39. A number of reference letters were submitted on behalf of the Accused. Mr. Penisimani Ma'u who is the Assistant Senior Pastor wrote a letter to certify that the Accused and his family are members of the church.
40. Letters were also received from his wife who stated that the Accused is a dedicated husband and father and seeks the courts leniency to give the Accused a second chance. The Accused's daughter also wrote a letter seeking the courts leniency as her father is the sole provider for the family.
41. The District Officer of Kolofo'ou also wrote a letter to inform the court that the Accused is an upstanding member of the community and well loved by everyone. He has made many contributions to the community and he is a happy family man.
42. The probation officer assesses the Accused of someone with good character and recommends a suspended sentence and for the Accused to undertake rehabilitation course and to be placed on probation.

SECOND ACCUSED 'EPELI TAIONE

43. The Second Accused is the third of seven children born to Selafoni and Latai Taione of 'Utui, Vava'u. His father was a teacher and so they moved around a lot because of his father's teaching job.

44. The Accused grew up in the Seventh Day Adventist faith and attended Beulah College up to Form 5 and then completed Form 6 at 'Apifo'ou College. He then secured a scholarship to study at New Zealand so he migrated there. He later left for the United Kingdom where he was signed up by one of the rugby clubs there. He told the probation officer that his first pay was sent to Tonga to buy a house for his family.
45. The Accused is married to Hon. Salote Lupepau'u Tuita who is a member of the Royal Family. He has two children from an earlier relationship but with whom he remains in close contact with. He also has a good relationship with his wife's daughter from her first marriage. They are also currently parents to Master Reggie Taione who they adopted seven years ago.
46. The Accused's wife informed the probation officer that her husband is a genuine selfless sacrificial person who is family-oriented and obligated to caring not only for their own family, but also for his mother and siblings as well.
47. The district officer of Kolofo'ou also states that the Accused is supportive of all the sports fundraisings and is passionate in his support for young people.
48. The Accused is currently employed by an American-owned company called 'Tristen Technologies' and he is the managing director for the sub-branch here in Tonga. He could not confirm his earnings to the probation officer because the earnings vary depending on project availability. The reference letter submitted from the company states that they are currently exploring opportunities to work with the Ministry of Education.
49. The Accused is also a member of the UNISON Company where his wife is the Director. He assists the company in arranging for importation of heavy machinery from Honolulu. This is a company licensed to import and export goods.
50. The Accused also previously held the position of Chairperson of the Tonga Rugby Union Committee from 2012 to 2015.
51. In relation to the offending, the Accused maintains that he has no knowledge of the substances he is charged with. He told the probation officer that he only recalls having a fight with his wife and she locked him out of their apartment which is why he had gone to the First Accused's house. He said that he was very drunk and could not recall everything that happened. He only remembers

vomiting and being assisted to the mattress where he was later found. He was only woken up by the police who questioned him about the white substance.

52. The Accused's wife told the probation officer that since they married in 2013 she has never seen her husband use drugs. She said that the Accused smokes cigarettes but has no association with any form of illicit drugs. She told the probation officer that she believes that the Accused is innocent but also states that this matter has had a positive effect on him and their marriage relationship as he is more focused on his family now than before and he is more grounded and humbled.
53. The Accused told the probation officer that although he is innocent, he takes this matter as a positive thing which has made him want to improve his life. His wife also agrees that this matter has drawn them closer to each other. They believe that rehabilitation is not required because there is no indication of substance abuse.
54. The probation officer recommends a suspended sentence with conditions to be on probation and a few hours of community work.

F. DISCUSSION

55. As I have often stated in previous cases sentenced by me, the courts attitude to drug offending has been well publicised and everyone in our community should be aware of it by now.
56. The unequivocal message that must be sent out to the youths and the people who use or deal with illicit drugs is that if you involve yourself in drug offending you will receive an imprisonment term as a general rule and the only question for the judge is how long is appropriate. Indeed, this was the position of the Court of Appeal in *Maile* which was emphasized and re-instated by LCJ Whitten in *Afu*.

FIRST ACCUSED: CREED TONGAMOA

57. The Crown submits an overall sentence of 9 months imprisonment for the supply of 0.01grams of cocaine;
58. This court has consistently stated that anyone convicted of possession of a Class A drug under 1 gram will automatically receive a starting point of 12 months imprisonment no matter what the amount. This is to reflect the views of 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...”

59. Although the Illicit Drugs Control Act does not differentiate between possession and supply in terms of penalty, Mr. Tu’utafaiva did concede that supplying of illicit drugs should be treated as more serious than possession. The reason for this approach is set out by Lord Chief Justice Whitten in *Rex v Wolfgramm*[2020] TOSC 78; CR 35 to 41/19 where his Honour stated that ‘supply is the progenitor to subsequent interactions...such as use and addiction...In other words, without supply there could never be use or addiction’, in this case, to cocaine.
60. Therefore, for the supply of a Class A illicit drug under 1 gram, I set a starting point of 15 months’ imprisonment. This starting point also takes into consideration the fact that the Accused is not remorseful and maintains his innocence and for which I find an aggravating factor in this case. For him to maintain his innocence after having been caught in possession of damning circumstantial evidence indicating dealing in drugs and having been convicted of supplying cocaine to Mr. Taione demonstrates a reckless and could not care less attitude.
61. In my view, there are no mitigating factors to warrant a decrease in the starting point of 15 months’ imprisonment.
62. I have considered the principles in *Mo’unga v R* [1998] Tonga LR 154 and note that those principles do not apply in the present case. The Accused is not a first-time offender, he did not plead guilty at the earliest available opportunity and he is not remorseful. However, given the minimal amount of 0.01grams of cocaine which would be at the lowest end of the spectrum of weights and the recommendation by the Crown of a full suspension in any sentence given, I consider it appropriate to fully suspend the sentence on conditions.
63. In relation to compensation, I decline to grant this order requested by the Crown and I accept the submission by Defence Counsel that there is no sufficient justification to convince this court that compensation should also be ordered in addition to the term of imprisonment. It is not clear how the Crown was able to come up with the amount of \$3000 as compensation for alleged injury to the state caused by 0.01grams of cocaine. In the words of defence counsel, this is an unrealistic proposition and I do not find it appropriate in this case especially taking into consideration the very minimal amount of cocaine involved.

64. Because of the infinitesimally small amount of cocaine, I do not believe that an order for community service is appropriate;

SECOND ACCUSED: 'EPELI TAIONE

65. The Crown submits an overall sentence of 6 months' imprisonment for possession of 0.01 grams of cocaine;

66. As already stated above, this court has consistently set a starting point of 12 months' imprisonment for possession of a Class A illicit drug below 1 gram. I therefore set a starting point in this case of 12 months' imprisonment.

67. I deduct 6 months from the starting in light of the fact that up until now he has had a clean record.

68. As with the sentence for Tongamoa, I order that the sentence is suspended in full for 12 months upon conditions;

69. I note that the probation officer is of the opinion that no rehabilitation courses should be ordered because the Accused denies using and therefore does not have a drug problem. This is inconsistent with the evidence upon which I had convicted the Accused and inconsistent with his text message that he is sniffing at Creeds. It is disappointing that the Accused continues to maintain his innocence and maintains that he has no drug problem as this sort of behaviour is a sure recipe for re-offending.

70. Because of the infinitesimally small amount of cocaine in this case, I do not believe that an order for community service is appropriate.

G. SENTENCE

CREED TONGAMOA

71. On the count of supply of a Class A drugs (0.01) the accused is convicted and sentenced to 15 months' imprisonment;

72. The sentence is fully suspended for two years on the following conditions:

- a. The Accused is not to commit any further offences punishable by imprisonment during the period of his suspension;
- b. The Accused is put on probation;

- c. The Accused is to complete rehabilitation courses on drugs and alcohol as directed by the Probation Office.

'EPELI TAIONE

73. On the count of possession of a Class A drugs the Accused is convicted and sentenced to 6 months' imprisonment;
74. The sentence is fully suspended for 12 months on the following conditions:
 - a. Not to commit any further offences punishable by imprisonment for a period of 1 year;
 - b. The accused is to be placed on probation during the period of his suspension;
 - c. The accused is to complete rehabilitation courses on drugs and alcohol as directed by the Probation Office;

H. FORFEITURE OF CASH SEIZED

75. Section 33 of the Illicit Drugs Control Act deals with the issue of forfeiture. That section states:

33 Forfeiture

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.

76. In my view, the wording of section 33 does not require for an order for forfeiture because forfeiture is an automatic consequence of conviction.
77. However, both Defence counsels submit that the cash seized from their clients are not 'goods or property in respect of which the offence was committed'. They refer me to my judgement in *Rex v Fotu CR 311/2020* where the Crown had applied for forfeiture of a vehicle where the Accused had been sitting when he was arrested for possession of methamphetamine. I ruled in that case that a vehicle did not fall under the meaning of 'goods or property in respect of which the offence was committed'. If a vehicle were to fall within that meaning, then that will mean that the Crown will apply for forfeiture of every house where an Accused is arrested for possession of illicit drugs.
78. The circumstance in *Fotu* differ from this case because this is an application to forfeit the cash found on the Accused's' which is different from the issues in *Fotu*. Of relevance though is the fact that in *Fotu* I had ordered the forfeiture of the cash found on the Accused.

79. I accept the submissions submitted by the Crown that in this case the cash seized by the Police falls within 'goods or property...in respect of which the offence was committed'. As highlighted by Mr. 'Aho I had convicted the First Accused based on the evidence I refer to above. I therefore find that the cash falls within goods and property in respect of which the offence as committed;
80. The same goes to the Second Accused. I order that the cash seized from him is forfeited to the Crown. All other personal belongings are to be returned to both Accused's.
81. I further order that all illicit drugs seized from the Accused is destroyed.

NUKU'ALOFA: 26 February 2020

