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

CR 266 of 2020

REX
-v-
'ASAELI TEULILO

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mrs Aonima for the Prosecution
Ms Kafoa for the Accused
Date of trial: 1, 2 March 2021
Date of sentence: 2 March 2021
Date of remarks: 3 March 2021

Background

1. On 29 September 2020, the accused, who was then represented by Mr Tu'utafaiva, pleaded not guilty to:
 - (a) possession of 1.3 grams of cocaine contrary to s.4(a)(iii) of the *Illicit Drugs Control Act* ("Act"); and
 - (b) possession of 0.1 of a gram of cannabis contrary to s.4(a)(i) of the said Act.
2. On that date, the trial was listed to commence on 1 March 2021 on an estimate of three days.
3. The accused was late for the commencement of this trial and he appeared without counsel. He endeavoured to explain that he was confused about this case and a number of others he has at present and that he did not know whether Mr Tu'utafaiva was still representing him. The matter was stood down until 10 AM on 2 March 2021 for the accused to speak with Mr Tu'utafaiva. Given the accused had had five months from arraignment within which to arrange counsel for his trial, I indicated that the trial would proceed at that time, with or without counsel.

rec'd 03/03/21
llc

4. At the resumption of the trial the next day, the accused informed the court that he had still not spoken with Mr Tu'utafaiva, but that he had deposited funds with Mr Tu'utafaiva's firm for representation in this case. Mr Tu'utafaiva was in fact appearing before Cooper J in another matter in court 3. The matter was stood down until 2:30 PM.
5. At approximately 12:20 PM, the prosecutor and Mr Tu'utafaiva attended my chambers. He explained that he had not heard from the accused since his arraignment until the afternoon of 1 March 2021. As Mr Tu'utafaiva was busy with other clients, was unable to speak with you choose at that time although he did agree that his office staff request of the accused to deposit funds on account as mentioned above. Mr Tu'utafaiva added that he had given the accused certain advice prior to his arraignment last year and that the accused had in any event pleaded not guilty as scrubbed above. Mr Tu'utafaiva also stated that he had arranged for one of his associates, Ms Kafoa, to attend court at 2:30 PM, but that in the circumstances, she would not be in a position to be able to proceed with the trial then.
6. At 2:30 PM that day, Ms Kafoa appeared and informed the court that after speaking with the accused, he wished to change his plea. He was then rearraigned and pleaded guilty to both counts.
7. Ms Kafoa asked for the matter to them be adjourned in order to prepare submissions on sentence. Mrs Aonima was prepared to makes submissions on sentence then and there. In light of the history of the matter and the relatively small amounts of the drugs in question, I determined to proceed with the sentencing exercise by asking the accused questions in relation to his antecedents and the offending, with the reservation that if after that process, Ms Kafoa considered there were other matters which ought be investigated before sentence was passed, we would revisit the application for adjournment.

The offending

8. On or about 3 September 2019, a team from the drug enforcement task force, tactical response group and dog detector unit, conducted a search without warrant a residence in Ngele'ia. During the search, the accused arrived at the

property in a motor vehicle. The police searched the vehicle on suspicion that it contained illicit drugs or other items relating to drugs. During that search, police found a number of items including crumbs of cocaine and a test tube. The accused told police that it was "his leftover". He was cautioned and then arrested for possession.

9. The same team then conducted a search at the residence of the accused's de facto partner at 'Anana. That search was said to have been conducted pursuant to credible information received by police after arresting the accused that there were drugs at that house. When they arrived at the property, the accused argued with the police that as it was not his house, he would not enter it. The police then waited for the accused's partner to arrive, whereupon they informed her of their powers to search the property without a warrant. The accused's partner told police that only she and the accused had been living there for about the last month. During that search, police found cocaine and cannabis. The accused's partner disavowed any knowledge or ownership of the drugs. The accused told police that they belonged to him. He was cautioned again and arrested for further possession of illicit drugs.
10. On 12 February 2020, the drugs were tested and found to be cocaine weighing 1.3 g and cannabis weighing 0.1 g.
11. On 7 September 2019, the accused was interviewed but he chose to only speak in court.
12. Notwithstanding the accused's own information about having a number of other little proceedings on foot at the moment, at present, he only has one previous conviction for drunkenness. In other words, he has a relevantly clean record.

Crown's submissions

13. Mrs Aonima submitted that:
 - (a) the appropriate starting point on the head count, count 1, being possession of a class A drug over 1 gram, was 18 months' imprisonment;

- (b) by way of mitigation for the lack of relevant previous convictions and the albeit late guilty plea, that starting point should be reduced by between three and six months; and
- (c) the resulting sentence should be partially suspended.

The Defendant

14. In response to my questions, the defendant provided the following information:
- (a) He is currently 32 years of age.
 - (b) He grew up in Tongatapu. He is the eldest of six children. His parents separated when he was young his mother raised he and his siblings. During his childhood, his family moved around the Pacific and he attended schools in Fiji and Samoa where he dropped out during Form 7.
 - (c) He is not married although he has been in a relationship with his current de facto partner for approximately two years.
 - (d) He has two children from previous relationships, aged 20 and 10, with whom he has little involvement.
 - (e) He is employed during the day at his partner's business as a warehouse manager. Since 2018, he works at night as a DJ. Prior to that, he lived in New Zealand for about seven years where he was working in sales for an electronics company.
 - (f) From his DJ work, he earns up to \$1,200 per week. Of that, gives his mother \$300-\$400 per week for her support and that of his siblings who are unemployed from time to time. Last year, he also provided financial support for one of his sister's schooling overseas.
 - (g) He first got involved with illicit drugs in 2019 while working as a DJ and nightclubs.
 - (h) He professed to being "clean", meaning he has not used any illicit drugs, for the last 3 to 4 months. His constant sniffing and slurred speech cast some

doubt on that. In any event, he has not received any counselling or attended any rehabilitation programs.

15. The Defendant asked the Court for “a chance to move on with (his) life” and to “make it better”.
16. Ms Kafoa submitted that any term of imprisonment should be fully suspended because the defendant is the sole breadwinner for his mother and siblings at the moment. She was not aware of previous decisions of this Court or the Court of Appeal in relation to the "breadwinner plea".

Consideration

17. As discussed recently in *R v PMP* [2020] TOSC 112, in:
 - (a) *R v 'Uhila Latu* (CR 66/19) - the defendant pleaded guilty to possession of 1.29g of methamphetamine, 5.63g of cannabis and cultivating 3.36g of cannabis plant. Cato J considered the methamphetamine charge to be the most serious and set a starting point of 18 months' imprisonment. For the defendant's guilty plea and lack of previous convictions, four months were deducted resulting in a head sentence of one year and two months imprisonment. The final six months were suspended. Sentences of two months imprisonment for the cannabis offence and two months imprisonment for the cultivation offences were also imposed to be served concurrently with the methamphetamine sentence.
 - (b) *R v Siu Holani* (CR 65/19) - the defendant pleaded guilty at the first available opportunity to supplying 1.58 grams of methamphetamine. He also had 25 dealer bags ready for distribution. He was sentenced to two years imprisonment.
18. Cocaine and methamphetamine are both class A drugs, which, as at the date of the offence, carried a statutory maximum penalty of a \$1 million fine or 30 years imprisonment or both. Having regard to the amount of the cocaine, the appropriate starting point is 18 months' imprisonment. I order one month imprisonment for the cannabis to be served concurrently.

19. On the question of mitigation on the head sentence for the cocaine, the defendant has a relevantly good previous record and he has also pleaded guilty, albeit late. Had he pleaded guilty at arraignment, I would have been inclined to discount the starting point by six months. However, because of his late guilty plea, in the face of a very strong prosecution evidence, I will reduce the starting point by four months, resulting in a net sentence of 14 months imprisonment.
20. On the issue of suspension, the considerations discussed in *Mo'unga v R* [1998] Tonga LR 154 at 157, here, produce a mixed result. He is not young. He has a relevantly satisfactory record. I have some faith in his prospects of rehabilitation given what he told the Court but his continued rehabilitation can be catered for by other orders. He did not fully co-operate with the authorities. His late guilty plea reflects either a lack of genuine remorse, or lack of judgment in light of legal advice he received prior to his arraignment and the strength of the Prosecution case against him, or both. There are no other aspects of the case which can be viewed as reducing his culpability. I am also reminded that under the recent amendments to the Act, any offences committed after 26 November 2020, involving more than 0.25 grams of a class A drug are to be deemed as supply, for which harsher penalties than mere possession may be expected.
21. I reject the breadwinner plea as a basis for full suspension for the reasons discussed in *R v PMP*, *ibid*, at [22].
22. This is simply another unfortunate tale of, here, a mature man who has some life experience and has been earning a sizeable income, a part of which he pays to support his family, succumbing to illicit drugs. While cocaine is perhaps not as prevalent in Tonga as methamphetamine, it is of the same class under the Act with the same ultimate destructive potential, not just for the user, but others associated with him or her.
23. In those circumstances, I agree with the Crown's submission that only partial suspension is appropriate. Consistent with the sentence in *R v 'Uhila Latu* (referred to above), I will order that of the 14 month term, the final six months be suspended on conditions.

Result

24. The defendant is convicted of one count of unlawful possession of cocaine and one count of unlawful possession of cannabis, for which he is sentenced to:
- (a) 14 months imprisonment on count 1; and
 - (b) 1 month imprisonment on count 2, to be served concurrently with the sentence imposed on count 1.
25. The final six months of the said term of imprisonment is to be suspended for a period of 12 months, on conditions that during that period of suspension, the defendant is to:
- (a) not commit any offence punishable by imprisonment;
 - (b) be placed on probation;
 - (c) report to the probation office within 48 hours of his release from prison;
 - (d) reside where directed by his probation officer;
 - (e) complete a drugs awareness course as directed by his probation officer; and
 - (f) receive drugs counselling within prison and rehabilitation support as provided by the Free Wesleyan Church Crisis and Lifeline Centre.
26. Pursuant to section 32(2) of the *Illicit Drugs Control Act*, the drugs the subject of this proceeding are to be destroyed.

NUKU'ALOFA
3 March 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC
LORD CHIEF JUSTICE