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

CR 209/2020 & 47/2021

REX

-V-

MANAVAHETAU FUA'EIKI

BEFORE HON. JUSTICE NIU

Counsel : **Ms. S. `Eliesa for the Crown.
Mr. S. Tu`utafaiva for the accused.**

Plea : **Guilty, on 11 January 2021 to
CR209/2020 and on 15 March 2021 to
CR47/2021.**

Probation Report : **by `Ema and Tito on 5 February 2021.**

Submissions : **by Ms. `Eliesa on 22 February 2021 and
on 19 March 2021.**

: **by Mr. Tu`utafaiva on 23 March 2021.**

Sentencing : **6 April 2021.**

SENTENCING

Offences

[1] Manavahetau Fua'eiki, you now appear before me for sentence for 3 separate offences as follows:

- (a) that on 23 June 2020 at Pahu, you knowingly possessed 1.99 grams of methamphetamine contrary to the Illicit Drugs Control Act;

(b) that on the same day at Ha'akame you knowingly possessed one .12 bullet without a licence contrary to the Arms and Ammunitions Act; and

(c) that on 28 October 2020 at 'Anana you knowingly possessed 0.61 gram of methamphetamine contrary to the Illicit Drugs Control Act.

[2] You pleaded guilty to both offences of 23 June 2020 on 11 January 2021 and you pleaded guilty to the offence of 28 October 2020 on 15 March 2021.

[3] What happened was that the police received information that drugs were being sold at a car wash premises at Pahu. They conducted a search without warrant of those premises right away and they found you there. They searched you and found that you had several packs of methamphetamine and \$813.50 in your trouser's pocket.

[4] They then went with you to your house at Ha'akame and searched there and found similar but empty packs and a weighing scale in your room. They also found a live .12 bullet in the pocket of your coat hanging in your room.

[5] You were then arrested and charged with the two offences of the 23rd June 2020. You were subsequently released on bail.

[6] On 28 October 2020, the police received information that drugs were being sold at a residence of a certain person at 'Anana and they went there right away. They found you there and you had in your hand 2 plastic packets, one contained 2 packs of methamphetamine and the other contained 10 packs of methamphetamine.

[7] The police asked you who the packs belonged to and you told them that they belonged to the owner of the residence who was also standing there and that he had just handed them to you.

[8] The police also found your telephone on you and the other person's telephone on him and the two telephones showed that the person had

sent you a message to come and pick up "ice" to be sold, "ice" being the term for methamphetamine.

Probation report

- [9] The probation officer has prepared a report on you in respect of your offences of 23 June 2020. She says that you are 42 years old and that you are married and you live with your wife and your 5 children at your home at Ha'akame. She says that you had attended Liahona High School but that you left after form 4 and you just helped with your father's carpentry work, and later on you then worked for Five Star Construction for over 10 years.
- [10] Unfortunately, the probation officer does not say what happened to that job or why you no longer worked there. But it is clear that you then had no employment and she said that you told her that you were only relying on monies sent by your "family" from overseas.
- [11] She said that you explained to her that your children needed money for their school expenses and that you made several telephone calls overseas to ask for money but your family overseas never answered or returned your calls. She said that you told her that you then called your friends and asked them for money and that they told you to come and get it but that when you arrived to pick it up, they gave you the drugs to sell instead. She said that you told her that you thought it was an easier way to make money and so you decided to accept and to sell them to get the money for your family.
- [12] She does not say when it was you started to do that or how much you were selling or that you received.
- [13] She says that you have told her that you now regret what you have done, especially having to stoop to committing a criminal offence to feed your family, and that you have now sworn to stop that life of crime and to go and plant crops for your family instead.
- [14] She recommends that you be given a chance to do that by suspending your sentence in full on conditions of carrying out community work and attending drug courses of the Salvation Army.

[15] That report was prepared, it would appear, in ignorance that you had subsequently committed the offence of October 2020.

Crown submissions

[16] Ms. 'Eliesa, counsel for the Crown, made two sets of submissions, one after you pleaded guilty to the offences of 23 June 2020, and another set after you pleaded guilty to the offence of 28 October 2020.

[17] In respect of the 23 June 2020 offences, she submits, after referring to 3 cases, namely **R v Tu'i** (CR66/19) where there was 1.29 grams of meth, 5.62 grams of cannabis and 3.36 grams of cannabis plant, a first offender as well, and **R v Vasi** (CR124/20) where there was 2.8 gm of meth, that the appropriate sentence for you be 12 months imprisonment but subject to some part being suspended in accordance with the principles laid down in **Mo'unga v R** [1998] Tonga LR 154. She submits that you be fined for the possession of the bullet.

[18] In respect of the 28 October 2020 offence, she submits, after referring to the cases of **R v Maile** (AC23/2018) where there was 0.52 gm of meth, and to **R v Leka** (CR15/2020) where there was 0.61 gm of meth, that the appropriate sentence for you be 9 months imprisonment but subject to some part being suspended, and that that sentence be added to or be cumulative to your sentence for the offences of 23 June 2020.

[19] Your counsel, Mr. Tu'utafaiva, has filed submissions on your behalf and agrees with the recommendations of Ms. 'Eliesa but that

(a) instead of there being a fine for the possession the bullet, there be a one month imprisonment instead and that it be concurrent with the 12 months sentence for the possession of the meth; and

(b) 3 months of the sentence for the 28 October 2020 offence be made concurrent with the 12 months sentence for the 23 June 2020 offence.

[20] He says that you are now 43 years old and that you are a first offender. He says that you are remorseful and that you have resolved to turn away from every misconduct you have committed for the sake of your children. He also says that you would benefit attending the Salvation Army Drug Awareness course and programme.

Consideration

[21] In Ms. 'Eliesa's submissions in respect of the 23 June 2020 offences, she stated that it was an aggravating factor that there was cash (of \$813.50) and several packs of meth in your trouser pocket and empty packs and a weighing scale in your room at home. She said that it could be inferred from those that you were supplying drugs. She also says that you have told the probation officer that you were supplying drugs and that the money was from the sale of the drug. She therefore stated in her recommendation "with reference to the relevant authorities and the aggravating factors" the appropriate starting point was 18 months imprisonment.

[22] I am afraid that she cannot do that. Supplying is a separate and indeed a much more serious offence than simple possession with which you are being charged, convicted and now sentenced. Why the police did not charge you with supplying, and why the Crown counsel did not indict you with supplying in this Court, I do not know. But what I am not allowed to do is to sentence you for supplying because you have not been charged or convicted of it. I have to sentence you only for possession, like the sentences for possession which were imposed on the several accused persons in the cases to which she has referred.

[23] I have to apply the guideline which has been laid down by the Courts. That guideline is based on the weight of the drug found in the possession of the accused person, which is the criterion by which the Act has indicated that sentences be considered. That guideline is as follows:

band 1 (less than 5 grams) 2 to 4½ years imprisonment.

band 2 (less than 250 grams) 3 to 11 years imprisonment.

band 3 (less than 500 grams) 8 to 15 years imprisonment.

band 4 (less than 2 kg) 10 to 30 years imprisonment.

band 5 (greater than 2 kg) 10 to 30 years imprisonment.

[24] In your case you had the following amounts of meth:

23 June 2020 1.99 gm

28 October 2020 0.61 gm

Total 2.60 gm

Both those amounts, individually, and collectively, fall within band 1, that is, with imprisonment between 2 years and 4½ years. I would accept that the total amount that you had, 2.6 gm, falls at about the half way mark of 4½ years, which is 2 years and 3 months imprisonment. Because I am sentencing you for both offences together, I have to add the weights of the two amounts together for the purpose of the band, as if you had both amounts at the one time.

[25] Accordingly, I find that the starting point for your sentence is 2 years 3 months imprisonment. To that sentence, I would add a period in respect of any aggravating feature in your case and then deduct from the total a period in respect of any mitigation feature, and arrive at your final sentence.

[26] Ms. `Eliesa says that the aggravating features against you are that possession of meth is a serious offence, that the weight of the meth is 2.6 gm, that you were indeed supplying the drug, and that you are a repeat offender because you committed the offences of 23 June 2020 and then you committed the offence of 28 October 2020.

[27] She therefore submits that for the amount of 1.99 gm of meth of 23 June 2020, a sentence of 18 months imprisonment be the starting point and that 6 months be deducted for the mitigating factors leaving a final sentence of 12 months for that offence.

[28] As for the amount of 0.61 gm of meth of 28 October 2020, she says a sentence of 12 months be the starting point from which 3 months be

deducted for the mitigating factors, leaving a final sentence for it of 9 months imprisonment for that offence.

[29] She says that the two sentences be added to each other so that you have a total sentence of 1 year 9 months imprisonment for both offences.

[30] Mr. Tu'utafaiva agrees with the two sentences proposed by Ms. 'Eliesa but suggests that 3 months be deducted so that you only have 1 year 6 months, because of having the two sentences being dealt with together as one.

[31] I am afraid I do not see any valid or compelling reason why the sentence indicated by the above stated guideline be not followed. It is desirable that that guideline be followed unless there are compelling reasons why it should be departed from. In fact, I see every reason to follow it, in the circumstances of this case, namely, that you had possession of these meth packs knowingly and in clear breach of the law without any lawful justification for it. I therefore find that the appropriate starting point for your sentence is 2 years 3 months imprisonment.

[32] I do not see any aggravating factor to increase that sentence, but I would accept that you have mitigating factors to reduce that sentence because you have pleaded guilty and have thereby cooperated with the authorities, in addition to having no previous conviction. I would deduct 6 months from the starting point sentence for those leaving a sentence of 1 year 9 months imprisonment.

Suspension

[33] As to suspending that sentence, I find that you do qualify under some of the criteria laid down by the Court of Appeal in *Mo'unga v R* [1998] Tonga LR 154 because I have found that you are a first offender for the purpose of this sentencing, because your two offences have been combined as one in this sentencing, although you are not a young person any more.

[34] I am also satisfied that you are not and that you were not an user of the drug or any drug. If you were or are an user, you may have difficulty in abstaining from it in future. I therefore consider that you would make use of the opportunity of the suspended sentence to abstain from possessing the drug and to rehabilitate yourself, which is another of the criteria set by the Court of Appeal.

[35] I am also satisfied that your guilty pleas to all these offences have helped the police and the prosecution as well as this Court. I would accept that that is cooperation with the authorities which is another of the criteria set by the Court of Appeal.

[36] Accordingly, I am satisfied that you are eligible to be granted a suspension of that imprisonment sentence.

Ammunition

[37] As for the bullet found in your coat, I consider that it was an isolated act and I accept your explanation that you simply found it in your car after others had been in it. I would simply convict and discharge you on that.

Community service and courses

[38] I however consider that you should serve community service and that you should attend the life skills and drug and alcohol awareness courses to ensure your rehabilitation, such as the probation officer has recommended. I consider that knowledge and discipline thereof will assist your rehabilitation.

Sentence

[39] Accordingly, I sentence you as follows:

- (a) For the offences of possession of 1.99 gm of methamphetamine on 23 June 2020 and of 0.61 gm of methamphetamine on 28 October 2020 as charged under count 1 of CR209/2020 and under count 1 of CR47-48/2021 respectively, you are sentenced to 1 year 9 months imprisonment, but that imprisonment be suspended for 3 years from today upon the following conditions:

- (i) you are not to commit an offence punishable by imprisonment within the 3 year period of suspension;
 - (ii) you are to serve 80 hours community service as directed by the probation officer;
 - (iii) you are to attend and complete the life skills, drug and alcohol awareness courses of the Salvation Army.
- (b) For the possession of one .12 bullet as charged under count 2 of CR209/2020, you are convicted and discharged.
- (c) The .12 bullet is forfeited to the Crown.
- (d) I make no order in respect of \$813.20 which was found in your pocket.
- (e) I order that the methamphetamine in respect of which these offences have been committed be destroyed by the Police forthwith.

NUKU'ALOFA: 6 April 2021.



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