

Sean + A

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

CR 32 of 2021

**REX**  
**-v-**  
**TANGATA 'O PANGAI**  
**(a.k.a. Pinomi Lavemai)**

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**SENTENCING REMARKS**

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BEFORE: LORD CHIEF JUSTICE WHITTEN QC  
Appearances: Mr T. 'Aho for the Prosecution  
Defendant in person  
Date: 23 April 2021

**The charge**

1. On 18 March 2021, the Defendant pleaded guilty to possession of 1.63 grams of methamphetamine.

**The offending**

2. On 7 October 2019, the Drugs Enforcement Taskforce (DET) received information that the Defendant was selling drugs from his car in Ma'ufanga. The DET and the Tactical Response Group (TRG) then located the Defendant's car and stopped him in Kolomotu'a. When the Defendant got out of his car, one of the officers found in the Defendant's hand a piece of paper containing a substance, which was suspected to be methamphetamine. The Defendant told the officers that there were drugs in his vehicle. During the ensuing search, police found a number of dealer bags, a smoking pipe and a weighing scale. Each bag contained a crystallized substance. The substances were weighed and tested and found to be 1.63 grams of methamphetamines.
3. The Defendant denied any knowledge of the drugs. During questioning after his arrest, he chose to remain silent.

**Crown's submissions**

4. The Crown submits the following as aggravating features:
  - (a) 1.63 g of methamphetamine;
  - (b) found in 11 dealer bags, suggesting a commercial enterprise, rather than personal use; and
  - (c) the presence of a smoking pipe.
5. The Crown submits the following as mitigating features:
  - (a) early guilty plea; and
  - (b) no previous convictions.
6. The Crown relies on the following comparable sentences:
  - (a) *Mangisi*, CR 10/2018 – Defendant was convicted of possession of 1,969.14 grams of methamphetamine and attempted export of illicit drugs. He was sentenced to 12 and a half years' imprisonment on count 1 and 5 years on count 2, to be served concurrently. Reference was made to the sentencing guidelines for Class A illicit drugs revised by the NZ Court of Appeal in *Zhang v R* [2019] NZCA 507 at [126] as follows:
    - (i) Band 1 for less than 5 grams: community service to 4 years;
    - (ii) Band 2 for less than 250 grams: 2 to 9 years;
    - (iii) Band 3 for less than 500 grams: 6 to 16 years;
    - (iv) Band 4 for less than 2 kilograms: 8 to 16 years; and
    - (v) Band 5 for more than 2 kilograms: 10 years to life.
  - (b) *Uhila Latu*, CR 66/2019 – the Defendant pleaded guilty to possession of 1.29 grams of methamphetamine, 5.63 grams of cannabis, and cultivating 3.36 grams of cannabis plants. A starting point of 18 months was set for the methamphetamines, reduced by 4 months for mitigation, with the final 6 months suspended.
  - (c) *Siu Holani*, CR 65/2020 – 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, too, had no previous convictions although he was dealt with at about the same time for other drug-related offences. On the supply charge, Cato J set a starting point of two years' imprisonment. That was reduced for mitigation to 18 months and the final 9 months were suspended.

7. In the present case, the Crown submits the following as an appropriate sentence:
  - (a) a starting point of 19 months' imprisonment;
  - (b) reduced by 4 months for mitigation; and
  - (c) the final 6 months suspended on conditions.

### **Presentence report**

8. The Defendant is 33 years of age. He is the third of six children. He is married with two adopted children aged 11 and 3. He was educated to Form 6 and then later enrolled in technical courses. His father passed away last year. As a result, the Defendant became the sole provider for his mother and family. He participated in the Australian Seasonal Picking Scheme in 2016 and was selected as the group leader that year. He is described by the members of his group as a hardworking and trustworthy person.
9. In relation to the offending, the probation officer reported that the Defendant admitted that he made a mistake, that he has brought shame upon his family and tainted his good character in the community and church. He explained that he agreed to deliver the drugs for a friend because he was behind in his car payments and feared that his vehicle would be repossessed. The probation officer opined that the Defendant is genuinely remorseful and has the capacity to change and grow, if given the opportunity.

### **Starting point**

10. The maximum penalty for possession of methamphetamine is a fine not exceeding \$1 million or 30 years' imprisonment or both.

11. Once again, the Court's stance on illicit drugs, particularly the scourge of methamphetamines, must be recited. It may be summarized as follows:<sup>1</sup>
- (a) methamphetamine is a scourge to societies everywhere that has effected a great deal of harm and misery;
  - (b) the distribution and use of methamphetamine in Tonga is a significant government and community concern;
  - (c) in prescribing a maximum penalty of 30 years imprisonment, the Legislature has expressed a clear intention that significant penalties are to be imposed;
  - (d) therefore, those involved with methamphetamine in any capacity, and even small amounts, can expect to receive custodial sentences.
12. The Court's responsibility in addressing drug-related offending involving methamphetamines is 'to ensure that sentences imposed ... are adequate and effective in denouncing and punishing such crimes, provide a strong deterrent effect, not just for individual offenders but also for the general community and those who may contemplate succumbing to the toxic allure of illegal drugs and also to provide incentive and opportunity for rehabilitation of those who have succumbed.'<sup>2</sup>
13. More often than not, due to the composite nature and lack of delineation between the different types of proscribed offending in s 4 of the version of the Act applicable hereto, the most (if not the only) instructive and objective variable available to the Court in determining an appropriate starting point is the amount of the drugs in question. That then informs the range indicated by comparable sentences to ensure parity.
14. But there is more than that in this case to consider in assessing the seriousness of the offending. Exercise of the broad discretion in sentencing must be informed by a realistic assessment of the facts of each case to which each Defendant has pleaded guilty. In the absence of a qualified plea, following which, evidence may

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<sup>1</sup> *PMP* [2020] TOSC 112 at [16], referring to *Afu* [2020] TOSC 69 and the Court of Appeal in *Maile* [2019] TOCA 17 approving statements by Cato J in *Ngaue* [2018] TOSC 38 at [5] and [6].

<sup>2</sup> *Ali* [2020] TOSC 94 at [26].

be necessary and determinations made on any disputed, material facts, I proceed on the basis of the Crown's allegations in the summary of facts.

15. It follows that I regard the Defendant's explanation to the probation officer of the nature of his involvement in the offending to be doubtful, at least. The presence of methamphetamine in a number of packets, in different locations in the Defendant's vehicle, together with a smoking pipe and weighing scales is more consistent with the nature of the information received by police than the Defendant just being a courier on this one occasion. Those factors support a reasonable inference that the Defendant possessed the drugs for the purpose of supply.
16. Sentences for supplying ought generally be more severe than mere possession for personal use. As observed in *Wolfgang* [2020] TOSC 78, 'supply is the progenitor to subsequent interactions ... such as use and addiction.... In other words, (and apart from a defendant's own cultivation or manufacture) without supply, there could never be use or addiction'.<sup>3</sup> Whilst not an expressly provided offence, in my view, for the purposes of sentencing, possession, for the evident purpose of supplying, lies somewhere in between possession and supply.
17. It is also notable that the recent amendments to the Act, if applicable here, would have had the effect of deeming the offending to be supply, again, by reference to the amount being over 0.25 of a gram. Alas, however, the amendments do not provide different maximum penalties for possession versus supply (or the other types of offending in s 4) save for the new demarcation between amounts less than 1 gram and 1 gram or more.
18. I therefore take into account that whilst the Defendant is to be sentenced for possession, the nature and surrounding circumstances of the offending point to a case of possession for the purpose of supply.
19. For those reasons, and having regard to the nature of the offending, the amount of the methamphetamines, the comparable sentences (particularly, *Holani*, which involved an explicit charge of supplying an amount only slightly less than the

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<sup>3</sup> Referred to recently by Langi AJ in *R v Taione* [2021] TOSC 31 at [59].

amount here and for which a starting point of 2 years was set) and the principles referred to above, I set a starting point of 21 months' imprisonment.

### **Mitigation**

20. For the Defendant's early guilty plea, demonstrated remorse and previous good record, I reduce the starting point by one third or 7 months, thereby resulting in a sentence of 14 months' imprisonment.

### **Suspension**

21. The considerations discussed in *Mo'unga* [1998] Tonga LR 154 at 157 favour some suspension of the resulting sentence. The Defendant is still relatively young. He had a previous good record and while he partially co-operated with police, his subsequent guilty plea upon arraignment reflects his acceptance of responsibility and remorse, which are both necessary catalysts for lasting rehabilitation.
22. That the Defendant has an extended family to support cannot, of itself, determine questions concerning suspension, including the extent thereof. The almost inevitable suffering to the Defendant's family by any term of incarceration is the result of the risk he took in deciding to involve himself with illicit drugs: *Wolfgramm* [2020] TOSC 78 at [47] to [49]. I do, however, consider it a favourable factor in assessing the likelihood of the Defendant responding to the incentive and opportunity for rehabilitation provided by a partially suspended sentence. Determining the extent of any suspension also requires a balance to be struck between the need for effective deterrence on the one hand and, to a very limited extent, the personal circumstances of the offender and those dependent on him, on the other: *Vake* [2012] TOCA 7.
23. Weighing up all those considerations, I consider it appropriate to order that the final 6 months be suspended on conditions. The net result is that subject to compliance with the conditions to be imposed and any remissions, the Defendant will be required to serve 8 months in prison.

**Result**

24. The Defendant is convicted of possession of illicit drugs and is sentenced to 14 months' imprisonment.
25. The final six months of the said sentence is to be suspended, for a period of 12 months from the date of his release from prison, on the following conditions, namely, that during:
- (a) his incarceration, the Defendant is to complete rehabilitation program/s on drugs and alcohol and life skills as may be provided by the Free Wesleyan Church Crisis and Lifeline Centre; and
  - (b) the suspension period, the Defendant is to:
    - (i) not commit any offence punishable by imprisonment;
    - (ii) be placed on probation;
    - (iii) report to the probation office within 48 hours of his release from prison and at such times thereafter as his probation officer may direct; and
    - (iv) if the Defendant has not completed, or been able to be accommodated within, the FWC program referred to in subparagraph (a) above, then he is to complete similar programs as conducted by the Salvation Army.
26. The Defendant is advised that should he fail to comply with any of the above conditions, the suspension order may be rescinded, in which case, he will be required to serve the balance of his sentence.
27. Finally, I order, pursuant to s 32(2)(b) of the Act, that the illicit drugs the subject of this proceeding be destroyed.

NUKU'ALOFA  
23 April 2021



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

M. H. Whitten QC  
LORD CHIEF JUSTICE