

REX
-v-
VILIAMI PALETU'A

SENTENCING REMARKS

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

The charge

1. On 18 March 2021, the Defendant pleaded guilty to possession of 3.16 grams of methamphetamine, contrary to ss 4(b)(iii) of the *Illicit Drugs Control Act*.

The offending

2. On or about 29 September 2020, the Drugs Enforcement Taskforce received information that the Defendant's co-accused, Creed Tongamoa (CR 26/21), was selling drugs from his workshop. Later that day, police raided the workshop. The Defendant was present. When the Defendant and Tongamoa were apprehended and searched, police found, among other things, 0.17 g of methamphetamine on Tongamoa. The search also revealed a total of 13 dealer bags containing 3.16 grams of methamphetamine as well as other drug-related paraphernalia, including a test-tube, empty dealer bags and weighing scales. The Defendant admitted to police that those methamphetamines belonged to him.

Crown's submissions

3. The Crown submits the following as aggravating factors:
 - (a) possession of class A drugs is a scourge on our society;
 - (b) the significant amount (3.16 grams) of methamphetamine seized; and

- (c) the methamphetamine was found in 13 dealer bags, suggesting a commercial purpose rather than personal use.
4. Mitigating factors are the Defendant's early guilty plea and lack of previous convictions.
5. The Crown submits the following as comparable sentences:
- (a) *Mangisi*, CR 10/18 – the 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 made to the *Zhang* guidelines.¹
- (b) *Maile*, AC 23/18 – the Defendant pleaded guilty to possession of 0.52 grams of methamphetamine. On appeal, he was sentenced to 9 months' imprisonment, fully suspended on conditions.
- (c) *John Thorn Ngaue*, CR 6/18 – the Defendant pleaded guilty to possession of 14.5 grams of methamphetamine. A starting point of 4 years and 6 months was set. After discounts for mitigation, he was sentenced to 3½ years' imprisonment with final 9 months suspended on conditions.
- (d) *'Amusia Mateni*, CR 213/20 – the Defendant was found guilty of possession of 8.08 grams of methamphetamine and interfering with evidence. A starting point of 4 years was set, reduced by 6 months' for mitigation. The final 12 months of the resulting sentence of 3 ½ years was suspended on conditions.
- (e) *Konileti Latu*, CR 109/17 – the Defendant pleaded guilty to possession of 4.53 grams of methamphetamine and 21.33 grams of cannabis. A starting point of 3 years was set for the methamphetamine charge, and then discounted by 12 months for mitigation. Three months for the cannabis charge was added making a total sentence of 2 years and 3 months' imprisonment, of which, the final 12 months was suspended.
- (f) *Pilioti Uasike*, CR 161/19 – the Defendant pleaded guilty to possession of

¹ *Zhang v R* [2019] NZCA 507 at [126].

3.48 grams of methamphetamine, 0.87 grams of cannabis and bribing police. A starting point of 3 ½ years was set for the methamphetamine charge, reduced by 6 months for mitigation. Three of 14 months' imposed for the bribery was added, resulting in a sentence of 2 years and 9 months' imprisonment, of which the final 12 months was suspended.

6. In this case, the Crown submits that an appropriate starting point is 3 ½ years' imprisonment, reduced by 9 months for mitigation, and that no more than the final 9 months' of the resulting sentence should be suspended on conditions.

Presentence report

7. The Defendant is 41 years of age. He had a good upbringing and was educated to Form 5 at Tonga College, 'Atele. He then enrolled in a mechanical engineering course at Fokololo and completed a certificate in engineering. He is married with five children aged 16 to 4 years. He was previously employed at the Ministry of Infrastructure and Tonga Airports Limited. He quit his last job and has been self-employed since. His income depends on the work available to him.
8. In relation to the offending, past alcohol abuse led the Defendant to methamphetamines. He admitted to the probation officer to being a substance abuser. He is reported to have started using methamphetamine to boost his energy when he had a lot of work, for as he described it, "more work means more money."
9. The Defendant's drug use resulted in him becoming separated from his family last year. They reconciled following his release after arrest for this offence. The probation officer considers that the Defendant has expressed genuine remorse. His wife is reported to have seen profound changes in the Defendant's behaviour. He is said to no longer use alcohol or drugs and he avoids his criminal former peers. He is now committed to his family and his church. Reverend Hefa of the Assembly of God Church provided a letter of support which reflected similar sentiments and aspirations for the Defendant. The probation officer opines that if those lifestyle changes can be maintained, the risks of the Defendant reoffending will be low. He recommends that, to that end, it is critical that the Defendant's recovery and rehabilitation be supported through the supervision of a probation

officer and the Defendant undertaking drug and alcohol abuse courses such as those provided by the Salvation Army.

10. I note in passing that the probation report refers to the Defendant having a previous criminal history as "referenced to [sic] the Prosecutor's submission". However, the Crown's submissions refer to the Defendant having no previous convictions. Given the responsibility of the Crown to ensure that matters such as previous convictions are accurately placed before the court, the following analysis is based on the Defendant, in fact, having no previous convictions.

Starting point

11. At the time of the instant offending, the statutory maximum penalty for possession of methamphetamine is a fine of \$1 million or 30 years' imprisonment or both.
12. The Court's stance on illicit drugs, particularly methamphetamines, and the approach taken to sentencing, has been recited time and again. It may be summarized as follows:²
 - (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.
13. 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

² *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].

succumbed.¹³

14. The sentencing guidelines for drugs such as methamphetamines provided by the New Zealand Court of Appeal in *Zhang v R* [2019] NZCA 507, and which have been applied regularly by the Courts in Tonga,⁴ suggest that for less than 5 grams, the appropriate sentence ranges from community service to 4 years imprisonment. In *Zhang*, the Court of Appeal revised what had been the previous guidelines set out in *Fatu* [2006] 2 NZLR 72 (CA). The band levels in *Fatu* were designed for supply offending and included references to the levels of supply presumed by the amounts in each band. For example, in band 1, amounts less than 5 grams were presumed to be low level supply.
15. I raise this observation because of the reference to the Defendant not having been gainfully employed (or irregularly self-employed) for some time, the amount of methamphetamine in question, that it was contained in a significant number of dealer bags and the other drug-related paraphernalia found at the scene. In my view, those features all lead to a reasonable inference that the Defendant was involved in supplying methamphetamines. Even though the Act does not contain a specific offence of possession for the purpose of supplying, and the Defendant has only been charged with, and has pleaded guilty to, possession simpliciter, the probability that he possessed the 3.16 grams of methamphetamine for the purpose of sale can properly be taken into account in considering an appropriate sentence: *Mafi v Rex* [2004] TOCA 4 at [24]. For a discussion on how the courts view and approach sentencing for supply offending, including longer prison terms and that suspension may not be appropriate, even for first offenders, see e.g. *Vea v Rex* [2004] TOCA 7 at [18] and, more recently, *R v Latuselu* [2021] TOSC 19 at [13] to [16].
16. Having regard to the seriousness of the offence, the amount of methamphetamines involved, the comparable sentences, principles and other observations referred to above, I consider the appropriate starting point to be three years and three months (or 39 months) imprisonment.

³ *Ali* [2020] TOSC 94 at [26]. See also *R v Moli* [2020] TOSC 107 per Langi AJ.

⁴ *R v Amusia Mateni* (CR 213/20, 14 April 2021).

Mitigation

17. For the Defendant's early guilty plea and previous good record, I deduct one third or 13 months, resulting in a sentence of 26 months' imprisonment.

Suspension

18. On balance, application of the considerations discussed in *Mo'unga* [1998] Tonga LR 154 at 157 to the instant case, favours some suspension. While the Defendant is not particularly young, he has a previous good record and he co-operated with the authorities. His admission to police at the outset, early guilty plea and subsequent efforts to redeem his life, are good evidence of his acceptance of responsibility and genuine remorse. Further, the observations and opinions expressed in the presentence report indicate that he is likely to take the opportunity offered by the sentence to rehabilitate himself.
19. Sadly, and as with his co-accused, that the Defendant has a family to support is, as the Court has stated on numerous occasions, not a basis itself for suspension.⁵ Any suffering his wife and children are likely to endure during his incarceration is the direct result of his decision to succumb to, and most likely to have profited from, illicit drugs. The Court must also ensure that a balance is 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.
20. Weighing all those considerations, I consider it appropriate to order that the final 12 months of his sentence be suspended for a period of two years, from the date of his release, on conditions. Therefore, subject to compliance with the conditions to be imposed, and any remissions available through the prison system, the Defendant will be required to serve 14 months in prison.

Result

21. The Defendant is convicted of possession of illicit drugs and sentenced to two

⁵ For example, see *Wolfgramm* [2020] TOSC 78 at [47] to [49].

years and two months (or 26 months) imprisonment.

22. The final 12 months of the said sentence is to be suspended, for a period of two years from the date of release from prison, on the following conditions, namely, that during the 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; and
 - (d) complete a drugs and alcohol awareness course as directed by his probation officer.
23. Failure to comply with any of the said conditions may result in the suspension being rescinded, in which case, the Defendant will be required to serve the balance of his prison sentence.
24. Pursuant to s 32(2)(b) of the Act, the illicit drugs the subject of this proceeding are to 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