

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

CR 294 of 2020
CR 26 of 2021

REX
-v-
CREED (a.k.a. Kuliti) TONGAMOA

SENTENCING REMARKS

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

The charges

1. The Defendant appears today for sentencing following guilty pleas for:
 - (a) unlicensed possession of a firearm and ammunition (CR 294/20); and
 - (b) possession of 0.17 grams of methamphetamine (CR 26/21).

The offending

2. On 25 January 2020, the Drugs Enforcement Taskforce conducted a search of the Defendant's car workshop in 'Umusi which resulted in the seizure of cash, drugs and mobile phones. The drugs seized included 0.01 g of cocaine. That became the subject of proceeding CR 192/20 in which the Defendant was charged with supplying that amount and another amount of cocaine. He pleaded not guilty to both counts and was released on bail.
3. On or about 12 February 2020, the Defendant's seized mobile phone was examined. It contained a video of the Defendant handling and firing what was later identified to be an M-16 assault rifle (or, as per the indictment, a 5.56 mm calibre high-powered assault rifle). It appears the video was made in June 2019. A text message on the phone indicated that the Defendant was trying to sell the rifle.

4. On 19 March 2020, police executed a search warrant at the Defendant's workshop in an endeavour to find the firearm. It was not located. However, they did seize various cartridge casings and .22 and 9 mm calibre cartridges from the floor and inside the walls of the workshop. The Defendant did not have a licence for either the assault rifle or any ammunition. They are the subject of proceeding CR 294/20.
5. On or about 29 September 2020, while he was on bail for CR 192/20, the Drugs Enforcement Taskforce received information that the Defendant was selling drugs from his workshop. Later that day, police raided the workshop. When the Defendant was apprehended and searched, police found \$970 in cash (including 16 x \$50 notes and one x \$100 note) and one dealer bag containing a crystallised substance. Police asked the Defendant what was in the pack but he refused to answer. The substance was later tested and found to be 0.17 g of methamphetamine. That is the subject of proceeding CR 26/21.
6. The search also revealed a total of 13 dealer bags containing 3.16 g of methamphetamine as well as other drug-related paraphernalia, including a test-tube, empty dealer bags and weighing scales. Viliami Paletu'a admitted to police that those methamphetamines belonged to him. They are the subject of proceeding CR 27/21.

History of proceedings

7. On 11 December 2020, in proceeding CR 192/20, Langi AJ convicted the Defendant of supplying 0.01 g of cocaine. On 26 February 2021, he was sentenced to 15 months' imprisonment, which was fully suspended for two years on conditions, due to what Her Honour described as being an "infinitesimally small amount of cocaine".
8. On 18 March 2021, in CR 26/21, the Defendant pleaded guilty to possession of 0.17 g of methamphetamine.
9. On 19 March 2021, in CR 294/20, the Defendant pleaded guilty to the unlicensed firearms and ammunition counts. After his arraignment, the Defendant informed the prosecution that:

- (a) on the day he made the video referred to above, Samiu Mahe and his wife, Anitala, were at the workshop; and
 - (b) that Mr Mahe, who has since died, took the rifle with him after the Defendant made the video.
10. On 19 April 2021, police spoke with Anitala who informed them that neither her nor her late husband have ever had a firearm nor did he ever mention anything about firearms to her before he passed away.

CR 294/20 – the firearms and ammunition charges

11. As the firearms charges occurred first in time, I will deal with them first.

Crown's submissions

12. The Crown submits the following as aggravating factors:
- (a) possession of an unlicensed firearm;
 - (b) the Defendant was attempting to sell the rifle;
 - (c) the rifle has not been located;
 - (d) the rifle is a high-powered military grade weapon unlike most firearms in Tonga being .22 calibre rifles or 12 gauge shotguns;
 - (e) the Defendant dangerously discharged the rifle inside his workshop; and
 - (f) the Defendant has the following previous convictions:
 - (i) 2010, common assault, fined \$50;
 - (ii) 2010, possession of illicit drugs, 3 years' probation, 120 hours community service and required to complete a drugs course; and
 - (iii) 2021, possession of cocaine in CR 192/20, referred to above.
13. The only mitigating factor is the Defendant's early guilty plea. For the reasons explained above, the anticipated information about the whereabouts of the rifle has not resulted in any positive outcome.

14. The Crown referred to the following comparable sentences. In *Tu'ilakepa* (CR 173/14) the Defendant pleaded guilty to four counts of unlicensed possession of rifles and pistols. He was fined \$2,000 on each count. In *Tu'iha'ateiho* (CR 116/13),¹ the Defendant was convicted at trial of unlicensed possession of one pistol. On the discretion provided by s 30 of the *Criminal Offences Act* to impose a fine in lieu of imprisonment, Cato J explained his decision to impose fines in *Tu'ilakepa* as “because the Defendant was of good character, was a first offender, had contributed extensively to the Tongan community over many years and had unwittingly inherited the firearms from a relative who had lived at the Defendant’s premises before he died”. He also noted that the firearms had not been associated with a criminal enterprise or obtained for trafficking purposes. In *Tali Taufala Latu* (CR 118/14), on a guilty plea for unlicensed possession of a .22 rifle, Paulsen LCJ imposed a fine, starting at \$1,000, which was then reduced (no specified in the submissions) for mitigation. In *Viliami Na'a* (CR 115/19), the Defendant was sentenced to 2½ years imprisonment for one count of unlicensed possession of a firearm to be served concurrently with a sentence of 6 years and 9 months for grievous bodily harm.
15. The Crown submits that due to the nature of the rifle and the Defendant attempting to sell it, the starting point should be 2 years’ imprisonment. For his early guilty plea, the starting point should be discounted by 6 months leaving a sentence of 18 months’ imprisonment.

Defence submissions

16. Mr Tu'utafaiva submitted that the sentence in *Na'a* should be distinguished by reason of the fact that “it would appear” that the firearm was used to cause the grievous bodily harm. Neither side provided a copy of that decision or any other. Further, Mr Tu'utafaiva submitted, unsupported by any comparable sentence or other authority, that the appropriate sentence is a fine of \$500. The reasons posited included that the rifle was not in the Defendant’s possession at the time of the search on 25 January 2020; on the Defendant’s instructions, he was not the owner of the rifle or ammunition; that they belonged to Samiu Mahe who was

¹ [2015] TOSC 8.

then working for the Defendant and that Samiu had asked the Defendant to show him how the rifle worked which was the reason for the video; the rifle was returned to Samiu; the Defendant's possession was limited to the demonstration; the Defendant tried to sell the rifle to Sosaia of Utula whilst it was with Mr Mahe but Sosaia did not respond to the Defendant's text message; the Defendant's guilty plea and further information to the authorities regarding the whereabouts of the firearm and ammunition.

Presentence report

17. For reasons which are not presently relevant, the probation office did not file a separate presentence report in CR 294/20. However, the information provided in the report that was filed for CR 26/21, referred to below, provides sufficient information to inform the sentencing exercise for both proceedings.

Starting point

18. Section 4(2)(b) of the *Arms and Ammunition Act* sets a maximum penalty for unlicensed possession of any arm or ammunition of 5 years' imprisonment.
19. In *R v Kohinoa* [2008] TOLawRp 9, Andrew J said:

"In offences involving firearms it is almost inevitable that a gaol sentence will follow."

20. In *Tu'iha'ateiho*, *ibid*, Cato J observed that:

"[14] ... Parliament has set a clear directive to the Courts that serious consequences should follow a conviction for being in possession of an unlicensed firearm...."

[16] ... In my view, the licensing and security of firearms in any society is a matter of great importance.... I consider that Parliament in providing that imprisonment as the appropriate penalty for being in possession of an unlicensed firearm, evidenced its intent plainly.... It would be a wrong message for the Tongan community that persons could avoid conviction for being in possession of unlicensed firearms..."

21. For the reasons which follow, I do not accept the Defendant's instructions to Mr Tu'utafaiva of his asserted fleeting possession of the M-16 rifle and ammunition:
- (a) With the apparent benefit of legal advice from Mr Tu'utafaiva, the Defendant pleaded guilty to the charges. Had he in fact only demonstrated the

operation of the rifle for another person who was the true owner of it, and then returned it to that person, the Defendant would not have had the requisite control over the firearm or intention to possess it to constitute possession,² and would therefore have pleaded not guilty to the charge.

- (b) The text message found on his phone clearly stated that he had an M-16 for sale, which was consistent with ownership. Further, by his instructions to Mr Tu'utafaiva, the Defendant admits that he tried to sell the rifle. The text message did not say that the Defendant was selling it on behalf of Mr Mahe or any other person.
 - (c) The cartridges and casings found during the March 2020 search are consistent with the Defendant owning firearms.
 - (d) His information to the authorities following his arraignment was refuted by Mrs Mahe who, since the death of her husband, has no motive to lie.
22. The comparable sentences resulting in fines are of limited assistance in the present case. The nature of the offending here and the Defendant's antecedents place him in a very different position to the Defendants in those cases. That an assault rifle, with automatic or semi-automatic firing capability,³ may be circulating around Tonga, either unregistered and/or in the hands of unlicensed users, is a matter of great concern. Such are the inherent dangers of a weapon of that kind that s 26 of the *Arms and Ammunition Act* expressly prohibits possession without the authority of the Prime Minister and provides separate penalties for contravention of that prohibition. It is also the type of firearm, which if used for criminal purposes, could well place police officers (other than perhaps members of the Tactical Response Group) at a distinct, and potentially lethal, disadvantage.
23. Further, the Defendant's demonstrated involvement with illicit drugs, and the sorts of weapons that that underbelly of society tends to seek out, also heightens those concerns. That the firearm has still not been located and that the Defendant sought to sell it compounds those circumstances of aggravation.

² *R v Tupou* [2020] TOSC 91 at [38] to [40] referring to *R v Tau & ors* [2005] Tonga LR 418 and *R v Yang Yu Zhen* [2009] Tonga LR 481.

³ <https://www.globalsecurity.org/military/systems/ground/m16-specs.htm>

24. For those reasons, I consider that a fine is not appropriate and that a sentence of imprisonment is warranted.
25. In that regard, and if Mr Tu'utafaiva's submission in relation to the decision in *Na'a* is correct, then the sentence imposed there is at the other end of the spectrum and not particularly instructive in the instant case.
26. However, there are other decisions of this court in which sentences of imprisonment have been imposed for unlicensed possession of firearms. For example, in:
 - (a) *Talia'uli* [1997] Tonga LR 7 - the Defendant was sentenced to two years imprisonment for unlicensed a pistol and six months for possession of bullets, both suspended for three years.
 - (b) *Liou* [2010] Tonga LR181 & AC 21/2010 - the Defendant was sentenced to 12 months' imprisonment, fully suspended together with a fine of \$3,000.
 - (c) *Vakapuna* [2018] TOSC 81, the Defendant was sentenced to 18 months' imprisonment for unlicensed possession of a .22 rifle and six months imprisonment for possession of ammunition. He too was not a first offender and the firearms and ammunition were found during a search which also uncovered illicit drugs. Paulsen LCJ recorded that the Defendant considered that he required protection from an associate involved with drugs being the same person who had previously shot him. This created a very dangerous situation. The potential for offending involving serious injury or even loss of life is obvious. The sentences were fully suspended for two years on conditions including probation and 100 hours of community work.
 - (d) *Huni* [2018] TOSC 33, Cato J sentenced that Defendant, along with others involved in a large-scale cannabis plantation, at which .22 rifles were secreted, to 2 ½ years imprisonment for the rifle and six months for the ammunition.
27. Having regard to the seriousness of the offending, the circumstances of aggravation including, in particular, the fact that the firearm has not yet been recovered, and the above principles and comparable sentences, I consider an

appropriate starting point to be 18 months' imprisonment for the firearm and six months imprisonment for the ammunition.

Mitigation

28. For the Defendant's early guilty plea and lack of any previous convictions concerning firearms, I deduct one third from each starting point, resulting in a sentence of 12 months' imprisonment for the firearm and four months imprisonment for the ammunition.

CR 26/21 – the methamphetamine charge

29. I turn now to the methamphetamine charge.

Crown's submissions

30. The Crown submits the following as aggravating factors:

- (a) possession of a class A drug is a scourge on our society;
- (b) the offence was committed whilst the Defendant was on bail for CR 192/20;
- (c) the presence of weighing scales, a CCTV camera and \$50 and \$100 notes, suggests the Defendant was dealing in methamphetamine; and
- (d) the Defendant has previous convictions as noted above.

31. The only mitigating factor is the Defendant's early guilty plea.

32. 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.⁴

⁴ *Zhang v R* [2019] NZCA 507 at [126].

- (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 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.
33. In this case, the Crown submits an appropriate starting point is 9 months' imprisonment, to be reduced by 3 months for mitigation. By reason of the Defendant's previous criminal history, no part of the resulting 6 month sentence should be suspended.

Defence submissions

34. Mr Tu'utafaiva agrees with the Crown's submissions on starting point and mitigation.

35. In relation to suspension, Mr Tu'utafaiva refers to the fully suspended sentence in CR 192/20; that the Defendant, who is now 50 years of age, is currently attending the Salvation Army course ordered; that he has undertaken not to reoffend; and, that the income from his mechanic workshop provides the sole financial support for his wife and four children who are all still at school.

Presentence report

36. The presentence report provides the following further relevant information. When he was quite young, the Defendant and his family migrated to the United States where he grew up and graduated from high school. In 1998, as a result of criminal activity in the U.S., he was deported to Tonga.
37. In relation to the methamphetamine charge, and notwithstanding his guilty plea, the Defendant told the probation officer that the drugs found did not belong to him and that he did not know where they came from or how they came to be in his workshop. His wife told the probation officer that she had never seen her husband use drugs nor had she ever found any on him. She also described improvements in the Defendant's behavior and attitude since his sentence in CR 192/20 by spending less time out with his friends and more time with the family and a greater commitment to the church.
38. The probation officer, too, notes that the Defendant is currently attending a Salvation Army course as part of the conditions of his fully suspended sentence in CR 192/20, which is due to be completed by June 2021. He recommends probation, abstention from alcohol and drugs and community work.
39. I have also had regard to a number of late-filed letters of support from the Defendant's church, business associates and friends as well as a letter from the Salvation Army confirming his completion of 43 hours of the alcohol and drugs awareness program he is attending.

Starting points

40. The maximum penalty for possession of methamphetamine at the time of instant offending is a fine of \$1 million or 30 years' imprisonment or both.

41. 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:⁵
- (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.
42. 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.'⁶
43. Again, unfortunately, with the exception of the sentence in *Maile*, the other comparable sentences referred to in the Crown's submissions, which all involved amount well over 1 gram, do not assist in the present case. Having regard to the sentence in *Maile* and other recent cases involving relatively low weights,⁷ I consider that ordinarily, an appropriate starting point, based on the amount alone, would be six months' imprisonment. However, by reason of the Defendant committing this offence whilst he was on bail for CR 192/20 and (it would appear)

⁵ *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].

⁶ *Ali* [2020] TOSC 94 at [26]. See also *R v Moli* [2020] TOSC 107 per Langi AJ.

⁷ For example, *Kitione Finau* (CR 33/19), *Kisepi Havea* (CR 178/19), *Viliami Falevai* (CR CR 42/19), *Sione S. Lave* (CR 185/20), *Fine Hafo'ou* (CR 220/20), *Muimui He Lotu 'Amaka* (CR 214/20), and *Kalonihea* [2020] TOSC 68.

CR 294/20,⁸ I increase the starting point by three months to a total of nine months' imprisonment.

Mitigation

44. For the Defendant's early guilty plea, I deduct two months resulting in a sentence of seven months imprisonment.

Cumulative sentences

45. The Crown submitted that the firearms offences took place nine months prior to the methamphetamine offence. Although the indictment specified the possession of the firearms as being 25 January 2020, that was in fact the date of the search in which the Defendant's phone was seized. The video found on the phone was made in June 2019. Therefore, the possession actually occurred on or about June 2019. Save for the Defendant's purported explanation about what happened to the rifle after he took the video, it is unclear for how long the rifle and ammunition were or have been in the Defendant's possession; or, of course, precisely what happened to them.

46. In any event, whatever the temporal gap, the Crown submits, by reference to my recent comments in the matter of *Selupe* [2021] TOSC 47, that the two offences are separate crimes and the sentences should be served cumulatively. However, it submits that having regard to the totality of the offending, the total of its submitted terms of 24 months should be reduced to 15 months' imprisonment.

47. I agree that the offences in each proceeding are to be viewed as separate and unrelated crimes for which, subject to the totality principle, cumulative punishment is appropriate.⁹ Therefore, the aggregate sentence for both offences is 19 months' imprisonment.

48. However, having regard to the totality principle, I reduce the net sentence to 15 months' imprisonment.

⁸ The Magistrates Court summonses were issued on 23 March 2020.

⁹ *Kolo v Rex* [2006] TOCA 5 at [11]; *Hokafonu v Rex* [2003] TOCA 3 at [51].

Suspension

49. On the issue of suspension, the Defendant meets virtually none of the considerations discussed in *Mo'unga* [1998] Tonga LR 154 at 157. He is not young. He has previous convictions. He has not expressed any remorse for either offence. Instead, through subsequent statements to his counsel and the probation officer, he has chosen to either downplay his involvement or attempt to exonerate himself, which of course is entirely belied by his guilty pleas to both counts. There is no identifiable diminution in culpability. He did not co-operate with police. But he did subsequently enter guilty pleas upon arraignment.
50. In endeavouring to assess whether the Defendant might respond favourably to the deterrent effect intended by a suspended sentence, it is also relevant to recall that he committed the methamphetamine offence whilst on bail for the cocaine offence and the present firearms charges.
51. That the Defendant has a family to support is, as the Court has stated on numerous occasions, not a basis itself for suspension.¹⁰
52. Ultimately, however, the overarching consideration on this issue is whether suspension is likely to aid in the rehabilitation of the Defendant. If it is, his rehabilitation is, in turn, also likely to benefit the community. The fact that he is currently observing the conditions of his suspended sentence in CR 192/20 and that he has been observed to be responding positively to that opportunity is cause for optimism that he will continue to make efforts to rehabilitate himself.
53. 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. That is especially applicable with firearms and drugs offences, given the dangers they both pose to the safety and security of the community.
54. Having regard to the above considerations and principles, the overall level of criminality, the nature of the offences and the Defendant's history and lack of

¹⁰ For example, see *Wolfgramm* [2020] TOSC 78 at [47] to [49].

remorse, I do not consider it appropriate to order full suspension. I am satisfied, however, that it is appropriate to order that the final 6 months be suspended on conditions.

55. The net result is, subject to compliance with the conditions to be imposed, and any remissions available within the Prison system, that the Defendant will be required to serve nine months imprisonment.

Result

56. In proceeding CR 294/20, the Defendant is convicted of:
- (a) unlicensed possession of a firearm and sentenced to 12 months' imprisonment; and
 - (b) unlicensed possession of ammunition and sentenced to 4 months imprisonment, to be served concurrently with the sentence in (a) above.
57. In proceeding CR 26/21, the Defendant is convicted of possession of illicit drugs and sentenced to 7 months imprisonment.
58. The sentence in CR 26/21 is to be served cumulatively with the head sentence imposed in CR 294/20.
59. The aggregate sentence for both proceedings of 19 months' imprisonment is to be reduced to 15 months' imprisonment in total.
60. The final six months of the resulting 15 month sentence is to be suspended, for two years from the date of his release from prison, on condition 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 from prison; and
 - (d) complete the drugs awareness course he is currently undertaking and a life skills course as directed by his probation officer.

61. 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.
62. Pursuant to s 32(2)(b) of the *Illicit Drugs Control Act*, the illicit drugs the subject of this proceeding are to be destroyed.
63. Pursuant to s 33 of the said Act, the \$970 in cash seized from the Defendant is to be forfeited to the Crown.
64. Should the firearm and/or ammunition, the subject of this proceeding, be located and seized by the authorities, then pursuant to s 37 of the *Arms and Ammunition Act*, they are to be forfeited to the Crown.

NUKU'ALOFA
23 April 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE