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

CR 203 and 329 of 2020
CR 330 of 2020

REX
-v-
PALETILI AFU

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mrs. A. 'Aholelei for the Prosecution
Mr S. Tu'utafaiva for the Defendant
Date: 4 May 2021

The charges

1. The Defendant appears for sentencing on the following charges:
 - (a) in CR 330/2020, that on 20 February 2019, he unlawfully possessed 0.24 of a gram of methamphetamines; and
 - (b) by amended indictment combining proceedings CR 203 and 329 of 2020, that on 6 February 2020, the Defendant unlawfully possessed:
 - (i) 27.49 grams of methamphetamines; and
 - (ii) 196.53 grams of cannabis.

The offending

2. On or about 20 February 2019, Police were conducting a search of Similati Tupou's residence in Pahu when the Defendant arrived in his vehicle. The Police also searched the Defendant and his vehicle and found 10 packets of methamphetamines weighing 0.24 grams, \$165 in cash and test tubes. When he was arrested, the Defendant chose to remain silent. The delay between arrest and committal is not explained. On 29 January 2021, in this Court, the Defendant pleaded not guilty to the charge.

3. On 6 January 2020, the Drugs Enforcement Taskforce conducted a search of the Defendant's residence and vehicle in Vaini. The search revealed one dark plastic bag containing 27.49 g of methamphetamine, one tick book containing entries and \$3,218 in cash. Inside the Defendant's house, police found a black bag containing 27 packs of cannabis totalling 196.53 grams together with a red book containing names, two test tubes, empty plastic packets, a black weighing scale, a black external drive and a pipe. The Defendant admitted that the items belonged to him. In October 2020, the Defendant pleaded not guilty to four counts in CR 203 and 329 of 2020 and those matters were listed as a reserve trial commencing 29 March 2021. On that date, the Defendant changed his pleas to guilty on two of those charges and the Prosecution called no evidence on the balance. He also changed his plea in CR 330/20 to guilty.

Crown's submissions

4. The Crown submits the following as aggravating factors for all proceedings:
 - (a) drugs are a 'huge issue' in Tongan society;
 - (b) the substantial amount of methamphetamines;
 - (c) evidence of the Defendant being a supplier; and
 - (d) in or about 2004, the Defendant was convicted of possession of illicit drugs and sentenced to 60 hours community service.
5. The Crown submits that the only mitigating factor is the Defendant's guilty pleas.
6. The Crown referred to the following comparable sentences:
 - (a) *Paula Moala* (CR 186 and 280/20) - the Defendant pleaded guilty in one matter to possession of 7.63 grams of methamphetamine and 2.43 grams of cannabis, and in a second, to possession of 25 grams of methamphetamine and unlicensed ammunition. For the 7.63 grams of methamphetamine charge, a starting point of 3 years imprisonment was set, reduced by 9 months for mitigation, resulting in a sentence of 2 years and 3 months. For the 25 grams of methamphetamines, a starting point was set at 5 years'

imprisonment. That was reduced by 15 months for mitigation resulting in a sentence of 3 years and 9 months' imprisonment. One year of the first sentence was added making a total sentence of 4 years and 9 months' imprisonment. The final 18 months were suspended on conditions.

- (b) *Siosifa Fotu* (CR 311/20) – the Defendant pleaded guilty to possession of 25.5 grams of methamphetamine. A starting point of 5 years was set with 15 months deducted for mitigation. The final 18 months of the resulting sentence of 3 years and 9 months was suspended on conditions.

7. The Crown submits the following as appropriate sentences:

- (a) for CR 203 and 329/2020:

- (i) the head sentence is the methamphetamines;
- (ii) a starting point of 5 ½ years' imprisonment;
- (iii) reduced by 15 months for mitigation;
- (iv) no more than 12 months suspended on conditions; and
- (v) 18 months' imprisonment for the cannabis, to be served concurrently with count 1.

- (b) on CR 330/2020:

- (i) a starting point of 12 months' imprisonment;
- (ii) reduced by 3 months for mitigation.

- (c) Taking into account the totality principle, 3 months of the remaining 9 months for CR 330/20 should be served 'concurrently' with the final sentence imposed in CR 203 and 329/2020.

Defence submissions

8. Mr Tu'utafaiva submitted, in summary:

- (a) the Crown's submitted aggravating features were not disputed;

- (b) the Crown's submitted starting point on the head count of 5 ½ years imprisonment is appropriate;
- (c) that his client pleaded guilty to all the offences so that he can "start with a clean slate after that". For that reason, the Defendant voluntarily attended a Salvation Army course;
- (d) in relation to the other items seized by police:
 - (i) the tick book is a record of flour and milk powder sold on credit;
 - (ii) the weighing scale was used to weigh the flour and milk;
 - (iii) the cash discovered was more than \$5,000 but only \$3,200 was counted at the police station and was earned from selling flour and milk powder and used to pay for the export of food crops to New Zealand;
- (e) the Defendant should receive credit for the three months he has spent remanded in custody; and
- (f) the sentences in *Moala* and *Fotu* deem the Defendant here eligible for partial suspension of his sentences.

Presentence report

9. The probation report provided the following relevant information. The Defendant is 37 years of age. He is the youngest of five children. He grew up in a good and religious family. He was educated to form 6 and enrolled in the University of the South Pacific but later withdrew. He operates his own businesses which he described to the probation officer as tyre repair and maintenance and 'Food Freezing Container'. He is married with three boys, aged 12, 9 and 7. When his wife left him for another man and his parents migrated to New Zealand for medical reasons, his life "became meaningless". As a result, he started socialising with the wrong crowd and got involved with drugs. His wife then returned his sons to him because she was in financial difficulty.
10. The probation officer opines that the Defendant appears remorseful and asks for another chance to turn his life around and be a better father and role model to his

sons. The probation officer recommends suspension on the usual conditions and community work.

Starting points

11. The maximum penalty for unlawful possession of methamphetamines is a fine not exceeding \$1 million or 30 years' imprisonment or both. The maximum penalty for possession of 28 grams or more of cannabis is a fine not exceeding \$50,000 or 7 years' imprisonment or both.
12. The Court's repeated stance on illicit drugs, particularly methamphetamines, and the approach taken to sentencing, may be summarized as follows:
 - (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. In order for the Courts to send a message for deterrence of drug offending, it ensures 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."
14. The 25.49 grams of methamphetamine is clearly the head count, followed by the 196.43 grams of cannabis, followed by the 0.24 grams of methamphetamines in CR 330/20.

15. In the Court's experience, the amounts of drugs involved in CR 203 and 329 of 2020 are far greater than those usually encountered for personal use. Overall, those amounts, together with the other drug-related paraphernalia and cash seized clearly suggests that the Defendant is a middle tier drug dealer. While the Defendant has been charged with, and has pleaded guilty to, possession, the facts here strongly indicate possession for the purpose of supply: see *R v 'O Pangai* [2021] TOSC 50.
16. The sentencing bands for Class A drugs prescribed by the New Zealand Court of Appeal in *Zhang v R* [2019] NZCA 507 at [126], include:
 - (a) Band 1: up to 5 g = community to 4 years; and
 - (b) Band 2: up to 250 g = 2 to 9 years.
17. Having regard to the seriousness of the offending, the substantial amount of methamphetamines and cannabis involved, the comparable sentences and principles referred to above, I set the following starting points:
 - (a) for the 27.49 grams of methamphetamine: 5 years and 3 months' imprisonment;
 - (b) for the 196.43 grams of cannabis: 2 years' imprisonment; and
 - (c) for the 0.24 grams of methamphetamines: 12 months' imprisonment.

Mitigation

18. The Defendant's eligibility for any discounts in mitigation is limited. He does not have a clean record. He has a prior conviction for possession of illicit drugs, albeit in 2004. Further, he chose to plead guilty quite late in the proceedings. Notwithstanding, I deduct the following amounts from the above starting points:
 - (a) 12 months;
 - (b) 4 months; and

(c) 3 months.

19. The resulting sentences therefore are:

(a) 4 years and 3 months;

(b) 20 months; and

(c) 9 months.

20. However, the offending in CR 330/20 occurred in February 2019. Therefore, the offending in CR 203 & 329/20, which occurred in February 2020, must have been committed when the Defendant was on bail for the offence the subject of CR 300/20. Accordingly, to reflect the overall level of criminality, I consider it appropriate to add 3 months of the sentence of 9 months for that offence to the head count in CR 203 & 329/20, resulting in a head sentence of 4 ½ years' imprisonment.

Suspension

21. The considerations in *Mo'unga* [1998] Tonga LR 154 at 157 do not favour suspension in this case. The Defendant is not particularly young. He has a previous conviction for drugs, although it is fairly old. The amounts of drugs in question and other indica of drug dealing strongly indicate premeditation. There are no other factors diminishing the Defendant's culpability. He did not co-operate with police, although he belatedly pleaded guilty.

22. Against that, the Defendant has voluntarily enrolled in a Salvation Army drugs awareness course. He has three young sons for whom he has recently resumed responsibility. There is some basis for confidence that he will take the opportunity afforded by a partially suspended sentence to consolidate and continue his efforts to date to rehabilitate.

23. On balance, I consider it appropriate to order that the final 18 months of the head sentence be suspended on conditions.

Forfeiture

24. I am not persuaded by the submissions on behalf of the Defendant that the \$3,218 cash seized by police was earned from selling flour and milk powder. Firstly, it was found on the floor of the Defendant's vehicle throughout which the drugs and other related items were found. Secondly, the submission does not accord with the Defendant's description of his businesses to the probation officer which did not include any reference to selling flour and milk powder. I am therefore satisfied that the cash was more likely than not the proceeds of crime, or in the language of s 33 of the Act, property in respect of which the offences were committed.

Result

25. In proceedings CR 203 and 329/2020, the Defendant is convicted of:
- (a) possession of 27.49 grams of methamphetamine and sentenced to 4 years and 3 months' imprisonment
 - (b) possession of 196.53 grams of cannabis and sentenced to 20 months' imprisonment, to be served concurrently with (a) above.
26. In proceeding CR 330/20, the Defendant is convicted of possession of methamphetamines and sentenced to 9 months' imprisonment.
27. Three months of the sentence in CR 330/20 is to be added to the head sentence in CR 203 and 329/2020, resulting in a **total head sentence of 4 ½ years' imprisonment**. The balance of the sentence in CR 330/20 is to be served concurrently with the sentence in CR 203 and 329/2020.
28. The final 18 months of the head sentence is to be suspended for a period of two years from the date of the Defendant's release from prison, on condition that during the said 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 any drugs awareness course he is currently undertaking and a life skills course as directed by his probation officer.
29. The Defendant is to be given credit for any time spent in custody on remand for the charges the subject of these proceedings.
30. 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.
31. Pursuant to:
- (a) s 32(2)(b) of the *Illicit Drugs Control Act*, the illicit drugs the subject of this proceeding are to be destroyed; and
 - (b) s 33 of the said Act, all cash and other items seized by police is to be forfeited to the Crown.

NUKU'ALOFA
4 May 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE

