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

CR 312 of 2020

**REX**

**-v-**

**SALESI FA'AOA**  
**(a.k.a Mahelofa Tuputau)**

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## **SENTENCING REMARKS**

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**BEFORE:** LORD CHIEF JUSTICE WHITTEN QC  
**Appearances:** Mrs A. Aholelei for the Prosecution  
The Defendant in person  
**Date:** 30 April 2021

### **The charges**

1. The Defendant was charged with one count of possession of 0.3 grams of methamphetamine contrary to s 4(a)(iii) of the *Illicit Drugs Control Act* and possession of 22 rounds of .22 calibre ammunition without a licence contrary to s 4(2)(b) of the *Arms and Ammunition Act*. Upon his arraignment, he pleaded not guilty to both counts and the trial was listed to commence on 11 March 2020.
2. By reason of the Defendant's failure to secure counsel to appear, the start of the trial was deferred over several days. On 15 March 2021, the Defendant changed his plea to the ammunition charge to guilty but maintained his not guilty plea to the methamphetamine charge.
3. On 18 March 2021, the trial proper on the drug offence commenced. At the conclusion thereof, the Defendant was found guilty.

### **The offending**

4. On 18 June 2020, the Drugs Enforcement Taskforce received information that the Defendant was selling drugs from his car in the Nuku'alofa area. The Police located the Defendant's car and stopped him. During searches of the vehicle, police found 26 rounds of .22 blank bullets inside the front compartment box, one silver weighing scale, empty dealer packs, a test tube and \$153 in cash. They

also found within the cavity of the ceiling lining one pack containing two packs of what was later tested to be methamphetamines.

5. In relation to the ammunition, the Defendant stated that it was originally found in the car of a customer at his car wash business about three months before the police search. The ammunition, together with other items that belonged to the customer, were put out beside the vehicle but not returned to the car after it was cleaned. One of the accused brother's children, a 3-year-old, was later found playing with the ammunition. The Defendant never satisfactorily explained how or why the ammunition was at some point transferred to his vehicle.

### **Crown's submissions**

6. The Crown submits the following as aggravating features of the offending:
  - (a) drug offending is an issue in Tonga;
  - (b) possession of a Class A drug;
  - (c) the Defendant did not co-operate with the Police;
  - (d) he did not plead guilty to the drug charge; and
  - (e) he has a previous conviction for possession of methamphetamine.
7. On 28 January 2020, the Defendant was sentenced by the Magistrates Court for possession of 0.20 grams of methamphetamine and sentenced to a nine month good behaviour bond. The present offending occurred some five months later.
8. The Crown submits that the only mitigating feature is that the Defendant pleaded guilty to the ammunition charge.
9. The Crown relies upon the following comparable sentences:
  - (a) *Fainga Lavolu Tengange* [2020] TOSC 9 – the Defendant pleaded guilty to possession of 0.38 grams of methamphetamine. He was a first-time offender, co-operated with the Police but belatedly pleaded guilty. He was sentenced to 6 months' imprisonment, fully suspended for 12 months on conditions including 30 hours community service.

- (b) *'Alapasita Sakopo* [2020] TOSC 47 – the Defendant pleaded guilty to possession of 0.38 grams of methamphetamine. He was sentenced by Niu J to 2 years' imprisonment, fully suspended for 2 ½ years on conditions.
  - (c) *'Unga* (CR 28/2019) – the Defendant pleaded guilty to possession of 0.47 grams of methamphetamine. She was a first time offender. She was sentenced to 8 months' imprisonment, fully suspended on conditions.
  - (d) *Master Tome Suasau* (CR 120/2020) – the Defendant pleaded guilty to possession of 0.48 grams of methamphetamine. He was a first-time offender. A starting point of 12 months was set, reduced by 4 months for mitigation, resulting in a sentence of 8 months' imprisonment, fully suspended for two years on conditions including 70 hours community service.
10. Here, the Crown submits that a custodial sentence be imposed, calculated as follows:
- (a) the head sentence is for count 1, for which the starting point should be 12 months' imprisonment;
  - (b) no discount for mitigation;
  - (c) the Defendant does not qualify for any suspension under the *Mo'unga* considerations; and
  - (d) 3 months' imprisonment for count 2, to be served concurrently with count 1.

### **Pre-sentence report**

11. The Defendant is the eldest of three children. Due to his parent's marital problems, his mother and siblings migrated to New Zealand in 1994. His mother died in 1996 and he was raised by his aunt. He was well educated and finished year 11 before dropping out of high school. At 17, he married, and has three children from that marriage before it broke down. In 2014, as a result of criminal activity, he was deported to Tonga.
12. In relation to the offending, the Defendant told the probation officer that he was introduced to drugs and alcohol at a very young age as his older cousins were

members of street gangs, which led to his involvement in criminal activities. He still maintains his innocence in respect of the drug offence but somehow accepts responsibility because they were found in his vehicle. Ironically, he also accepts that he has a serious problem with drugs for which he needs training or rehabilitation.

13. The probation officer describes the Defendant's previous conviction as resulting in a sentence of 9 months' probation. He apparently did not complete his rehabilitation course as a result of the Covid-19 restrictions at the time on his enrolment in January 2020. I find that difficult to understand or accept. Nevertheless, he is said to be willing to retake and complete that course.
14. The probation officer considers that the Defendant is remorseful and that his risk of re-offending can be reduced by being placed on probation and undertaking a rehabilitation program. She recommends a fully suspended sentence on conditions including probation, abstention from alcohol and drugs, an alcohol and drug abuse course and community work.

### **Starting points**

15. The statutory maximum penalty for possession of a Class A drug is a fine of \$1 million or 30 years' imprisonment or both. The maximum penalty for possession of ammunition without a licence is 5 years' imprisonment.
16. 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:<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;

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<sup>1</sup> See, most recently, *R v Paletu'a* [2021] TOSC 49; CR 27 of 2021 (23 April 2021) citing *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].

- (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.
17. Despite the relatively small amount of methamphetamines found, there are two troubling aspects to the offending in this case.
  18. Firstly, and as explained in the verdict, the manner in which the methamphetamines were secreted above the ceiling lining of the Defendant's vehicle together with the other drug-related paraphernalia found left no doubt that not only did the drugs belong to the Defendant but, consistent with the information received by police, he most likely possessed them (or the residue of them) for the purpose of supply. The Defendant continues to deny that.
  19. Secondly, he committed the instant offences within five months of being sentenced by the Magistrates Court for possession of methamphetamines and given either a bond or being placed on probation. His representations to the probation officer were entirely silent about that. That fact also casts real doubt over the probation officer's no doubt well-intended recommendations and tends to undermine any confidence in the Defendant's capacity and/or willingness to rehabilitate through yet another non-custodial or fully suspended custodial sentence.
  20. Having regard to the seriousness of the offending, the amount of methamphetamines in the Defendant's possession, the comparable sentences (particularly *Tengange* and *Sakopo*) and the observations and principles referred to above, I set a starting point for count 1, the methamphetamines charge, of 9 months' imprisonment.
  21. For count 2, the ammunition charge, I set a starting point of 3 months' imprisonment.

## Mitigation

22. Discounts for mitigation will usually be applied in cases where a Defendant has a good previous (relevant) record and/or enters a guilty plea at some point prior to conviction. The sooner that plea is entered, the greater the proportion of the discount available will usually be applied. Had the Defendant here had no previous convictions, particularly for drugs, and pleaded guilty at the earliest opportunity, which, as the evidence adduced at trial strongly indicated he should have, he could have expected a reduction on the starting point of up to one third or three months and, very likely, full suspension. Instead, given that the Defendant has a recent previous conviction for possession of methamphetamines, that he breached the terms of his sentence for that conviction by the instant offending and that he maintained his not guilty plea on this matter to verdict (and has maintained it since), he is not eligible for any discount on the starting point for the methamphetamines.
23. On the ammunition charge, for his belated guilty plea and lack of previous relevant convictions, I deduct one month from that starting point, resulting in a sentence of two months' imprisonment, to be served concurrently with the sentence on count 1.

## Suspension

24. On balance, the considerations discussed in *Mo'unga* [1998] Tonga LR 154 at 157 do not favour suspension. At 31 years of age, the Defendant is not particularly young. He has a recent and relevant previous conviction. He did not co-operate with the police and, in my view, he is only remorseful because he got caught, not because of any realisation of the error of, and responsibility for, what he has done. That he committed the instant offences while subject to the sentence for his previous methamphetamine offence militates heavily against any rational expectation that the Defendant is, at present, genuinely desirous of rehabilitation. In fact, my observations of him during the trial were of a man who was prepared to try and deflect any and all responsibility for his actions (including seeking to inculcate a friend who never materialised) if it meant he could continue

his caustic association with methamphetamines. Unfortunately, the objective elements of the pre-sentence report reinforce that perception.

25. Notwithstanding, the fact that the Defendant has not yet had the benefit of even a partially suspended sentence, and the supervision that comes with it, compels me to offer him the opportunity presented by such a sentence to make good on his representations of wanting to rehabilitate. However, and as with many methamphetamine cases, full suspension is unlikely to fulfill the Court's responsibility to ensure that sentences serve the demands of specific and general deterrence: *Vake* [2012] TOCA 7.
26. Accordingly, and somewhat unusually, I will order that the last six months of the nine months of the head sentence be suspended on conditions. Such a majority of term suspension must be understood by the Defendant to be his last opportunity to abandon his involvement with illicit drugs. Should he fail to do so, especially during the suspension period, he will almost certainly be imprisoned for a far more substantial period of time.

## **Result**

27. The Defendant is convicted of:
  - (a) possession of illicit drugs and sentenced to 9 months' imprisonment; and
  - (b) possession of ammunition without a licence and sentenced to 2 months' imprisonment, to be served concurrently with the sentence on count 1.
28. The final six months of the head sentence is to be suspended for a period of 2 years, from the date of the Defendant's 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 a drugs awareness course as directed by his probation officer.

29. Failure to comply with any of the said conditions may result in the suspension being revoked, in which case, the Defendant will be required to serve the balance of his prison sentence.

30. 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;
- (b) s 33 of the said Act, the \$153 in cash and other items seized from the Defendant are to be forfeited to the Crown; and
- (c) s 37 of the *Arms and Ammunition Act*, the ammunition, the subject of this proceeding, is to be forfeited to the Crown.

NUKU'ALOFA  
30 April 2021



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

M. H. Whitten QC  
LORD CHIEF JUSTICE