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

CR 211 of 2020

**REX**  
**-v-**  
**SIUA PALANITE HUFANGA**

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## **SENTENCING REMARKS**

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**BEFORE:** LORD CHIEF JUSTICE WHITTEN QC  
**Appearances:** Mrs. 'Eliesa for the Prosecution  
The Defendant in person  
**Date:** 28 May 2021

### **The charge**

1. On 23 April 2021, the Defendant pleaded guilty to possession 2.13 grams of methamphetamine and 8.16 grams of cannabis.

### **The offending**

2. On the evening of 30 March 2020, the Defendant was travelling in a vehicle being driven by another. The vehicle was stopped by police at a Covid-19 curfew checkpoint at Mu'a. The Defendant whispered to the driver who then told police that they were rushing to town because the Defendant had dislocated his shoulder. The Defendant was asked to get out of the car. When he got out, a police officer held his hand. The Defendant broke free and ran off. He was later apprehended and searched. Police found 2 packets of suspected cannabis, 4 packets of suspected methamphetamines and empty packets. The substances were later analysed and found to be 2.13 grams of methamphetamine and 8.16 grams of cannabis. The Defendant admitted to the offending.

### **Crown's submissions**

3. The Crown submits the following as aggravating features:
  - (a) the substantial amount of methamphetamine;
  - (b) the amount of cannabis;

- (c) the Defendant's attempt to escape arrest; and
  - (d) drugs are a 'huge issue' in Tonga.
4. The Defendant has a number of previous convictions, including:
- (a) 2003 – driving under the influence of alcohol – 1 year imprisonment;
  - (b) 2003 – assault – 18 months' imprisonment;
  - (c) 2010 – theft – 3 months' imprisonment, suspended for 2 years; and
  - (d) 2020 – theft – 2 weeks' imprisonment.
5. The only mitigating factor is the Defendant's early guilty plea.
6. The Crown referred to the following comparable sentences:
- (a) *Zhang v R* [2019] NZCA 507 – where, relevantly, the New Zealand Court of Appeal set guidelines or bands of amounts of class A drugs and sentencing ranges. Of those, band 1, for up to 5 grams, suggest a range from community service to 4 years imprisonment.
  - (b) *Kelikupa Maile* [2021] TOSC 69 (CR 132/21) – the Defendant pleaded guilty late to possession of 0.5g and 2.5g of methamphetamines and a total of 51.32g of cannabis. For the head count of 2.5g of methamphetamine, a primary starting point of 3 years imprisonment was set. A further 6 months was added due to the offending occurring while the Defendant was on bail. The total was reduced by 12 months for mitigation with the final 12 months suspended on conditions.
  - (c) *Paletu'a* [2021] TOSC 49 (CR 27/21) – the Defendant pleaded guilty to possession of 3.16g of methamphetamine and other drug-related paraphernalia. A starting point of 3 years and 3 months was set, reduced by 13 months with the final 12 months suspended for two years on conditions.
7. Here, the Crown submits the following sentence formulation:
- (a) the head sentence is count 1;
  - (b) a starting point of 3 years' imprisonment;
  - (c) reduced by 6 months for mitigation resulting in a sentence of 2 ½ years;

- (d) 6 months for count 2, to be served concurrently with count 1; and
- (e) the final 6 months suspended for 12 months, on conditions.

### **No presentence report**

8. At his arraignment on 23 April 2021, the Defendant was directed to attend the probation office within the next 48 hours to arrange an interview for the preparation of his presentence report. He failed to do so, within that time, or at all. As a result, the probation office has been unable to prepare a report.
9. Such directions are made for the benefit of Defendants who are to be sentenced, particularly those who are not legally represented. The resources of the State in the form of the free service provided by the probation office in preparing presentence reports are valuable and limited. The reports greatly assist the Court to understand a Defendant's background and personal circumstances and often provide an insight into the reasons for the offending from the Defendant's perspective. Probation officers are also in a unique position to assess the genuineness or otherwise of any remorse expressed by a Defendant.
10. However, if a Defendant chooses not to attend the probation office for the preparation of his/her report, he/she can only be taken to have waived the benefit of a report. In those cases, and save for exceptional circumstances, the Court must proceed to deal with the matter, on the day directed, with whatever information is properly before it. That a judge may offer a Defendant an opportunity to make oral submissions if he or she wishes either shortly before or on the day of sentencing will rarely be an effective substitute for a presentence report. It may also interfere with the judge's preparation of sentencing remarks.
11. In the end, these are matters for a Defendant to decide. Failure to attend the probation office, such as has occurred here, can also often be a poor reflection of a Defendant's attitude to the offending and acceptance of responsibility and thereby devalue any professed remorse.

### **Starting point**

12. At the time of this offending, the statutory maximum penalty for unlawful possession of methamphetamines is a fine of \$1 million or 30 years'

imprisonment or both. The maximum penalty for possession of less than 28 grams of cannabis is a fine of \$5,000 or 1 year imprisonment or both.

13. The Court's repeated stance on illicit drugs, particularly methamphetamines, and the approach taken to sentencing, 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 (and now, for 1 gram of more, life 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.
14. Further, the Court's responsibility in addressing drug-related offending involving methamphetamine 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>
15. In *PMP*, *infra*, the Defendant was sentenced for possession of 2.12g of methamphetamine and 0.91g of cannabis. On the methamphetamine charge, the Crown submitted a starting point of 2 years, which was accepted. However, there were extenuating circumstances in that case which do not apply here.
16. Having regard to the seriousness of the offending, the amount of methamphetamines, the above principles and comparable sentences, I set a starting point for count 1 of 2 ½ years imprisonment.

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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].

17. For count 2, the cannabis, I set a starting point of 4 months imprisonment.

### **Mitigation**

18. On account of the Defendant's early guilty plea and that this appears to be his first detected drug offence, I reduce each of the starting points by approximately 30%, that is, 9 months for count 1 and 1 month for count 2.
19. The resulting sentences are therefore 21 months imprisonment for count 1 and 3 months imprisonment for count 2 to be served concurrently with the sentence on count 1.

### **Suspension**

20. The Defendant is 49 years of age. His return to crime by his most recent theft conviction, after a 10 year break (his sentence in 2010 being fully suspended), and now this offending, is troubling. The amount of methamphetamine involved (which would be deemed supply had the offence occurred on or after 8 December 2020) and the critical imperative for the Courts to ensure that sentences, particularly for methamphetamine, are effective in providing specific and general deterrence, clearly also weigh against full suspension. However, of the other considerations in *Mo'unga* [1998] Tonga LR 154 at 157, that the Defendant cooperated with police (after initially trying to escape, presumably an act of panic), admitted to the offending at the outset and that this is his first drug related offence do tend in favour of some suspension.
21. The opportunity and support offered by a period of supervision, support and education after the Defendant's release from prison is likely to assist in his rehabilitation should he choose that course for his life. To assist him with that choice, I will also order a significant suspension period.
22. In those circumstances, I consider it appropriate to order that the final 9 months of the head sentence be suspended for 2 years from release, on conditions.
23. In the result, and subject to compliance with the conditions below and any remissions granted within prison, the Defendant will be incarcerated for 12 months.

**Result**

24. The Defendant is convicted of possession of illicit drugs and is sentenced to:
- (a) 21 months' imprisonment on count 1; and
  - (b) 3 months' imprisonment on count 2, to be served concurrently with the sentence on count 1.
25. The final 9 months of the head sentence are to be suspended for 2 years from the date of the Defendant's release from prison, on conditions 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;
  - (d) reside where directed by his probation officer; and
  - (e) complete courses on alcohol and drug awareness and life skills as directed by his probation officer.
26. Failure to comply with the above conditions may result in the suspension being rescinded, in which case, the Defendant will be required to serve the balance of his sentence.
27. Pursuant to s 32(2)(b) of the *Illicit Drugs Control Act*, the illicit drugs the subject of these proceedings are to be destroyed.

NUKU'ALOFA  
28 May 2021



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

M. H. Whitten QC  
LORD CHIEF JUSTICE