

Sum & Aho.

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

CR 58 of 2021
CR 75 of 2021

REX
-v-
MATANGI FETU'U' AHO

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr T. 'Aho for the Prosecution
Mr S. Tu'utafaiva for the Defendant
Date: 1 June 2021

The charges

1. On 26 April 20221, the Defendant pleaded guilty in proceedings:
 - (a) CR 58/21, to unlawful possession of:
 - (i) utensils;
 - (ii) 25.27 grams of cannabis; and
 - (iii) 10.40 grams of cannabis seeds;
 - (b) CR 75/21, to unlawful possession of:
 - (i) 183.33 grams of cannabis;
 - (ii) 37.7 grams of cannabis; and
 - (iii) 1.16 grams of cannabis.

The offending

2. On 28 December 2020, Police received information that the Defendant was selling drugs from his residence. While driving to the Defendant's residence, Police were informed that the Defendant had gone to the residence of his co-accused, Manu Huni, at Fo'ui. When they arrived at Fo'ui, police found the Defendant packing cannabis. The Defendant and another co-accused, 'Atapani Pongi, picked up something from the floor and ran out the back door. They were

intercepted by police who identified several packs falling from the offenders' hands. At Manu's residence, Police found numerous packs of cannabis and cannabis leaves, a plastic bag containing 415 empty plastic packs and several bongs. At the Defendant's residence, Police found further packs of cannabis, 262 empty plastic packs, an aluminium can use for smoking cannabis and a utensil for smoking cannabis oil.

3. The Defendant admitted to the offending. His two co-accused did not. Their trial is listed to commence on 8 June 2021.

Crown's submissions

4. The Crown submits the following as aggravating features:
 - (a) drugs are a 'huge issue' in Tonga;
 - (b) the 'moderate' amount of cannabis found;
 - (c) the Defendant was packing cannabis for the purpose of a small commercial supply;
 - (d) pursuant to s 4(2) of the Act, as recently amended, as the amount of cannabis exceeds 7 grams, the Defendant is deemed to be a supplier; and
 - (e) the presence of unlawful utensils at his residence also suggests that he is a drug user.
5. In mitigation, the Defendant:
 - (a) co-operated with the Police;
 - (b) pleaded guilty at the earliest opportunity; and
 - (c) has no relevant previous convictions.¹
6. The Crown referred to the following comparable sentences:
 - (a) *Likamani Fa'aoso* [2020] TOSC 90 – the Defendant pleaded guilty to possession of 126 packs of cannabis, one plastic bag of cannabis leaves and seeds and another large bag of cannabis leaves, totalling 165.37

¹ In 2001, the Defendant was convicted of minor theft in the Magistrates Court and fined.

grams. A starting point of 2 years was set. That was reduced by 8 months for mitigation, resulting in a sentence of 16 months' imprisonment. The final 8 months was suspended for 12 months on conditions.

- (b) *Sione 'Atupuha Latu* (CR 136/17) and *Satio Matakaiongo* (CR 135/17) – were co-accused to the principal offender in *R v Huni* [2018] TOSC 33. Matakaiongo's motor vehicle was the subject of search outside the residence of Latu which revealed one plastic bag containing 89.2 grams of cannabis and a number of empty small bags contained in a larger bag. Also various sums of cash were located. At Latu's home, police found 133 small packets containing a total of 195.37 grams of cannabis and 109.8 grams of cannabis seeds. Cato J considered that both offenders fell into the second category of the classifications in *Ve a v R* [2004] TOCA 7 for cannabis offending justifying a sentence of between 2 and 4 years imprisonment for smaller scale commercial cultivation and possession of cannabis for commercial supply. Matakaiongo had previous convictions for drugs. For each, a starting point of three years and three months imprisonment was set. After discounts for mitigation, they were sentences to two years and three months imprisonment with the final 9 months suspended on conditions.
- (c) *Ngaue* [2018] TOSC 38 - the Defendant was charged with possession of 14.15 grams of methamphetamine and 43.89 grams of cannabis. On the cannabis charge, he was sentenced 18 months' imprisonment, to be served concurrently with the sentence on the methamphetamine charge of 3 years and 6 months' imprisonment, with the final 9 months suspended.
7. The Crown's reference to *Mangisi* (CR 10/18) and others citing the New Zealand Court of Appeal's guidelines or bands in *Zhang v R* [2019] NZCA 507 at [125] was misplaced. They relate to methamphetamines and other class A drugs.
8. Here, the Crown submits the following sentence formulation:
- (a) the head sentence is count 1 of CR 75/21, possession of 183.33 grams of cannabis, for which a starting point of 3 years' imprisonment should be set;
- (b) reduced by 9 months for mitigation;

- (c) resulting in a sentence of 2 years and 3 months;
- (d) 15 months' imprisonment for count 2;
- (e) 1 month imprisonment for count 3;
- (f) 9 months' imprisonment for count 2 (CR 58/21);
- (g) 6 months' imprisonment for count 3 (CR 58/21);
- (h) all sentences to be served concurrently with the head sentence; and
- (i) partial suspension of the head sentence.

Defence submissions

9. Mr Tu'utafaiva submitted, in summary:
- (a) the Crown's submitted aggravating and mitigating features are not disputed;
 - (b) a sentence of imprisonment is appropriate;
 - (c) having regard to the comparable sentences and the amount involved in the head count here, the Crown's submitted starting point of 3 years' imprisonment is excessive – 2 years is appropriate;
 - (d) the sentences submitted for the other charges are accepted; and
 - (e) as the Defendant has had a long period free from criminal activity and is most likely to take any opportunity offered by a conditional suspended sentence to attend a Salvation Army course, partial suspension is appropriate.

Presentence report

10. The Defendant is 35 years of age. He is the eldest of three children. His family migrated to the United States from Auckland after his birth. His parents separated when he was two. He then lived with his paternal grandparents and travelled with them to Tonga. He was educated to Form 4. He pursued studies at Tangaroa College in NZ but dropped out. He is single but has fathered one illegitimate child who resides with his mother. The report annexes and refers to a number of references, which I have considered.

11. In relation to the offending, the Defendant admitted to cultivating a cannabis plantation for his own personal use and for supplying purposes to earn an income. He is said to have taken responsibility for his actions, quit illegal drugs, is remorseful and seeks the court's leniency and mercy. However, the probation officer opines that the Defendant's alcohol and drug abuse problems and admissions of cultivating for supply render him a high-risk offender and a threat to the public. The officer recommends a partially suspended sentence on conditions.

Starting point

12. The statutory maximum penalties for the various categories of offending are:
 - (a) possession of more than 28 grams of cannabis – a fine of \$50,000 or 7 years' imprisonment or both;
 - (b) possession of utensils - a fine of \$10,000 or 3 years' imprisonment or both; and
 - (c) possession of less than 28 grams of cannabis – a fine of \$5,000 or 1 year imprisonment or both.
13. In *Vea* [2004] TOCA 7, the Court of Appeal adopted the New Zealand Court of Appeal's categories of cannabis drug offending discussed in *Terewi* [1999] 3 NZ 62, namely:
 - (a) for growing cannabis in small quantities for personal use - up to two years' imprisonment;
 - (b) small scale commercial cultivation - up to 4 years' imprisonment; and
 - (c) large scale cultivation for commercial purposes - over 4 years imprisonment.
14. The head count is clearly count 1 in proceeding CR 75/21, possession of 183.33 grams of cannabis.
15. Having regard to:
 - (a) the seriousness of the offending, marked by:

- (i) the amount and total weight of the cannabis found in the Defendant's possession (257.86 grams) which, in my view, places him between the first and second *Terewi* categories;
 - (ii) the overall level of criminality by reference to the relationship between the head count and the other counts demonstrating the Defendant to be a low level cannabis supplier; and
- (b) the comparable sentences and principles referred to above,

I set a starting point for the head count of 2 years and 9 months (or 33 months) imprisonment.

Mitigation

16. For the Defendant's early guilty plea and relevantly good record, I reduce that starting point by one third or 11 months, resulting in a head sentence of 22 months' imprisonment.

Sentences for the other offences

17. By a similar process, having regard to the submissions referred to above, and by reference to the sentence for the head count as a benchmark, the respective statutory maximum penalties, the amounts of cannabis involved and their nature, I impose the following sentences for the remaining offences:
- (a) CR 58/21, for unlawful possession of:
 - (i) utensils – 12 months' imprisonment;
 - (ii) 25.27 grams of cannabis - 10 months' imprisonment; and
 - (iii) 10.40 grams of cannabis seeds – 4 months' imprisonment;
 - (b) CR 75/21, for unlawful possession of:
 - (i) 37.7 grams of cannabis - 12 months' imprisonment; and
 - (ii) 1.16 grams of cannabis – 1 month imprisonment.
18. Those sentences are to be served concurrently with the sentence for count 1 of CR 75/21.

Suspension

19. The considerations in *Mo'unga* [1998] Tonga LR 154 at 157 weigh in favour of some suspension in this case. The Defendant is not particularly young and the offending was clearly premeditated. However, he has had a long period free of crime and these are his first detected drug-related offences. He also co-operated with the authorities and pleaded guilty at the earliest opportunity. Also, if the Defendant's assertion that he has quit drugs is to be accepted, then there is some hope that he will take the opportunity for rehabilitation offered by a partially suspended sentence and the supportive conditions to be attached.

Result

20. In proceeding CR 58/2021, the Defendant is convicted of unlawful possession of:
- (a) utensils for drug use and sentenced to 12 months' imprisonment;
 - (b) 25.27 grams of cannabis and sentenced to 10 months' imprisonment; and
 - (c) 10.40 grams of cannabis seeds and sentenced to 4 months' imprisonment.
21. In proceeding CR 75/21, the Defendant is convicted of unlawful possession of:
- (a) 183.33 grams of cannabis and sentenced to 22 months' imprisonment ("**the head count**");
 - (b) 37.7 grams of cannabis and sentenced to 14 months' imprisonment; and
 - (c) 1.16 grams of cannabis and sentenced to 1 month imprisonment.
22. All the above sentences are to be served concurrently with the head sentence.
23. The final 11 months of the head sentence of 22 months' imprisonment are 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 an alcohol and drugs awareness course with the Salvation Army.

24. The Defendant is to be given credit for any time spent in custody on remand in respect of the subject proceedings.
25. 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.
26. Pursuant to:
 - (a) s 32(2)(b) of the *Illicit Drugs Control Act*, the illicit drugs the subject of these proceedings are to be destroyed; and
 - (b) s 33 of the said Act, the drug-related paraphernalia seized from the Defendant's residence is to be forfeited to the Crown.

NUKU'ALOFA
1 June 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE