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

CR 6 of 2021
CR 56 of 2021
CR 117 of 2021

REX
-v-
SIFITANI AFU

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Ms 'A. 'Aholelei for the Prosecution
The Defendant in person
Date: 4 June 2021

The charges

1. The Defendant appears today for sentencing after pleading guilty, on 16 April 2021 and 20 May 2021, to a total of 16 offences, namely:
 - (a) CR 6/21:
 - (i) possession of 0.40 grams of methamphetamine;
 - (ii) possession of 2.93 grams of cannabis;
 - (iii) possession of 0.05 grams of methamphetamine;
 - (iv) possession of 0.98 grams of methamphetamine; and
 - (v) possession of 0.34 grams of cannabis.
 - (b) CR 56/21:
 - (i) possession of 14.34 grams of methamphetamine;
 - (ii) possession of 0.16 grams of methamphetamine;
 - (iii) possession of 7.22 grams of cannabis; and
 - (iv) possession of utensils.

(c) CR 117/21:

- (i) possession of 0.91 grams of methamphetamine;
- (ii) attempting to destroy evidence; and
- (iii) possession of utensils.

The offending

2. In relation to CR 6/2021, on 6 February 2020, Police received information that drugs were being sold from Paletili Afu's residence at Vaini. When Police arrived, most of the vehicles had left. They then patrolled the Vaini area and noticed a black vehicle that was at Patetili's residence. Police stopped the vehicle. It was being driven by the Defendant. He and two co-accused were removed from the vehicle and a search was conducted. Police found 0.93 grams of cannabis on Harris Satini, who is also to be sentenced this day. Throughout the vehicle, they also found 3 packets of methamphetamine, 4 packets of cannabis, 2 test tubes, an empty packet and \$240 in cash. The Defendant did not co-operate when questioned.
3. In relation to CR 56/21, on or about 18 December 2020, Police carried out a search of the Defendant's residence during which they found a total of 31 packs of methamphetamine, quantities of cannabis, \$460 and various drug-related utensils. The Defendant admitted that the items belonged to him but did not co-operate further when questioned.
4. Further to the above offending the subject of the sentences to be imposed today, on 9 March 2021, after being found guilty, the Defendant was sentenced in the Magistrates Court (CR 175-176/20, after being remitted from the Supreme Court in proceeding CR 265/20) for possession of 12.42 g of cannabis and 0.31 g of methamphetamine to 9 months imprisonment, fully suspended for 12 months. That offending occurred on 1 April 2020.
5. In relation to CR 117/21, on 11 March 2021, that is, only two days after he was given a fully suspended sentence in the Magistrates Court, Police conducted another search of the Defendant's residence as a result of information received that he was

selling drugs. During the search of one of the bedrooms, Police heard the Defendant flush the toilet and he was detained. Police found seven empty packets, one packet of suspected methamphetamine and a straw inside the toilet bowl. After being informed of his rights, the Defendant said that the objects inside the toilet bowl were his. Police also found a packet of cannabis on the floor beside the Defendant's bed. He said to belong to somebody else. He was then arrested and, again, did not cooperate when questioned.

Crown's submissions

6. The Crown submits the following as aggravating features:
 - (a) CR 6/21 – possession of a substantial amount of methamphetamines, a Class A drug, whilst on bail for another offending fifth and a previous conviction.
 - (b) CR 56/21 – substantial amount of methamphetamine and other drug paraphernalia including cash, indicating that he is a supplier, whilst on bail.
 - (c) CR 117/21 – amount of methamphetamine and drug paraphernalia indicating supply, possession of dealer bags and weighing scales, attempting to destroy evidence, again committed whilst on bail.
7. The only mitigating factor is the Defendant's guilty pleas for all proceedings.
8. As at the date hereof, the Defendant has previous convictions as referred to in paragraph 4 above.
9. The Crown referred to the following comparable sentences:
 - (a) In *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 to 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.
 - (b) In *Paula Moala* (CR 186 280/2020) – 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.

- (c) In *'Uhila Tu'i* (CR 66/2019) – the Defendant pleaded guilty to possession of 1.29 grams of methamphetamine, 5.62 grams of cannabis and 3.36 grams of cannabis plant. For the methamphetamine, he was sentenced to 14 months' imprisonment, with the final 6 months suspended. He was sentenced to 2 months for the cannabis charge, to be served concurrent to count 1. For the cultivation charge, he sentenced to 2 months, to be served concurrently with count 1.
- (d) In *Nasif Ali* [2020] TOSC 94 – the Defendant was charged with 0.86 and 1.07 grams of methamphetamine and 0.04 grams of cannabis. He was sentenced to 6 months' imprisonment for count 1 and 12 months for count 2, to be served cumulatively to count 1. For the cannabis, he was sentenced to 1-month imprisonment, to be served concurrently with count 2. The final 9 months were suspended on conditions.

10. Here, the Crown's submits the following sentence formulation:

- (a) CR 6/2021
 - (i) the head sentence is count 4;
 - (ii) a starting point of 18 months' imprisonment;
 - (iii) reduced by 6 months for mitigation;
 - (iv) partial suspension;
 - (v) 6 months' imprisonment for count 1;

- (vi) 3 months' imprisonment for count 2;
- (vii) 4 months' imprisonment for count 3; and
- (viii) 1 month imprisonment for count 5.

(b) CR 56/2021

- (i) the head sentence is count 1;
- (ii) a starting point of 4 years' imprisonment;
- (iii) reduced by 12 months;
- (iv) partial suspension;
- (v) 4 months' imprisonment for count 2, 3 and 4.

(c) CR 117/2021

- (i) the head sentence is count 2;
- (ii) a starting point of 18 months' imprisonment;
- (iii) reduced by 6 months;
- (iv) partial suspension;
- (v) 18 months' imprisonment for count 1; and
- (vi) 2 months imprisonment for count 3;
- (vii) 4 months' imprisonment for count 4.

- (d) Having regard to the totality principle, count 1 in CR 56/21 be used as the head sentence. Six months from the sentences in CR 6 and CR 117 be added. balance of the sentences to be served concurrently.

Defence submissions

11. Mr Tu'utafaiva submitted, in summary, that:

- (a) the Crown's submissions on sentencing are not disputed;
- (b) in pleading guilty, the Defendant has taken responsibility for his actions;

- (c) he committed the offences in CR 56/21 on 18 December 2020, the date the amendments to the *Illicit Drugs Control Act* came into effect;
 - (d) the offending for all three proceedings were committed whilst on bail and the offending in CR 117/21 was committed two days after he was sentenced to 9 months in the Magistrates Court for possession of 0.31 grams of methamphetamine, which was fully suspended;
 - (e) by consideration of the *Mo'unga* principles, the sentences should be partially suspended with a condition that the Defendant attend a Salvation Army Drugs and Alcohol Awareness course, in order for him to rehabilitate and refrain from future drug use.
12. I have also had regard to a number of character references and letters of support filed from various of the Defendant's previous employers, church leaders and family members. They all speak highly of him and regard the current offending as out of character. They lament the turn his involvement with drugs has taken in the Defendant's life and pledge their support for him in the future after he completes his sentences for these matters.

Presentence report

13. The Defendant is 38 years of age. He is the fourth of six children. He grew up in a good family. He was customarily adopted and raised by his grandparents and when they migrated to New Zealand, he moved back to live with his parents. He is married with no children. Prior to getting married, he had already used drugs but she passed away in 2013, he then turned to drugs, particularly, methamphetamines, as a way of coping and trying to "relieve the pain" from an injury he had sustained in a road accident. His life went downhill from there. He holds a Bachelor of Arts Degree in Accounting and Information System from the University of the South Pacific. He is currently engaged to be married. The report annexes and refers to a number of references, which I have considered.

14. In relation to the offending, the Defendant admitted to the offences and is said to have taken responsibility for his actions. However, the probation officer opines that the Defendant has been given multiple opportunities by the court for rehabilitation and did not make use of any of those chances given to him. He has not learned his lesson and has ruined his own life. The officer recommends a custodial sentence.

Consideration

15. The Act provides various maximum penalties for the offences under consideration comprising fines and periods of imprisonment. Fines are not appropriate in the current case.
16. For offending which occurred prior to the recent amendments to the Act which came into effect on 8 (not 18) December 2020, the maximum term of imprisonment for possession of methamphetamine was 30 years. For offending which occurred on or after the date of the amendments, possession of less than 1 g of methamphetamine carries a maximum term of 3 years imprisonment and for possession of 1 g or more, imprisonment for life. Section 4(2) now provides that any person in possession of 7 g or more of a Class B drug such as cannabis or 0.25 g or more of a Class A drug such as methamphetamine, shall be deemed to be supplying such drugs.
17. The prison terms for possession of cannabis remain at 1 year for less than 28 g and 7 years for 28 g or more.
18. The new (s 5A) maximum term of imprisonment for possession of utensils is 3 years. For destroying or attempting to destroy evidence in relation to the commission of an offence under the Act (s 37A), the maximum term is 15 years imprisonment.
19. As observed in *R v Afu* [2021] TOSC 61, while the Defendant has been charged with, and has pleaded guilty to, possession, the facts here strongly indicate possession for the purpose of supply. Moreover, the number and nature of the offences, the amounts, particularly of methamphetamines, involved and other drug-related paraphernalia and cash seized leave little doubt that the Defendant

here was a drug dealer: *R v 'O Pangai* [2021] TOSC 50 at [16]. As a matter of law, his last offences deems him as such.

20. While the Act does not differentiate, in terms of penalty, between possession for personal use, possession for the purpose of supply and supplying, “sentences for supplying ought generally be more severe than mere possession for personal use. As observed in *Wolfgramm* [2020] TOSC 78, ‘*supply is the progenitor to subsequent interactions ... such as use and addiction.... In other words, (and apart from a Defendant’s own cultivation or manufacture) without supply, there could never be use or addiction*’.
21. As submitted by the Crown, the most serious offence of all the charges is count 1 in CR 56/21, possession of 14.34 g of methamphetamine (which occurred after the amendments to the Act and is therefore deemed to be supplying), followed by count 4 in CR 6/21 (which occurred prior to the amendments to the Act), possession of 0.98 g of methamphetamine, and then count 2 in CR 117/21, attempting to destroy evidence.
22. Having regard to the seriousness of the offending, the amount of drugs involved, the statutory maximum penalties, the comparable sentences referred to above and the courts robust stamps in relation to sentencing for drug offences, particularly methamphetamines, as referred to most recently in *R v Hufanga* [2021] TOSC 80 at [14] and [15], I set the following starting points for the head counts in each proceeding:
 - (a) count 1 in CR 56/21, possession of 14.34 g of methamphetamine – 4 years imprisonment;
 - (b) count 4 in CR 6/21, possession of 0.98 g of methamphetamine – 18 months imprisonment;
 - (c) count 2 in CR 117/21, attempting to destroy evidence – 30 months imprisonment.

23. For the Defendant's early guilty pleas, and his previous clean record (bearing in mind that the offending for the Magistrates Court conviction occurred during the span of dates the subject of the proceedings here under consideration), I reduce each of those starting points by one third, resulting in the following sentences:
- (a) count 1 in CR 56/21, possession of 14.34 g of methamphetamine – 2 years and 8 months (or 32 months) imprisonment;
 - (b) count 4 in CR 6/21, possession of 0.98 g of methamphetamine – 12 months imprisonment;
 - (c) count 2 in CR 117/21, attempting to destroy evidence – 20 months imprisonment.
24. By a similar comparative and process, and having regard to the statutory maximums and comparable sentences for each, I impose the following terms of imprisonment for the balance of the counts:
- (a) CR 6/21:
 - (i) possession of 0.40 grams of methamphetamine – 5 months;
 - (ii) possession of 2.93 grams of cannabis – 2 months;
 - (iii) possession of 0.05 grams of methamphetamine – 2 months;
 - (iv) possession of 0.98 grams of methamphetamine – 12 months; and
 - (v) possession of 0.34 grams of cannabis – 1 month.
 - (b) CR 56/21:
 - (i) possession of 14.34 grams of methamphetamine – 32 months;
 - (ii) possession of 0.16 grams of methamphetamine – 6 months;
 - (iii) possession of 7.22 grams of cannabis – 3 months; and
 - (iv) possession of utensils – 12 months.
 - (c) CR 117/21:
 - (i) possession of 0.91 grams of methamphetamine – 12 months;

- (ii) attempting to destroy evidence – 20 months; and
- (iii) possession of utensils – 12 months.

25. By reason of the offending in CR 117/21 occurring two days after the Defendant was sentenced in the Magistrates Court to a 9 month fully suspended sentence, I order that the suspension of that sentence be rescinded, and the sentence be activated as of this day.
26. As the offending in each of what are now four proceedings occurred independently, and on different dates, between February 2020 and March 2021, and that all the offending post that of CR 6/21 occurred whilst the Defendant was on bail, it is appropriate, subject to the totality principle, to order that the head sentences in each proceeding served cumulatively or consecutively: *R v Latu* [2021] TOSC 81 at [33] and [34]. The aggregate of those sentences is 73 months imprisonment. Having regard to the totality principle, for the seriousness of the overall offending, and for a first period of incarceration, that result may be regarded as a crushing sentence. Accordingly, I consider an appropriate total head sentence to be 4 ½ years (or 54 months) imprisonment.

Suspension

27. The considerations in *Mo'unga* [1998] Tonga LR 154 at 157, favour some suspension of the resulting head sentence. While the Defendant is not particularly young, the offending was clearly premeditated (albeit fuelled no doubt by his own drug addiction), and the little weight that may be given for him being a 'breadwinner' (*R v Soane* [2021] TOSC 42 at [26]), the Defendant's previous clean record and early guilty pleas together with the considerable support of those around him are strong indicators but the Defendant is likely to take the opportunity and incentive afforded by a partially suspended sentence with conditions including completion of a drug and alcohol awareness program. Accordingly, I will order that the final 18 months of the head sentence be suspended for a period of two years on conditions as set out below.

28. In the result, subject to compliance with the said conditions and any remissions granted within prison, the Defendant will be required to serve 3 years imprisonment.

Result

29. The Defendant is convicted of the offences in each proceeding and sentenced to the terms of imprisonment set out in paragraph 24 above.
30. The sentences within each proceeding are to be served concurrently.
31. The head sentences in each proceeding are to be served consecutively.
32. The suspension of the sentence of 9 months imprisonment imposed by the Magistrates Court in CR 175-176/2020 on 9 March 2021 is rescinded and the Defendant is required to serve that sentence commencing this day, also consecutively to the head sentences referred to immediately.
33. Having regard to the totality principle, the aggregate of all four head sentences of 73 months is reduced to 4 ½ years imprisonment.
34. The final 18 months of the net sentence are to be suspended for a period of 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 from prison; and
 - (d) complete a drugs and alcohol awareness course and a life skills course as directed by his probation officer.
35. 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.
36. 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, all cash and other items seized are to be forfeited to the Crown.

NUKU'ALOFA

4 June 2021



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

M. H. Whitten QC

LORD CHIEF JUSTICE