

Sean + PL.

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

CR 236 of 2020
CR 80 of 2021
CR 81 of 2021
CR 87 of 2021

REX
-v-
SEFO MOALA

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Ms Aholelei for the Prosecution
Mr D. Corbett for the Defendant
Date: 4 June 2021

The charges

1. The Defendant is charged with a total of 9 offences, namely:
 - (a) CR 236/20:
 - (i) possession of 4.06 grams of cannabis;
 - (ii) possession of 0.78 grams of methamphetamine;
 - (iii) possession of 139.3 grams of methamphetamine;
 - (iv) possession of 41.82 grams of cocaine; and
 - (v) possession of 79.10 grams of cannabis.
 - (b) CR 80/21:
 - (i) possession of 0.46 grams of methamphetamine;
 - (c) CR 81/21:
 - (i) possession of 1.31 grams of methamphetamine; and
 - (ii) possession of utensils.
 - (d) CR 87/21:
 - (i) possession of 0.81 grams of methamphetamine.

2. On 23 October 2020, upon arraignment, the Defendant pleaded not guilty to all counts in proceeding CR 236/20 and the trial of that matter was listed to commence on 15 March 2021.
3. On 15 March 2021, the Defendant changed his pleas to all counts in CR 236/20 to guilty. He also indicated that he wished to plead guilty to all other outstanding drug related matters then before the Magistrates and Supreme Court so that he could be sentenced together for all offences.
4. On 7 March 2021, the Defendant pleaded guilty to all charges in proceedings CR 80/21, CR 81/21 and CR 87/21.

The offending

5. In relation to CR 80/21, on 31 August 2019, Police searched the Defendant and his residence. They found two packets of methamphetamines, substantial sums of American and New Zealand currency, and a weighing apparatus. found in one of the bedroom draws. The substances were tested and confirmed to be methamphetamines and cocaine.
6. In relation to CR 236/20, on 12 November 2019, Police received information that the Defendant was selling drugs from his car parked at Longolongo. Police attended the location and conducted a search of the Defendant and his vehicle. They found seven packets of cannabis, a brown wallet containing significant amounts of Tongan, Fijian and Australian currency, six small packets of methamphetamines, five large packets of methamphetamines and two large packets of cocaine. Police then performed a search of the Defendant's residence, which revealed a test tube using for smoking drugs, 128 small packets of cannabis and a weighing scale. The Defendant co-operated when questioned and admitted to the offending.
7. In relation to CR 87/21, on 13 November 2020, the Police conducted another search of the Defendant's residence and vehicle. They found over 40 test tubes and a pack of methamphetamine. He and his wife denied any knowledge of the items found.

8. In relation to CR 81/21, on 4 March 2021, Police executed a search warrant of Defendants residence and found five packets of methamphetamines, 11 empty dealer packets, 141 empty dealer packets and a test tube. The Defendant co-operated with Police when questioned and admitted to the offending.

Crown's submissions

9. The Crown submits the following as aggravating features of the offending:
 - (a) drug offending is a serious issue in Tonga;
 - (b) the substantial quantities of Class A and B drugs found;
 - (c) that, together with the substantial amount of cash seized, indicates that the defendant is a drug supplier; and
 - (d) the offences after those are subject of CR 80/21 were all committed whilst the Defendant was on bail.
10. Mitigating features are:
 - (a) these are Defendant's first drug related offences;
 - (b) he co-operated with the police; and
 - (c) he pleaded guilty to the offences.
11. The Defendant has an extensive criminal history, for other than drug-related offences, including:
 - (a) 1999 – housebreaking and robbery – 2 ½ years' imprisonment;
 - (b) 2000 – housebreaking, armed robbery, bodily harm and trespass – 9 years' imprisonment;
 - (c) 2001 – robbery – 11 years' imprisonment;
 - (d) 2003 – escape from lawful custody – 6 months' imprisonment;
 - (e) 2005 – theft, housebreaking, wilful damage, trespass and arson – 6 years and 9 months' imprisonment;
 - (f) 2012 – attempted armed robbery and grievous bodily – 9 years' imprisonment and 5 years' imprisonment;

- (g) 2013 – theft and conspiracy to commit theft – 1 year imprisonment; and
- (h) 2019 – possession of illicit drugs – 1 month imprisonment.

12. The Crown referred to the following comparable sentences:

- (a) In *Ngaue* (CR 6/18), the Defendant pleaded guilty to possession of 14.5 grams of methamphetamine and 43.89 grams of cannabis. A starting point of 4 ½ years' imprisonment was set for the methamphetamines. The final sentence was 3 ½ years' imprisonment, with final 9 months suspended on conditions. For the cannabis, the Defendant was sentenced to 18 months' imprisonment, to be served concurrently.
- (b) In *Viliami Mangisi* (CR 10/18), the Defendant was convicted of possession of 1,969.14 grams of methamphetamine and attempted export of illicit drugs. He was sentenced, with reference made to the *Zhang* guidelines,¹ to 12 ½ years' imprisonment for the possession charge and 5 years for the attempted export, to be served concurrently.
- (c) In *Paula Moala* (CR 186, 280/20), the Defendant pleaded guilty to possession of 7.63 grams of methamphetamine and 2.43 grams of cannabis, for which a starting point of 3 years was set and reduced by 9 months for mitigation. He also pleaded guilty to possession of 25 grams of methamphetamine and unlicensed ammunition, for which a starting point of 5 years' imprisonment was set, reduced by 15 months for mitigation with the final 18 months suspended on conditions. One year of the first sentence was added to the second, resulting in a sentence of 4 years and 9 months, with the final 18 months suspended.
- (d) In *Tu'i* (CR 66/19), 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 charge, a starting point of 18 months was set, reduced by 4 months, resulting in a sentence of 14 months' imprisonment with the final 6 months suspended. For the cannabis charges,

¹ *Zhang v R* [2019] NZCA 507.

he was sentenced to 2 months each, to be served concurrently with count 1.

- (e) In *Teulilo* (CR 266/20), the Defendant pleaded guilty to possession of 1.3 grams of cocaine and 0.1 grams of cannabis. A starting point of 18 months was set for the cocaine, reduced by 4 months and 1 month sentence for the cannabis, to be served concurrently. The final 6 months of the head sentence was suspended on conditions.

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

(a) CR 236/2020:

- (i) the head sentence is count 3 (139.3 grams of methamphetamine);
- (ii) a starting point of 9 years' imprisonment, reduced by 3 years' imprisonment, resulting in a sentence of 6 years' imprisonment.
- (iii) 4 months' imprisonment for count 1;
- (iv) 6 months' imprisonment for count 2;
- (v) 4 years' imprisonment for count 4;
- (vi) 2 years' imprisonment for count 5; and
- (vii) the sentences for those counts to be served concurrently with that for count 3.

(b) CR 80/2021:

- (i) a starting point of 9 months' imprisonment for count 1; and
- (ii) reduced by 3 months for mitigation, resulting in a sentence of 6 months' imprisonment;

(c) CR 81/2021:

- (i) the head sentence is count 1 and a starting point of 18 months' imprisonment;
- (ii) reduced by 4 months for mitigation, resulting in a sentence of 14 months' imprisonment;

- (iii) 3 months' imprisonment for count 2, to be served concurrently with count 1.
- (d) CR 87/2021:
 - (i) a starting point of 12 months' imprisonment for count 1, reduced by 3 months by way of mitigation, resulting in a sentence of 9 months' imprisonment.
- (e) Of those sentences, 3 months from the sentenced imposed in CR 80/21, 6 months from CR 81/21 and 6 months from CR 87/21 be served cumulatively to the 6 years' imprisonment imposed in CR 236/20, making a total of 7 years and 3 months imprisonment.
- (f) The Defendant's criminal history makes him ineligible for suspension.

Defendant's submissions

14. Mr Corbett submitted, in summary:

- (a) For the head offence in CR 236/20, a starting point of 6 years' imprisonment be imposed for his co-operation with the police and his early guilty plea to the offences.
- (b) The starting point should be reduced by 33% by way of mitigation as he is remorseful and wishes to turn his life around. (Mr Corbett then erroneously calculated that reduction to be 4 years off instead of 2.)
- (c) 4 months of the sentence in CR 236/20 be suspended for 2 years because the Defendant:
 - (i) is remorseful for his actions, hence his cooperation with the Police;
 - (ii) pleaded guilty early;
 - (iii) co-operated with the Court by having all his outstanding matters with the Magistrates and Supreme Court be called and sentenced at the same time, in the hopes of getting all charges out of the way so that he is able to start a new life; and
 - (iv) has two young children.

- (d) By reference to a number of comparable sentences, that the appropriate sentence for:
 - (i) CR 80/21 is 9 months imprisonment fully suspended;
 - (ii) CR 81/21 is 2 years with the final year suspended for the methamphetamines and 6 months fully suspended for the utensils; and
 - (iii) CR 87/21 is 9 months fully suspended,
- (e) All to be served concurrently with the head sentence in CR 236/20.
- (f) Having regard to the multiple offences, the totality principle applies.
- (g) The final sentence be reduced by the total amount of time the Defendant was remanded in custody for the proceedings.

Presentence report

- 15. The Defendant is 52 years old. He is the eighth of ten children. In 1977, his family migrated to Hawaii. His parents struggled to make ends meet and adapt to a foreign country. He had a difficult upbringing. He was educated to 10th grade.
- 16. From a young age, the Defendant started mixing with the wrong crowd and eventually got involved with alcohol, and selling drugs, to earn money to help support his family. As a result, he served 10 years in prison in Hawaii and was then deported to Tonga in 1998. Shortly, after his arrival in Tonga, he was sentenced to prison for armed robbery. Upon his release, he returned to drugs which led to his current plight. The rest of his criminal record is referred to above.
- 17. The Defendant recently married. He has two older illegitimate children from a previous partner. He otherwise has little connection with his family and has only associated with other criminals.
- 18. By his pleas of guilty to the offences, the Defendant is remorseful. He admits to selling drugs for the purpose of earning income. He also told the probation officer that he is dissatisfied with his lawyer and wishes to represent himself at his sentencing. He asks for leniency.

19. The probation officer opines that the Defendant poses a threat and danger to “public peace and the future of the young people of Tonga especially [with] the ongoing problems with the battle with illegal drugs”. A full custodial sentence is recommended and that, in prison, the Defendant undertake alcohol and drugs counselling with Rev. Semisi Kava of the Lifeline and Crisis Centre of the Free Wesleyan Church of Tonga.

Starting points for the head offences

20. For offending which occurred prior to the recent amendments to the *Illicit Drugs Control Act*, which came into effect on 8 December 2020, the maximum term of imprisonment for possession of methamphetamine is 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. The maximum prison term for possession of less than 28 g of cannabis remains at 1 year. The new (s 5A) maximum term of imprisonment for possession of utensils is 3 years.
21. The most serious offences are clearly counts 3 and 4 of CR 236/20. The guidelines for Class A drugs provided by the New Zealand Court of Appeal in *Zhang v R* [2019] NZCA 507 include band 2, between 5 and 250 grams, indicate a sentence of between 2 to 9 years imprisonment. In *R v Latu* [2021] TOSC 81 (21 May 2021), a starting point for possession of 50.22 grams of methamphetamines was set at 7 years’ imprisonment. At the other end of the (current) spectrum, in *R v Lisiate ‘Otuhouma* (CR 61/20), for possession of just over 3 kilograms of methamphetamines, Cato J (implicitly) set a starting point of 16 years imprisonment. Those cases illustrate the observation in *Latu*,² that ‘the Court’s broad discretion in sentencing can rarely, if ever, be reduced to any strict or linear mathematical exercise’.

² [26]

22. In relation to count 3, possession of 139.3 grams of methamphetamine, and having regard to:
- (a) the seriousness of the offending;
 - (b) the significant amount of the methamphetamines;
 - (c) the comparable sentences referred to above;
 - (d) that the Defendant was admittedly involved in supplying drugs; and
 - (e) that this offending occurred while the Defendant was on bail for CR 80/21,
- I consider the appropriate starting point on this count to be 8 years imprisonment.
23. In relation to count 4, possession of 41.82 grams of cocaine, I set a starting point of 6 years imprisonment.

Mitigation

24. Given his extensive criminal history, for the Defendant's late guilty pleas in CR 236/20 (the day of his trial) only, I reduce those starting points by the equivalent of 12.5% to:
- (a) count 3 – 7 years imprisonment; and
 - (b) count 4 – 5 years and 3 months imprisonment.

Other offences

25. For the other offences, I apply a similar approach, although with proceedings CR 80, 81 and 87/20, I allow a greater discount in mitigation for the Defendant pleading guilty at the earliest opportunity to those counts. Having regard to the seriousness of those offences, that they were part and parcel of the Defendant's admitted supply enterprise, the relevant statutory maximum penalties and the comparable sentences identified by the Crown and Mr Corbett, I impose the following terms of imprisonment:
- (a) CR 236/20:
 - (i) possession of 4.06 grams of cannabis – 2 months;

- (ii) possession of 0.78 grams of methamphetamine – 10 months;
- (iii) possession of 139.3 grams of methamphetamine – 7 years;
- (iv) possession of 41.82 grams of cocaine – 5 years and 3 months;
- (v) possession of 79.10 grams of cannabis – 18 months.

The sentences for counts 1, 2, 4 and 5 are to be served concurrently with the sentence on count 3.

- (b) CR 80/21: possession of 0.46 grams of methamphetamine - 5 months.
- (c) CR 81/21:
 - (i) possession of 1.31 grams of methamphetamine - 15 months;
 - (ii) possession of utensils – 12 months, to be served concurrently with count 1.
- (d) CR 87/21: possession of 0.81 grams of methamphetamine – 10 months.

Cumulative sentences, totality principle and net head sentence

26. As the offending in each of the four proceedings occurred independently, and on different dates, between August 2019 and March 2021, and that all the offending post that of CR 80/21 occurred whilst the Defendant was on bail, it is appropriate, subject to the totality principle, to order that the head sentences in each proceeding be served cumulatively or consecutively: *R v Latu* [2021] TOSC 81 at [33] and [34]. The aggregate of those sentences is 9 ½ years imprisonment.³ Having regard to the totality principle, and even though this is not the Defendant's first period of incarceration, for the seriousness of the overall offending, I consider it appropriate to reduce the total head sentence to 8 years' imprisonment.

Suspension

27. Few of the considerations in *Mo'unga* [1998] Tonga LR 154 at 157 favour suspension. The Defendant is not young. He has an extensive criminal history

³ 7 years = 84 months plus 5 months plus 15 months plus 10 months = 114 months or 9.5 years.

which has consumed most of his adult life. All of the instant offending was clearly premeditated. Against that, are his limited co-operation with police and guilty pleas.

28. Mr Corbett's submitted [19(v)] that the Defendant:

"has two young children ages [sic] with the co-accused Heilala Talatala Moala (CR 235/20) and was recently married this year. If his wife is also imprisoned they will be away from their children who will be without parents."

29. In *Rex v Misinale* [1999] TOCA 12, the Court of Appeal added to the non-exhaustive list of *Mo'unga* relevant considerations:

"... the seriousness of the offending, the need for effective deterrence, the effect on the complainants, and the personal circumstances of the offender or those dependent on him or her."

30. However, in *Vea v Rex* [2004] TOCA 7, the Court of Appeal noted, with apparent approval, the position stated by its New Zealand counterpart, on numerous occasions, that *"personal circumstances are generally irrelevant when sentencing for drug offending"*. In *Rex v Vake* [2012] TOCA 7 at [18], the Court of Appeal again cited the above excerpt from *Misinale*. In *R v Wolfgramm* [2020] TOSC 78, a cultivation case involving multiple offenders, I attempted to reconcile the apparent tension between the above approaches by determining to have *"some regard to the Defendants' respective personal circumstances, to ensure, among other things, proportionality among their sentences"*.

31. The concern inherent in Mr Corbett's submission was allayed on 7 May 2021, when Heilala Talatala Moala was sentenced to a term of imprisonment, but which was full suspended.

32. Even though this most recent period of criminality has seen the Defendant move away from property, violence and dishonesty offences, the harm done to the community though the supply for profit of illicit drugs is arguably greater and longer lasting than any of his previous misdeeds. As opined in *Latu*:⁴

'... those who import, manufacture, distribute or supply illicit drugs are currently one of the greatest threats to the physical, mental and spiritual

⁴ [38]

health of the people of Tonga and its social fabric and cohesion. Therefore, although it is incumbent on the Courts to seek to fulfil all the objectives of sentencing, in cases such as the present, the protection of the community and deterrence weigh heavily in that balance’.

33. In discussing the *Mo’unga* considerations, the Court of Appeal in *Rex v Misinale* [1999] TOCA 12 stated:

“... the major consideration is whether a suspension is likely to aid in the rehabilitation of the offender. If it is not, or if for any reason rehabilitation is not relevant to the sentence to be imposed, suspension of any part of the sentence is in general not appropriate.”

34. In my view, notwithstanding the Defendant’s professed remorse, his long criminal history is overwhelming evidence that suspension is unlikely to aid in his rehabilitation.
35. Further, and consistent with the opinion expressed by the probation officer, the Defendant has been a long-term menace to society. Unless and until the Defendant demonstrates a genuine desire and willingness for lasting rehabilitation, a commitment to which only he can decide, he is likely to continue to pose a threat to the community. Undertaking alcohol and drugs counselling with someone like Rev. Semisi Kava of the Lifeline and Crisis Centre of the Free Wesleyan Church of Tonga whilst in prison may be a significant step in that direction. For now, however, this case is a prime example of the need for the Court to give *“weight to public denunciation and outrage and to the need to stop or control conduct which detrimentally affects all members of the community”*: *R v Manu* [2020] TOSC 82.⁵
36. For those reasons, I consider it not appropriate to suspend any part of the sentence.

Result

37. The Defendant is convicted of the offences in each proceeding herein and sentenced in accordance with paragraph 25 above.

⁵ Citing *Wills v Police* (HC, Christchurch AP 23/95, 2 February 1995); [1993-1995] BCLD 2018; adopted by Blanchard J in *Hokianga v Police* (HC, Auckland AP 31/95, 26 April 1995).

38. The sentences within each proceeding are to be served concurrently.
39. The head sentences in each proceeding are to be served consecutively.
40. Having regard to the totality principle, the aggregate of those sentences is reduced to a net total sentence of 8 years' imprisonment.
41. The Defendant is to be given credit for any time in custody on remand in respect of any of the subject proceedings.
42. 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

