

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

CR 74 & 76 of 2021

REX

-v-

[1] 'ATAPANI PANGI

[2] MANU HUNI

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mrs 'A. 'Aholelei for the Prosecution
The Defendants in person
Date: 14 July 2021

The charges

1. 'Atapani Pangi (CR 74/21), Matangi Fetu'u'aho (CR 75/21) and Manu Huni (CR 76/21) were all charged jointly with possession 183.33 g of cannabis (count 1). Pangi and Fetu'u'aho were also charged with possession of 37.7 g of cannabis (count 2). Huni was charged with possession of utensils and knowingly permitting his house to be used for the possession of cannabis by the other two (counts 3 and 4). Fetu'u'aho was also charged with possession of 1.16 g of cannabis (count 5).
2. On 26 April 2021, Fetu'u'aho pleaded guilty to all counts against him. On 1 June 2021, he was sentenced for those offences as well as other drug offences CR 58/21.
3. The present defendants pleaded not guilty to all charges against them. Following a trial on 8 and 9 June 2021, Pangi was found guilty of the two counts against him and Huni was found not guilty on count 1 but guilty on counts 3 and 4. They appear for sentencing today on those counts.

The offending

4. On 28 December 2020, Police received information that Fetu'u'aho was selling drugs from his residence. While driving to the Defendant's residence, Police were informed that Fetu'u'aho had gone to Huni's residence at Fo'ui. When they arrived at Fo'ui, police saw Fetu'u'aho and Pangi with a sizeable amount of cannabis being placed into smaller packs in the middle of the lounge room floor (count 1). Huni was sitting on a bed nearby watching them. When police entered

the house, Fetu'u'aho and Pangi picked up some of the cannabis and attempted to escape by running out the back door. They were intercepted by police and several packs of cannabis fell from their hands (count 2). During the ensuing search, police found numerous packs of cannabis, cannabis leaves, 415 empty plastic packs and bongs in the form of aluminium cans shaped for use in smoking drugs, two of which were found in Huni's bedroom and another in his outdoor kitchen (count 3). When questioned at the scene, Fetu'u'aho admitted to the offending. Huni blamed Fetu'u'aho and Pangi. Pangi said that the cannabis belonged to him and Fetu'u'aho. During their records of interview on 4 January 2021, Pangi did not admit to the offending and Huni chose to remain silent.

'Atapani Pangi

Crown's submissions

5. In relation to Pangi, the Crown submits the following as aggravating features:
 - (a) drugs are a serious issue in Tonga;
 - (b) the packing of the cannabis indicates it was for the purpose of a small commercial supply; and
 - (c) he attempted to flee the scene with drugs.
6. The only mitigating factor is Pangi's lack of any previous criminal convictions.
7. The Crown referred to the following comparable sentences:
 - (a) *Vea* [2004] TOCA 7 – the Defendant was convicted of possession and growing Indian hemp comprising 20 branches, a total of 125 seeds and one joint. While on bail, he was found with another 8 plants and dried branches and leaves. He was sentenced to 9 months for the first possession charge, 2 years for the second and 3 years for growing the marijuana. The last two sentences were to be served concurrently but cumulative on the first making a total of 3 years 9 months. The last 1 year and 9 months were suspended for 2 years.
 - (b) *Fetu'u'aho* [2021] TOSC 83 – the co-accused referred to above had no previous convictions. On the head count of possession of 183.33 grams of cannabis, a starting point of 2 years and 9 months (33 months) was set, which was reduced by 11 months for mitigation, resulting in a sentence of 22 months' imprisonment. On the count of 37.7 grams of cannabis, he was sentenced to 12 months' imprisonment. For possession of utensils in CR 58/21, he was sentenced to 12 months' imprisonment.
8. Here, the Crown submits the following sentence formulation:
 - (a) a starting point of 33 months imprisonment for the head count 1;
 - (b) 12 months imprisonment for count 2;
 - (c) reduced by 5 months for mitigation; and

- (d) no suspension.

Presentence report

9. 'Atapani Pangi is 33 years of age. He is the youngest of four children. He had a good upbringing. He dropped out of school in Form 3. He has been responsible for taking care of his mother who suffers from serious health issues. He works in construction where he has been earning \$350 per week. His employer describes him as a competent employee. He also works in a plantation and owns a small piglet farm which helps support his family's needs. He has a long history of alcohol addiction and illicit drug use.
10. To the probation officer, 'Atapani admitted to the offending and expressed remorse. The town officer (who provided a letter of support) reported that 'Atapani has demonstrated positive behaviour through his involvement in community activities.
11. Contrary to the Crown's submission, the probation officer reported from the court case management system that 'Atapani has previous convictions in the Magistrates Court for drunkenness (2010 and 2019), wilful damage to property and conspiracy to commit wilful damage to property (2009). All those matters resulted in fines.
12. The probation officer recommends partial suspension on conditions.

Starting point

13. The maximum statutory penalty for possession of 28 grams or more of a Class B drug a \$50,000 fine, 7 years' imprisonment or both. Section 4(2)(a)¹ of the *Illicit Drugs Control Act* now deems possession of 7 grams or more to be supplying.
14. Recently, in *R v Finau* [2021] TOSC 96, I referred to the Court of Appeal decision in *Veā* [2004] TOCA 7, where that Court referred to the guidelines for cannabis offences provided by the New Zealand Court of Appeal in *R v Terewi* [1993] 3 NZLR 62 as follows:

"[14] The decision ... provides guidance, although this Court immediately acknowledges that consideration must be given to the different social conditions in Tonga and to the different maximum penalties that apply here compared with those which apply in New Zealand. Having said that we note the following matters referred to by Court of Appeal in the above case.

*[15] The Court in Terewi identified three categories of offending. The first related to the growing of marijuana or as it is called here Indian hemp in **small quantities for personal use**. The Court said that in such cases a **non custodial** sentence was generally appropriate. A similar approach is taken in relation to charges of possession for personal use. In a case of growing for **small scale commercial purposes**, the Court has said that a **starting point of between two and four years** may be appropriate and for **large scale growing for commercial purposes**, a sentence **in excess of four years** is*

¹ Introduced by amendments which came into force on 8 December 2020.

appropriate. A similar scale of sentencing applies to possession of cannabis. The New Zealand Court of Appeal has also made it clear on numerous occasions that personal circumstances are generally irrelevant when sentencing for drug offending.”

15. The Court of Appeal in *Veā* also referred to its decision in *Tuita v R* [1999] Tonga LR 152 at 156, where the Court opined:

“In our view, a conviction for growing any significant amount of marijuana should carry a sentence within the range of three to five years imprisonment. That sentence would not normally be suspended in whole or in part unless there are good reasons relating to rehabilitation, along the lines of the judgment of this Court in R v Misinale (CA 13/99, 23 July 1999). Further we consider that similar sentences should be imposed on persons convicted of possession for supply of amounts of marijuana that indicate a commercial scale operation.”

16. As noted in *Fināu* [17], on the distinction between sentences for personal use and for supply, the Court of Appeal agreed with the remarks of Ward CJ in June 2001, where His Honour made it clear that:

“[18] ... possession of any drug including cannabis in a small quantity for personal use will in future result in a sentence of imprisonment although that sentence will be suspended for a first offender. ... in every case where there is evidence of supply to others the sentence will inevitably be a longer term of imprisonment and suspension of the sentence in any such case would not be appropriate. ... anyone who sells drugs can expect to go to prison for a very substantial length of time.”

17. Almost 20 years on, those views, particularly in relation to supplying, remain reflected in decisions such as *R v Latuselu* [2021] TOSC 19, in which this Court opined:²

“13. Supply is to be regarded as a more serious and insidious crime than mere possession for personal use. Apart from the minority of cases involving self-production for personal use, illicit drug use leading to almost universal and inevitable addiction is not possible without the supply of those drugs. It is also suppliers who facilitate and spread the destruction caused by drug use and abuse, usually for their own financial gain, in return for the eventual, and often irredeemable, suffering of drug users and often their innocent family members.”

18. Thus, in *R v Kalonihea* [2020] TOSC 68 at [19], in acknowledgment of the superadded evils committed by those who supply drugs, the Court stated:

“ ... for first offenders on possession charges, the court should endeavour to afford Defendants a chance of rehabilitation. The same may not be said for those who engage in trafficking or supply of any amounts, even if they are first offenders.”

² See also *Wolfram* [2020] TOSC 78 at [39] to effect that 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.

19. Having regard to the seriousness of the offending, the amount of cannabis involved deeming the possession to be supplying, which I consider to fall within the category of small commercial purpose described in *Terewi*, the comparable sentences and principles referred to above, I set the following starting points:
- a) count 1 – 2 years and 9 months' imprisonment; and
 - b) count 2 – 12 months' imprisonment.

Mitigation

20. As the present offences represent the Defendant's first detected drug offending, and his previous convictions are quite old and/or unrelated, I am prepared to discount the starting points by 5 months and 2 months respectively. Given his recent confession to the probation officer, the Defendant regrettably robbed himself of a greater discount by not pleading guilty at the earliest opportunity.
21. The resulting sentences therefore are:
- (a) count 1 – 2 years and 4 months (28 months) imprisonment; and
 - (b) count 2 – 10 months imprisonment, to be served concurrently with the sentence on count 1.

Suspension

22. Of the considerations for suspension discussed in *Mo'unga* [1998] Tonga LR 154 at 157, the Defendant:
- (a) is not particularly young;
 - (b) has minor non-drug related previous convictions;
 - (c) premeditated the offending;
 - (d) did not fully co-operate with the Police;
 - (e) maintained his innocence at trial through a very weak defence; and
 - (f) has only belatedly acknowledged responsibility for his wrongdoing and expressed remorse.
23. However, I give some weight to his family circumstances and responsibilities. By his decision to get involved with illicit drugs, and to the extent of deemed supplying, the Defendant has not only betrayed his community but also his family's trust in, and dependence on, him. Insofar as he relies on the so-called 'breadwinner plea', the Courts have repeatedly explained that such a consideration attracts very little weight and 'is not, and is rarely likely ever to be, on its own, a proper reason for suspending a sentence': *R v Wolfgramm* [2020] TOSC 78 at [46] to [49].
24. I also take into account the reports of the Defendant having made some positive changes in his behaviour since being arrested on this matter. From that, there are some grounds for expecting that he will take the opportunity afforded by a

partially suspended sentence to rehabilitate himself. Further, given his reported long term drug abuse, I consider it appropriate to order partial suspension on conditions which will assist the Defendant to hopefully rid himself of drugs once and for all and provide effective deterrence.

25. In those circumstances, I will order that the final 12 months of the head sentence be suspended on conditions as set out below.
26. In the result, and subject to compliance with those conditions and any remissions granted within prison, the Defendant will be required to serve 16 months in prison. I regard the differential in that outcome compared to Fetu'u'aho, whose ultimate sentence requires him to serve 11 months, to be appropriate in light of the latter's completely clean record and early guilty plea.

Manu Huni

Crown's submissions

27. In relation to Manu Huni, the Crown submits the following as aggravating features:
 - (a) drugs are a 'huge issue' in Tonga;
 - (b) the packs of cannabis found were for the purpose of supply; and
 - (c) the presence of unlawful utensils at his residence suggested that he is a drug user.
28. The Crown submits that Huni has been convicted:
 - (a) in this court in 2002 for indecent assault and abduction for which the defendant was sentenced to 15 months imprisonment on each count to be served consecutively but "suspended to 2 years";
 - (b) in the Magistrates Court in 2009 and 2010 for drunkenness for which he was fined; and
 - (c) in 2016 for driving under the influence of alcohol for which he was also fined.
29. However, in relation to mitigating factors, the Crown notes that Huni has "no relevant criminal conviction".
30. Apart from the sentence in *Fetu'u'aho* of 12 months imprisonment for possession of utensils, the Crown did not provide any other comparable sentences in relation to the offences for which Huni is to be sentenced.
31. Here, the Crown submits the following sentence formulation:
 - (a) the head sentence is count 4;
 - (b) a starting point of 15 months' imprisonment;
 - (c) 9 months' imprisonment on count 3; and
 - (d) no suspension.

Presentence report

32. Manu Huni is 40 years of age. He is the third of ten siblings. He grew up in a large family. Their main source of income was their father's plantation. Manu left school in Form 3 to help his parents. His siblings all left to pursue further education and have their own families while he remained with his parents. After years of looking after her, his mother passed away last year. His sister describes him as a good person who has sacrificed much for their family, especially his siblings. He is formally unemployed but receives \$350 to \$500 per week from his siblings as part of a promise they made to their mother to look after him.
33. In relation to the offending, the Defendant admitted to the probation officer that he used the utensils for smoking cannabis (which he denied at trial) and tobacco. However, he still maintains that he was not aware of his co-accused coming into his home with the cannabis, even though the uncontradicted evidence at trial was that he was sitting right in front of Pangi and Fetu'u'aho while they were packing cannabis. The report also records that the Defendant has no previous convictions. The source of that information is not disclosed.
34. The probation officer reports that the Defendant is regarded as a low risk offender who is remorseful and who is trying to live a more positive life by getting involved in community and church activities. The officer recommends a fully suspended sentence on conditions.

Starting point

35. The recently introduced ss 5A and B of the *Illicit Drugs Control Act* provide identical statutory maximum penalties for unlawful possession of utensils and for permitting the use of premises for the commission of an offence, namely, a \$10,000 fine or 3 years' imprisonment, or both.
36. Having regard to those provisions, the seriousness of the offending, particularly, count 4, where the Defendant allowed Pangi and Fetu'u'aho to use his house to pack cannabis for supply, and the sentence in Fetu'u'aho for possession of utensils (which included a can for smoking cannabis and a utensil for smoking cannabis oil), I set the following starting points:
 - (a) count 3 – 12 months' imprisonment; and
 - (b) count 4 – 18 months' imprisonment.

Mitigation

37. By reason only of the Defendant's relevantly clean record, I reduce those starting points to sentences of:
 - (a) count 3 – 10 months imprisonment to be served concurrently with the sentence for count 4; and
 - (b) count 4 – 15 months imprisonment.

Suspension

38. Application of the considerations for suspension in *Mo'unga*, *ibid*, to the present case produce a mixed result. The Defendant is not young. He is not a first time offender, although this is his first detected drug-related offending. He did not co-operate with the police and did not plead guilty at the earliest opportunity. I am also concerned by his refusal to accept responsibility for count 4 in the face of overwhelming evidence against him at trial and the pitiful defence attempted by suggesting that Pangi and Fetu'u'aho were trespassers. I am also concerned by the fact that by the amount of cannabis Pangi and Fetu'u'aho were dealing with, right in front of him, the Defendant must have been aware that they were doing so for the purpose of supply.
39. With the passing of his mother, the Defendant no longer bears the burden of looking after her. Rather, it appears he has become a financial burden on his siblings.
40. But for his relevantly clean record, long period since his only serious conviction in 2002 and the probation report assessment of him representing (what I interpret was meant as) a low risk of reoffending, I would only have been minded to suspend part of the head sentence. However, in all the circumstances, I am prepared to give the Defendant this, and most likely only, opportunity for reform and abandonment of drugs. I will therefore order that the sentences be fully suspended albeit in accordance within additional conditions as set out below.

Result

41. 'Atapani Pangi is convicted of possession of cannabis and is sentenced to:
 - (a) count 1 - 2 years and 4 months (28 months) imprisonment; and
 - (b) count 2 – 10 months imprisonment, to be served concurrently with the sentence on count 1.
42. The final 12 months of the head sentence 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 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 courses on alcohol and drugs awareness and life skills with the Salvation Army as directed by his probation officer.
43. Manu Huni is convicted of possession of utensils and of permitting his residence to be used for the possession of cannabis and is sentenced to:
 - (a) count 3 – 10 months imprisonment to be served concurrently with the sentence for count 4; and

- (b) count 4 – 15 months imprisonment.
44. His sentence is to be fully suspended for a period of 2 years from this day on conditions that during that period, 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;
 - (d) complete courses on alcohol and drugs awareness and life skills with the Salvation Army as directed by his probation officer; and
 - (e) complete 50 hours of community service as directed by his probation officer.
45. Failure, by either Defendant, to comply with the above conditions of their respective sentences may result in the relevant suspension being rescinded, in which case, the defaulting Defendant will be required to serve the balance of his sentence.
46. 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; and
 - (b) s 33 of the said Act, the drug-related paraphernalia seized is to be forfeited to the Crown.

NUKU'ALOFA
14 July 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE