

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

CR 142 of 2020

REX

-v-

Misivina TATAKAMOTONGA

SENTENCING REMARKS

BEFORE: THE HONOURABLE COOPER J
Counsel: ✓ Mr. F. Samani for the Prosecution
The defendant appears in person.
Date of trial: 21st to 22nd June 2021
Date of sentence: 17th August 2021

The charges

1. Count 1, Misivina Tatakamotonga, possession of 99.47 g Methamphetamine contrary to section 4 (a) (iii) Illicit Drugs Control Act.
2. Count 2, Count 1, Misivina Tatakamotonga, possession of 3.79 g Cannabis contrary to section 4 (a) (i) Illicit Drugs Control Act.
3. Mr. Tatakamotonga pleaded not guilty on arraignment.
4. The evidence adduced at trial was of an informant alerting the police to the defendant's possession of illicit drugs at his home address.
5. The police acted expeditiously, albeit without a warrant. They attended and entered his home and made a search, discovering first a suspected cannabis joint, then a cooler box in the kitchen.

6. This contained more packets of what appeared to be cannabis, as alleged in count 2 and the substantial quantity of what the police thought must be methamphetamine as alleged in count 1.
7. Cross examination of the officers made it clear that the obtaining of a warrant would have taken perhaps only some ten minutes or so. It seemed their reluctance to do so was based on their wish to attend a training course that was due to start on the afternoon in question. That can never be a proper basis for not following due process.
8. A careful consideration of *Bunning v Cross* (1978) 141 CLR 54 at the conclusion of the prosecution case led me to conclude that albeit there had been a flagrant breach in not obtaining a warrant, the cogency of the prosecution evidence was such as to leave no doubt as to what had been recovered and where.
9. Photographs, detailed record of items seized and the accurate and contemporaneous recording in the Diary of Investigation; all these clear records meant that ultimately the evidence of the search was ruled admissible, despite the lack of a warrant.
10. There was demonstrated a clear trail of evidence from search of the defendant's home, seizure of the suspected drugs to preserving those exhibits at the police station and their testing, ultimately proving they are the drugs as alleged in the two counts; in short the prosecution proved their case.
11. The defendant chose to give evidence. Initially he declined to account for the drugs, but at the end of the evidence admitted that he had been given them and that was for him to sell. He identified Aisea Alangi, who is now hiding some where in South Pacific, as the person he bought them from.
12. Putting that part of the evidence aside for a moment, it is noteworthy that the Crown had also adduced as part of their case a notebook sized from the defendant's home (exhibit 2). It was in fact a dealer list, covering some four and half months of dealing in illicit drugs, apparently many hundreds of grams of methamphetamine.
13. For example at page 22 is written : "Ice gave me 16 ounces¹, new batch! Owe 60,000 \$".

¹ 16 ounces equals 453.592 grams

14. It is a matter of grave concern that in the face of that evidence the defendant was only charged with possession of the illicit drugs. These offences took place before the amendment to the Illicit Drugs Act which would have deemed the defendant's possession as supply. However, given the quantity involved and the defendant's own records of the amounts he was dealing in, what his true activities were was not reflected in the indictment.
15. There also appears to have been scant, if any, investigation into the names in the dealer list or any action taken in respect of the telephone numbers recorded therein.
16. If that is right, then the investigating authorities are strongly urged to reflect on what charges are brought in these circumstances and what lines of enquiry can properly be pursued.

Sentence

17. When it comes to sentencing I am bound by the counts on the indictment and can not take the other matters, I have just referred to, into consideration.
18. I have read and taken into account the pre-sentence report and all the references and considered all possible mitigating factors.
19. I remind myself of the Court of Appeal's remarks in *R v Maile* [2019] TOCA 17 in which the Court endorsed the view expressed by Cato J in *R v Ngaue*,² summarised as:
 - methamphetamine is a scourge to societies everywhere that has effected a great deal of harm and misery;
 - the distribution and use of methamphetamine in Tonga is a significant government and community concern;
 - in prescribing a maximum penalty of 30 years imprisonment, the legislature has expressed a clear intention that significant penalties are to be imposed; and
 - therefore, those involved with methamphetamine in any capacity, and even small amounts, can expect to receive custodial sentences.

² Unreported, Supreme Court, CV 6 of 2018, 2 August 2018 at [5] and [6].

20. I have considered *R v Sefo Moala* 236/2020 as the most useful comparable sentence.
21. In that case possession of 139.3g of methamphetamine, as sentence by Chief Justice Whitten QC, merited a sentence of 8 years' imprisonment, reduced to 7 years for his plea of guilty.
22. I have read all the character references, including many that note he has young children and the impact a custodial sentence will have on them.
23. This was an entirely avoidable situation that Mr. Tatakamotonga has brought about himself and inflicted on his family.
24. I have also taken into account all that has been submitted on his behalf including in the pre sentence report.
25. I also note that he was deported from the United States, after his arrival there in 2003, for inter alia, "Dangerous Drugs".
26. I take count 1 as the head count. Plainly this was possession for the purpose of supply.
27. Taking as my guide, the decision in *R v Sefo Moala* my starting point is 7 years (83.999 months). Which I have rounded up to 84 months. I will give a 5% discount for his, albeit extremely late confession.
28. That equals 4.2 months. Which I shall round off to make 4 months.
29. Therefore a sentence of 80 months imprisonment (7 years and 8 months).
30. In the hope that he can still be rehabilitated I shall suspend a portion of his sentence, but in the light of his record for drug offending in the United States I limit that to the last 6 months of his sentence which I suspend for a period of two years on the following conditions :
 - (a) not commit any offences punishable by imprisonment;
 - (b) be placed on probation;
 - (c) report to the probation office within 48 hours of his release; and
 - (d) satisfactorily undertake a drugs awareness course and any other rehabilitative course/s as directed by his probation officer.

31. Any breach will be reserved to this court.
32. Count 2, possession 3.79 g cannabis I sentence him to 1 year concurrent to the sentence in count 1.
33. I order that all monies be forfeited ; TOP \$ 1,391.60; AUS\$ 10.00 & NZ\$ 5.00
34. All drugs and paraphernalia are to be forfeited and destroyed.
35. Therefore that gives a total sentence of 80 months imprisonment, the last 6 suspended on the above conditions.

NUKU'ALOFA
17 August 2021

