

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

ATTORNEY GENERAL'S OFFICE	
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CR 13 of 2021

REX
-v-
KAUFUSI MOALA

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr F. Samani for the Prosecution
The Defendant in person
Date: 16 September 2021

The charges

1. On 5 March 2021, the Defendant pleaded not guilty to possession of 0.26 grams of methamphetamine.
2. On 12 August 2021, the day of his trial, the Defendant changed his plea to guilty.

The offending

3. On or about 21 August 2020, police received information that the Defendant and his co-accused, Maka Latu, were selling drugs from Latu's residence in Mataika. Around 7 p.m., police entered the residence and conducted a search without warrant. The Defendant was standing outside the veranda. Latu tried to escape but was later apprehended. Police found, among other things, 0.04 grams of methamphetamine in a packet which had been chewed by Latu, 0.26 grams of methamphetamine at the veranda and 2.71 grams of cannabis inside the house.
4. The Defendant did not co-operate when questioned.
5. On 21 May 2021, Latu was sentenced to a total of 8 years' imprisonment for the charges arising out of the above search as well as a range of other drug-related charges across a number of other proceedings.¹ For possession of 0.4 grams of methamphetamine (in CR 12/21), he was sentenced to 6 months imprisonment.

Crown's submissions

6. The Crown submits the following as aggravating features of the offending:
 - (a) contrary to the position stated in the summary of facts,² the Defendant has previous convictions:
 - (i) 2008 charges of housebreaking and disturbance for which he was

¹ *R v Latu* [2021] TOSC 81

² [22]

sentenced to 6 months' imprisonment, fully suspended for 12 months;
and

- (ii) in 2012, he was again charged with disturbance, for which he was fined \$100;
 - (b) drug offending is a very serious issue here in Tonga; and
 - (c) the Defendant did not co-operate with the police.
7. The Crown submits the following as mitigating features:
- (a) the Defendant pleaded guilty; and
 - (b) he is still young and can be rehabilitated.
8. The Crown referred to a number of comparable sentences, including, relevantly:
- (a) *Sakopo* [2020] TOSC 47 – on the day of her trial, the Defendant, who had previous convictions for drug-related offences, pleaded guilty to possession of 0.38 grams of methamphetamine. Niu J sentenced the Defendant to 2 years' imprisonment, fully suspended.
 - (b) *Tengane* [2020] TOSC 9 – the Defendant pleaded guilty to possession of 0.38 grams of methamphetamine. He had no previous convictions. He was sentenced to 6 months' imprisonment, fully suspended for 12 months on conditions.
 - (c) *Kapuana 'Unga* (CR 28/2019) – the Defendant pleaded guilty to possession of 0.47 grams of methamphetamine. She was sentenced to 8 months' imprisonment, fully suspended on conditions.
9. Here, the Crown submits the following sentence formulation:
- (a) starting point of 12 months' imprisonment;
 - (b) reduced by 6 months for mitigation; and
 - (c) full suspension.

Presentence report

10. The Defendant:
- (a) is 30 years of age;
 - (b) is the youngest of six children;
 - (c) had a good upbringing but due to apparent low self-esteem, he dropped out of school and began mixing with the wrong people;
 - (d) is married with two children, aged 9 and 3, and is their sole provider; and
 - (e) is employed at a panel beating a mechanical workshop.
11. In relation to the offending, the defendant explained that he was visiting his friend, Maka Latu, on day police raided Latu's residence. He made no reference or

admission to the drugs found and for which he has pleaded guilty.

12. According to the probation officer, upon his arrest, the defendant was remanded in custody for 3 months and 3 weeks until being granted bail by Chief Magistrate Lokotui. The reasons for that significant period have not been disclosed on the material before me.
13. Contrary to the Crown's submissions, the probation report states that the defendant is a first time offender.
14. The report also enclosed a number of references, which I have considered.
15. The probation officer opines that the Defendant is genuinely remorseful and that he has the capacity to change if given the chance and support. On account of the defendant's guilty plea, his wife and young children, and that "he has learned his lesson", the officer recommends a non-custodial sentence.

Starting point

16. The statutory maximum penalty for possession of methamphetamine at the time of offending is a fine of \$1 million or 30 years' imprisonment or both.³
17. As has been stated on numerous occasions⁴ during the recent surge in the so-called war on drugs, particularly methamphetamines, the Court's stance, and approach to sentencing, has been described thus:⁵
 - (a) methamphetamine is a scourge to societies everywhere that has effected a great deal of harm and misery;
 - (b) the distribution and use of methamphetamine in Tonga is a significant government and community concern;
 - (c) in prescribing a maximum penalty of 30 years' imprisonment (and now, for 1 gram or more, life imprisonment), the Legislature has expressed a clear intention that significant penalties are to be imposed;
 - (d) therefore, those involved with methamphetamine in any capacity, and even small amounts, can expect to receive custodial sentences.
18. According to the guidelines in *Zhang v R* [2019] NZCA 507, amounts of methamphetamine up to 5 g ought attract a sentence ranging from community service to 4 years' imprisonment.
19. I have considered the above comparable sentences as well as the sentences in:
 - (a) *Siosifa Kafalava*⁶ - where the defendant, who had no previous convictions, pleaded guilty to possession of 0.25 g, was sentenced to 6 months

³ Section 4(1) of the *Illicit Drugs Control Act*.

⁴ Most recently, in *R v Tatakamotonga* [2021] TOSC 132; CR 142 of 2020 (17 August 2021).

⁵ *PMP* [2020] TOSC 112 at [16], referring to *Afu* [2020] TOSC 69 and the Court of Appeal in *Maile* [2019] TOCA 17 approving statements by Cato J in *Ngave* [2018] TOSC 38 at [5] and [6], as most recently recited in *R v Hufanga* [2021] TOSC 80; CR 211 of 2020 (28 May 2021).

⁶ CR 288/20, 8 December 2020, Lord Tupou AJ.

imprisonment, fully suspended; and

- (b) *'Inoke Hu'akau*⁷ - whether defendant, who had previous convictions, and was convicted after pleading not guilty to possession of 0.29 g, was also sentenced to 6 months imprisonment.

20. Having regard to the above principles and comparable sentences, a custodial sentence will almost always be required in cases of methamphetamine. For the amount in this case, I set a starting point of 8 months' imprisonment.

Mitigation

- 21. While the defendant does have previous criminal convictions, they are relatively old, meaning that he has enjoyed a significant period free of crime, during which, he appears to have settled down, married and had children. This is also his first detected drug related offending.
- 22. Therefore, for his relatively, relevantly and reasonably good previous record and late guilty plea, I reduce that starting point by two months, resulting in a sentence of 6 months imprisonment.

Suspension

23. Having regard to the considerations for suspension discussed in *Mo'unga v R* [1998] Tonga LR 154:

- (a) the defendant is still reasonably young;
- (b) as noted, he has a relevantly good previous record and has had been out of any serious trouble with the law for approximately 12 years;
- (c) while there was no suggestion of coercion by his co-offender, I do take into account the likely influence on the defendant of a long-term career criminal of the likes of Maka Latu;
- (d) given that he is married with young children and gainfully employed, I am reasonably confident that the Defendant is likely to take the opportunity offered by a suspended sentence to rehabilitate; and

24. For those reasons, and for the fact that the defendant has not yet had the benefit of education support offered by appropriate conditions of a suspended sentence, I will order that the sentence be fully suspended for a period of 12 months on conditions. Those conditions will not include any period of community service, which would otherwise have been the case, but for the significant period the Defendant spent remanded in custody and the fact that he is currently employed full-time.

Result

25. The defendant is convicted of possession of methamphetamines and sentenced

⁷ CR 181/20, 18 December 2020, Langi AJ.

- to 6 months imprisonment.
26. The sentence is to be fully suspended for a period of 12 months 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) reports the probation office within the next 48 hours; and
 - (d) complete a drugs awareness course with the Salvation Army or as directed by his probation officer.
27. 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 term of imprisonment.
28. Pursuant to s 32 of the *Illicit Drugs Control Act*, I order that the drugs the subject of this proceeding be destroyed.

NUKU'ALOFA
16 September 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE