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

CR 57 of 2021

REX
-v-
KEPILINI POLE'O

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Ms H. 'Aleamotu'a for the Prosecution
The Defendant in person
Date: 7 October 2021

The charges

1. On 21 April 2021, the Defendant pleaded:
 - (a) guilty to destruction of evidence and possession of utensils; and
 - (b) not guilty to possession of methamphetamines.
2. On 1 September 2021, after a three-day trial, the Defendant was found guilty of possession of 0.13 grams of methamphetamine.¹ She appears today for sentencing on all three counts.

The offending

3. On 18 December 2020, police received information that the Defendant and her co-accused, Sifitani Afu, were selling drugs from Afu's residence. When the police arrived, they entered the residence and conducted a search without warrant. During their search, police found numerous packs of methamphetamine, quantities of cannabis, cash and various drug-related utensils. They found the Defendant locked inside a room occupied by her and her boyfriend, Paletili Afu. After the Defendant ignored repeated demands by police to open the door, police kicked the door open, and as they entered, the Defendant was observed smashing a test tube. Inside the room, Police found a bong, scales, empty dealer packets, a total of \$3,520 secreted in places such as the base of a fan and \$360 in the Defendant's apparel top. They also found a packet of methamphetamines wedged in the hinge line of the underside of the lid of a large blue plastic bin. The Defendant did not co-operate when questioned.
4. Despite her later admission to destroying evidence and possession of utensils, at

¹ *R v Pole'o* [2021] TOSC 146.

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her trial for the possession of the methamphetamines, the Defendant contended that the police had planted the methamphetamines, and that the utensils actually belonged to Paletili. While the Defendant only gave an unsworn statement from the Bar table to the above effect, Paletili, who is currently serving a term of imprisonment for methamphetamines and other drug-related offending, gave evidence. During his evidence, the Defendant was caught mouthing to Paletili to say that the utensils belonged to him. Her attempted defence to the methamphetamines charge, and the manner she conducted it at trial, was regrettable and displayed a lack of judgment and/or remorse for that offending.

Crown's submissions

5. The Crown submits the following as aggravating features of the offending:
 - (a) possession of illicit drugs is a very serious problem in Tonga;
 - (b) the Defendant was found in her room with drug related utensils and empty plastic dealer packets;
 - (c) the Defendant destroyed evidence;
 - (d) the Defendant did not co-operate with the police; and
 - (e) substantial amounts of cash found in the room and on the Defendant.
6. The Crown submits the following as mitigating features:
 - (a) the Defendant has no previous convictions; and
 - (b) she pleaded guilty early to destruction of evidence and possession of utensils.
7. The Crown referred to the following comparable sentences:
 - (a) *Fatongiatau* [2021] TOSC 9 – the Defendant, who had previous convictions for drugs, was convicted after trial of two counts of possession of illicit drugs and one count of destroying evidence. He had put plastic packets in his mouth and started chewing them before police stopped him and removed the packets. For possession of 0.09 grams of methamphetamine, Langi AJ sentenced the Defendant to 1 year and 9 months imprisonment and 6 months for interfering with evidence.
 - (b) *Tafuna* CR 198/2020 – the Defendant pleaded guilty to interfering with evidence by swallowing a plastic item he put into his mouth. He was sentenced to 3 months' imprisonment.
 - (c) *Kaufusi* [2021] TOSC 100 – the Defendant was convicted after trial of possession of 0.12 grams of methamphetamine. A starting point of 9 months was set, reduced by one month for mitigation with the final 4 months

suspended for 12 months on conditions.

(d) *Latu* [2021] TOSC 81 – the Defendant pleaded guilty to multiple charges (CR 289/20, 12/21 and 101/21), including destroying evidence by placing a pack of cannabis in his mouth and using his head to smash a test-tube that was in front of him and possession of utensils. He was sentenced to 18 months' imprisonment for destruction of evidence and 9 months for possession of utensils.

8. Here, the Crown submits the following sentence formulation:²

- (a) the head sentence is the destruction of evidence;
- (b) a starting point of 24 months; and
- (c) partial suspension.

Presentence report

9. The Defendant is 28 years of age. She is the fifth of six children. She grew up in a good and religious family. She was educated to form 5. She was spoiled by her father who allowed her do whatever she wanted, including marrying at the age of 15. Not long after, problems arose with her in-laws and she was abused by her now ex-husband. The Defendant has two children, ages 12 and 6.
10. In 2017, several years after her divorce, the Defendant commenced a de-facto relationship with Paletili Afu. He introduced her to methamphetamines to which she became addicted. She fell pregnant to Paletili but gave the child to his sister to adopt.
11. When Paletili was arrested (on a separate occasion) and sentenced to prison, the Defendant moved back home and started getting her life back together, including obtaining employment by sewing from home.
12. The relevant town officer describes the Defendant as coming from a good and stable family who have helped the community with their musical talents. Her mother describes positive changes in the Defendant and that she is more responsible now. Her income is used to support and take care of them.
13. The Defendant told the probation officer that she did not co-operate with the police because she was scared. She said that she later admitted to the offending because she was afraid and felt 'empathy' for Paletili who 'took all the blame'.
14. The report enclosed a number of references which I have considered.
15. The probation officer opines that the Defendant is remorseful and that she has

² The Crown's submissions did not refer to starting points for the other counts or any discounts for mitigation for any count

matured. He recommends full suspension on conditions.

Salvation army

16. On 5 October 2021, the court received a letter from the Salvation Army Alcohol and Drugs Awareness Centre advising that the Defendant had sought help from the Centre on 9 September 2021 and started a program on the 20th. She has so far completed 20 hours of the program.

Starting point

17. The statutory maximum penalties for the subject offences are:³
- (a) destruction of evidence – 15 years' imprisonment;
 - (b) possession of less than 1 gram of a Class A – a fine of \$10,000 or 3 years' imprisonment or both; and
 - (c) possession of utensils – a fine of \$10,000 or 3 years' imprisonment or both.
18. Having regard to those maximum terms, the comparable sentences referred to by the Crown and the seriousness of the offending here, marked, in particular, by the amount of methamphetamines involved suggesting only personal use (although the large amounts of cash found in the room casts some doubt over that), I set the following starting points:
- (a) destruction of evidence – 2 years' imprisonment;
 - (b) possession of 0.13 grams of methamphetamines – 9 months' imprisonment; and
 - (c) possession of utensils – 6 months' imprisonment.

Mitigation

19. For the Defendant's lack of previous convictions and early guilty pleas to destroying evidence and possessing utensils, I reduce those starting points by one third. For her lack of previous convictions only, I reduce the starting point on the methamphetamine count by 2 months.
20. The resulting sentences are:
- (a) destruction of evidence – 16 months' imprisonment;
 - (b) possession of 0.13 grams of methamphetamines – 7 months' imprisonment; and
 - (c) possession of utensils – 4 months' imprisonment.
21. All the sentences are to be served concurrently.

³ Since the amendments to the *Illicit Drugs Control Act* came into effect on 8 December 2020.

Suspension

22. The considerations for *Mo'unga v R* (1998) Tonga LR 154 at 157 favour suspension. The Defendant is still quite young. She has no previous convictions. While she did not cooperate with the authorities when arrested, she pleaded guilty early to two of the charges. Having observed her at her trial, I tend to think she only contested the methamphetamines count because of a belief that it was far more serious in terms of penalty than the others and out of a misplaced loyalty towards her partner and sympathy for his drug-riddled legal plight.
23. I also take into account the reported changes in the Defendant's behaviour since Paletili has been incarcerated, including the glowing praise of her employer for how quickly the Defendant has been able to learn new skills. She is also a single mother of two young children.
24. Consistent with the trend of decisions of this Court in recent times, and as endorsed recently by the Court of Appeal,⁴ had the amount of methamphetamines involved here been greater, I would have only been minded to suspend part of the sentence to ensure proper deterrence. However, after weighing all the Defendant's circumstances against the relative seriousness of the offending, I am prepared to offer the Defendant what is likely to be her one and only opportunity to stay out of prison, and only if she is prepared to end her involvement with illicit drugs (including with those who wish to remain involved with them) once and for all.

Result

25. The Defendant is convicted of:
 - (a) destruction of evidence and is sentenced to 16 months' imprisonment;
 - (b) possession of 0.13 grams of methamphetamines and is sentenced to 7 months' imprisonment; and
 - (c) possession of utensils and is sentenced to 4 months' imprisonment.
26. All sentences are to be served concurrently.
27. The sentences are to be fully suspended for a period of 2 years from this day 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 the next 48 hours;
 - (d) complete courses in drug and alcohol awareness as directed by her

⁴ E.g. see *Attorney General v Fuaeiki* (AC 11 of 2021, 1 October 2021).

probation officer; and

- (e) complete 60 hours community service as directed by her probation officer.
28. 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 her head prison sentence.
29. Pursuant to s 32(2)(b) of the *Illicit Drugs Control Act*, the illicit drugs the subject of these proceedings are to be destroyed.
30. Pursuant to s 33 of the said Act, all cash and other items seized are to be forfeited to the Crown.

NUKU'ALOFA
7 October 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE