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

CR 93 & 94 of 2021

REX

-v-

[1] TUPOU TAFUNA
[2] 'AMELIA HALAMEHI TAFUNA

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr T. 'Aho for the Prosecution
The Defendants in person
Date: 12 October 2021

The charges

1. On 2 September 2021, after a two-day trial, the defendants were found guilty on joint counts of possession of 3.82 g of methamphetamines (count 1) and 22.60 g of cannabis (count 2). 'Amelia was also found guilty of obstructing a police officer (count 3). Both were granted bail pending sentence.
2. That same day, Tupou was arrested for another drug related offence (Magistrate Court Criminal Summons 138/21) and remanded in custody. On 16 September 2021, he appeared before Cooper J in this Court on other drug-related charges (Supreme Court proceeding CR 143/21) and was remanded in custody pending his trial date in that matter commencing March 2022.

The offending

3. On 15 October 2020, Police received information that Tupou was selling drugs from his residence in Sopu. Police conducted a search of the premises without warrant. 'Amelia protested and refused to be searched by a female police officer, which resulted in her having to be restrained. She was subsequently charged with obstructing a police officer (count 3). During the search, police found 30 bags of methamphetamine, cannabis leaves, empty dealer bags, drug-related utensils, and a total of \$1,550 in cash, in a wall cavity and the ceiling space of the bedroom of the Defendants' daughter. When questioned, both Tupou and 'Amelia denied any knowledge of the drugs and otherwise chose to remain silent. At trial, their defence, such as it was, was found to be recent invention and 'Amelia's evidence was found to be unreliable.

Crown's submissions

4. The Crown submitted the following as aggravating features of the offending:
 - (a) possession of Class A drugs is a scourge on our society and the Courts should impose sentences of denunciation and deterrence;
 - (b) the amount of methamphetamine seized is substantial;
 - (c) the 30 dealer bags and other drug-related utensils and cash found indicates a commercial enterprise;
 - (d) the concealment of the drugs suggests that both defendants knew they were involved in illicit trade;
 - (e) lack of remorse;
 - (f) Tupou has the following relevant previous convictions:
 - (i) 11 February 2015 - common assault and simple bodily harm - 6 months imprisonment, fully suspended for 1 year;
 - (ii) 8 October 2020¹ - possession of 0.4 grams of methamphetamine and interfering with evidence - 6 months imprisonment, fully suspended for 12 months on conditions including 40 hours community service; and
 - (g) Tupou was arrested on the instant offences only a week after he was convicted and sentenced in the Supreme Court.
5. The only mitigating factor between the two is 'Amelia's lack of previous convictions.
6. The Crown referred to the following comparable sentences:
 - (a) 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. By reference to the *Zhang* guidelines,² he was sentenced to 12 ½ years' imprisonment for the possession charge and 5 years for the attempted export, to be served concurrently.
 - (b) *Paletu'a* [2021] TOSC 49 – the defendant pleaded guilty to possession of 3.16 grams of methamphetamines. A starting point of 3 years and 3 months imprisonment was set, reduced by one third for mitigation, resulting in a sentence of 26 months' imprisonment, with the final 12 months suspended.
 - (c) *Uasike* (CR 161/19) – the defendant pleaded guilty to possession of 3.48 grams of methamphetamine, 0.87 grams of cannabis and bribing police. A

¹ Supreme Court CR 198/20

² *Zhang v R* [2019] NZCA 507

starting point of 3½ years was set for the methamphetamine charge, reduced by 6 months for mitigation. The final 12 months of the aggregate sentence was suspended.

- (d) *Konileti Latu* (CR 109/17) – the defendant pleaded guilty to possession of 4.53 grams of methamphetamine and 21.33 grams of cannabis. A starting point of 3 years was set for the methamphetamine charge, reduced by 12 months for mitigation. Three months for the cannabis charge was added making a total sentence of 2 years and 3 months' imprisonment, of which, the final 12 months was suspended.
- (e) *'Amusia Mateni* (CR 213/20) – the defendant was found guilty of possession of 8.08 grams of methamphetamine and interfering with evidence. A starting point of 4 years was set, reduced by 6 months for mitigation. The final 12 months of the resulting sentence of 3 ½ years was suspended on conditions.
- (f) *John Thorn Ngaue* (CR 6/18) – the defendant pleaded guilty to possession of 14.5 grams of methamphetamine. A starting point of 4 ½ years was set, reduced by 1 year for mitigation. The final 9 months of the 3 ½ year sentence with suspended on conditions.

7. Here, the Crown submits that:

- (a) the starting point for the methamphetamine charge should be 3 ½ years' imprisonment;
- (b) the starting point for the cannabis should be 10 months' imprisonment;
- (c) for Tupou:
 - (i) no discount for mitigation;
 - (ii) no suspension;
 - (iii) rescission of the suspension, and activation, of his sentence in CR 198/20;
 - (iv) resulting in a total sentence of 4 years' imprisonment;
- (d) for 'Amelia:
 - (i) on the obstructing police charge, a starting point of 10 months' imprisonment;
 - (ii) the head starting point should be reduced for mitigation by 12 months for the methamphetamines and 3 months for each of the cannabis and obstruction charges (to be served concurrently with the head sentence), resulting in a head sentence of 2½ years imprisonment;

and

(iii) the final 12 months suspended on conditions.

Presentence reports

Tupou

8. The probation officer filed a letter attaching the presentence report for CR 198/20 following a telephone interview with Tupou.
9. Tupou is 39 years of age. He is an only child. He was told that his parents divorced after his birth. His father moved to Samoa but provided financial support. His mother went to the United States. He was raised by his paternal grandmother. As a child, he often wondered about whether his parents loved and cared for him and whether he was the reason for their separation. He often felt unwanted and alone. He found comfort in being alone and was desperate for a family. He was educated to form 5 at Liahona High School. When he left school, he went to Tofua Island, where he grew kava plants. More recently, he was employed by a security company and cut lawns for extra money. Tupou described marrying 'Amelia and having a family with her as having filled the "gaps" in his life growing up.
10. Tupou told the probation officer that he has learned his lesson and has been a law-abiding citizen since this offending. The probation officer recommended that the Defendant attend rehabilitation programs upon his release from prison.

'Amelia

11. 'Amelia is 32 years of age. She is the eleventh of thirteen children. She grew up in Vava'u in a good family. She attended Saint Andrews high school but dropped out in 2007 when her father died. That same year, she married and went on to have four children, now aged 12, 11, 9 and 5. She is unemployed. Since the offending, her mother and one of her siblings have travelled from Vava'u to provide moral support and are currently living with her at Sopu. She has cut herself off from her village and church community because she is ashamed of what happened.
12. 'Alipate Tavo is the CEO of Tonga Post and the Defendants' neighbour. He told the probation officer that vehicles would show up regularly at the Defendants' house which caused suspicion. He described them "*as a threat for security and peace in their community and they need the law to deal with the appropriate measure.*"
13. In relation to the offending, 'Amelia does not accept the court's decision and maintains her innocence. The probation officer considered 'Amelia's denial of responsibility as a means of attempting to escape the consequences of her involvement and to cover up her husband's illegal activities. The officer

recommended partial suspension.

Starting points

14. At the time of this offending, the maximum statutory penalties were:
 - (a) possession of methamphetamine - a fine of \$1 million or 30 years' imprisonment or both;
 - (b) possession of less than 28 grams of cannabis - a fine of \$5,000 or 1 year imprisonment or both; and
 - (c) obstructing a police officer - a fine of \$10,000 or 3 years' imprisonment.
15. The head offence is clearly the possession of methamphetamines.
16. The Courts' denunciation of, and approach to deterrence sentencing for methamphetamines offences has been repeated numerous times.³ Suffice to say, for the instant case, those involved with methamphetamine in any capacity, and even small amounts, can expect to receive custodial sentences.
17. The guidelines provided by the New Zealand Court of Appeal in *Zhang v R* [2019] NZCA 507, which have been applied regularly in Tonga,⁴ place the instant offending toward the upper end of band 1, namely, for up to 5 grams, a sentence ranging from community service to 4 years' imprisonment.
18. For the reasons explained in *Paletu'a*, *ibid*,⁵ the evidence of reported sales from the Defendants' residence and cars regularly visiting, the amount of methamphetamines, the number of dealer bags and other drug-related paraphernalia found in this case, strongly suggest possession for the purpose of supply, which must be considered a circumstance of aggravation: *Mafi v Rex* [2004] TOCA 4 at [24].
19. Having regard to the seriousness of the offending, the amount of methamphetamines involved, the comparable sentences and principles referred to above, I set the following starting points:
 - (a) count 1 – possession of 3.82 g of methamphetamines – 3 ½ years' imprisonment;
 - (b) count 2 – possession of 22.60 g of cannabis - 10 months' imprisonment; and
 - (c) count 3 – obstructing a police officer - 12 months' imprisonment.

³ *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 *Ngaue* [2018] TOSC 38 at [5] and [6], as most recently recited in *R v Moala* [2021] TOSC 151.

⁴ E.g. see *R v Paletu'a* [2021] TOSC 49.

⁵ At [15].

Mitigation

20. I agree with the Crown that, for Tupou, there are no mitigating factors by which to reduce the relevant starting points. Therefore, his head sentence for this proceeding is 3 ½ years' imprisonment with the sentence for count 2 to be served concurrently with that for count 1.
21. In relation to 'Amelia, in *Veā* [2004] TOCA 7,⁶ the Court of Appeal referred to the New Zealand Court of Appeal approach in *R v Terewi* [1993] 3 NZLR 62 and repeated stance that "*personal circumstances are generally irrelevant when sentencing for drug offending*".
22. Nevertheless, for her good previous record, I will reduce 'Amelia's starting points to result in the following sentences:
 - (a) count 1 - 33 months' imprisonment;
 - (b) count 2 - 8 months' imprisonment; and
 - (c) count 3 - 9 months' imprisonment.
23. As it was separate to the drug offences, I add 3 months of the sentence on count 3 to the head sentence, making a total head sentence of 3 years' imprisonment. The balance of the sentences for counts 2 and 3 are to be served concurrently with the sentence on count 1.

Suspension

24. In light of the fact that Tupou had the benefit of fully suspended sentences in 2015, and again in 2020, and that he committed (or was detected) the instant offending only a week after being sentenced in CR 198/20, I see no basis for suspending any part of his head sentence in this matter.
25. 'Amelia's good previous record is also a basis for some suspension of her sentence. Against that is her lack of remorse. On balance, I tend to the view that her children will hopefully provide sufficient impetus for her to take the opportunity offered by a partially suspended sentence to rehabilitate.⁷ I also note that she has family support who will no doubt care for the children. As the Court of Appeal has recently confirmed, the growing concern and prevalence of substantial methamphetamine cases means that full suspension, even for a first offender, would not fulfil the sentencing imperatives of denunciation and deterrence: *Attorney General v Fua'eiki* [2021] TOCA 20 at [14].
26. Accordingly, I will order that the final 12 months of 'Amelia's head sentence be suspended on conditions as set out below.

⁶ Applied recently in *R v Finau* [2021] TOSC 96.

⁷ *Mo'unga v R* [1998] Tonga LR 154.

CR 198/20

27. There remains the issue of Tupou's breach of the primary condition of his suspended sentence in CR 198/20.
28. Section 24(3)(c) of the Criminal Offences Act provides:
- In the event of the offender being convicted of an offence punishable by imprisonment committed during the period of suspension he will thereupon be sentenced to serve the term of the suspended sentence in addition to the punishment imposed for such subsequent offence.
29. Subsection (e) provides that in special circumstances, the Court may release an offender from the operation of paragraph (c) and may extend the original period of suspension for a further period not exceeding 1 year. No special circumstances have been demonstrated here.
30. Therefore, the Court is required to rescind the suspension and order that the 6 months imprisonment in CR 198/20 be served in addition to the sentence to be imposed in this proceeding.

Result*Tupou*

31. Tupou Tafuna is convicted of:
- (a) possession of 3.82 g of methamphetamines and is sentenced to 3 ½ years' imprisonment; and
 - (b) possession of 22.60 g of cannabis and is sentenced to 10 months' imprisonment, to be served concurrently with the above sentence.
32. Further, the suspension of his sentence in proceeding CR 198/20 is rescinded and Tupou is ordered to serve that term of 6 months imprisonment in addition to the head sentence imposed in this proceeding.
33. In the result, Tupou Tafuna is sentenced to a total of 4 years imprisonment.
34. I direct that, where available, Tupou Tafuna is to receive drug rehabilitation counselling within prison.

'Amelia

35. 'Amelia Tafuna is convicted of:
- (a) possession of 3.82 g of methamphetamines and is sentenced to 33 months' (or 2 years and 9 months) imprisonment;
 - (b) possession of 22.60 g of cannabis and is sentenced to 8 months' imprisonment; and
 - (c) obstructing a police officer and is sentenced to 9 months' imprisonment.

36. Three months of the sentence for obstructing police is to be added to the head sentence for possession of methamphetamines, making a total head sentence of 3 years imprisonment. The balance of the sentences for possession of cannabis and obstruction of police are to be served concurrently with the head sentence.
37. The final 12 months of the said head sentence are to be suspended for a period of 2 years from the date of her release from prison, on condition that during the said period of suspension, she 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 her release from prison; and
 - (d) complete a drugs awareness course as directed by her probation officer.
38. In the result, and subject to compliance with the above conditions and any remissions available under the *Prisons Act*, 'Amelia will be required to serve 2 years in prison.
39. Pursuant to s 32 of the *Illicit Drugs Control Act*, the illicit drugs the subject of this proceeding are to be destroyed.
40. Pursuant to s 33 of the said Act, all items and cash seized in this proceeding are forfeited to the Crown.

NUKU'ALOFA
12 October 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE