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

CR 45 of 2021

REX
-v-
'OKUSITINO LANGI

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mr T. 'Aho for the Prosecution
Mr D. Corbett for the Defendant
Date: 15 October 2021

The charges

1. On 9 September 2021, after a two-day trial, the Defendant was found guilty of possession of 43.85 grams of methamphetamine and 2.61 grams of cannabis.

The offending

2. On or about 13 July 2020, after receiving information that the Defendant was selling drugs from his residence, police conducted a search there without warrant. In a fake cavity in the rear of a bookshelf in a TV room used by children, police found multiple dealer bags containing methamphetamines, two packs of cannabis and \$390. Police also found \$1,600 in the Defendant's trousers, scales and other drug-related paraphernalia. After the drugs were found, the Defendant signed entries in the police diary of action by which he admitted that the drugs were his. When later questioned, the Defendant chose to remain silent.
3. At trial, the Defendant challenged the legality of the search and the amounts of drugs seized. He also gave evidence that he could not read Tongan and therefore did not know what he was signing in the diary entries. Those defences were rejected, and the Defendant's evidence was found to be unreliable for a number of reasons, including that he (through his counsel) had failed to put to the relevant Crown witnesses much of the evidence he gave which was therefore considered to be recent invention. Even his own counsel admitted, in closing submissions, to not having previously heard some of the material evidence the accused gave.

Crown's submissions

4. The Crown submits the following as aggravating features of the offending:

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- (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 dealer bags and other drug-related utensils and cash found indicates a commercial enterprise;
 - (d) the concealment of the drugs suggests that the defendant knew he was involved in an illicit trade;
 - (e) lack of remorse;
 - (f) the defendant has the following previous convictions:
 - (i) 20 May 1998 — 6 months' imprisonment for abetment to housebreaking, fully suspended for 6 months;
 - (ii) 23 February 2000 — 2 weeks' imprisonment for theft, suspended for 6 months;
 - (iii) 9 October 2000 – \$200 fine for possession of cannabis;
 - (iv) 28 January 2002 – 12 months' imprisonment for housebreaking, 6 months for theft and 9 months for possession of cannabis, fully suspended for 2 years;
 - (v) 1 August 2008 – 8 years' imprisonment for attempted armed robbery and 6 years for grievous bodily harm;
 - (vi) 16 December 2008 – 9 years' imprisonment for unlawful imprisonment, discharge of a firearm with intent to intimidate and abetment to armed robbery; and
 - (vii) 3 December 2015 – \$100 fine for negligent driving.
5. Further, the Crown conveyed information from the United States embassy in Fiji that, in 2001, the Defendant was deported from the U.S. to Tonga for multiple criminal convictions including possession of narcotics, theft, and receiving stolen property.
6. The Crown did not identify any mitigating features.
7. The Crown referred to the following comparable sentences:
- (a) *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, he was sentenced to 12 ½ years' imprisonment for the possession charge and 5 years for the attempted export, to be served concurrently.

- (b) *Latu* [2021] TOSC 81 – the defendant pleaded guilty to multiple charges (CR 289/20, 12/21 and 101/21), including possession of 50.22 grams of methamphetamine, for which a starting point of 7 years' imprisonment was set. For the Defendant's late plea, 12 months were deducted resulting in a sentence of 6 years' imprisonment.
 - (c) *Afu* [2021] TOSC 6 – the defendant pleaded guilty to possession of 27.49 grams of methamphetamine and 196.54 grams of cannabis. A starting point of 5 years and 3 months' imprisonment was set for the methamphetamines, reduced by 12 months for his late guilty plea, with the final 18 months suspended on conditions.
 - (d) *Tatakamotonga* [2021] TOSC 132 – the defendant was convicted for possession of 99.47 grams of methamphetamine and 3.79 grams of cannabis after confessing during his trial. He also had been deported from the US for drug-related offences. Cooper J set a starting point of 7 years' imprisonment, reduced by 4 months for the defendant's "extremely late confession", resulting in a sentence of 6 years and 6 months' imprisonment, of which the final 6 months was suspended.
 - (e) *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 was suspended on conditions.
8. Here, the Crown submits the following sentencing formulation:
- (a) a starting point of 6 ½ years' imprisonment for the methamphetamines;
 - (b) 1 month imprisonment for the cannabis to be served concurrently with the head sentence; and
 - (c) no suspension.¹

Presentence report

9. The Defendant is 47 years of age. He is the youngest of seven children. He dropped out of school at the age of 14 to help his father support their family. He and his family migrated to the United States in the early 1980s. That move changed his life. He became influenced by gang members and engaged in crime. By the time he was 18, he had already served time in prison. He later committed

¹ Referring to *R v Fekau* [2021] TOSC 108 at [35], where the Defendant there had also been afforded previous opportunities by suspended sentences but had gone on to engage in serious drug offending and for admittedly commercial gains. He was found to have demonstrated a flagrant disregard for the law and the opportunities he was offered.

another offence which led to his deportation to Tonga in 1997.

10. In 2001, the Defendant married, from which he has three children.
11. As he testified at trial, the Defendant told the probation officer that he operates a business (owned by his brother who is overseas) selling water and performing construction work.
12. The relevant town officer described the Defendant as a 'non-active member' of, and a threat to the safety of the community.
13. The probation officer opined that the Defendant:
 - (a) is at moderate risk of re-offending;
 - (b) is not remorseful and continues to deny any involvement with the drugs found in his house; and
 - (c) has no prospects for effective rehabilitation.
14. Notwithstanding, the officer recommended imprisonment with partial suspension and with rehabilitation programs in prison and when the Defendant is released.

Defence submissions

15. Mr Corbett submitted, in summary:
 - (a) for the head offence, the Crown's proposed starting point of 6 ½ years' imprisonment is appropriate;
 - (b) two months' imprisonment for count 2, concurrent with the head sentence;
 - (c) partial suspension for the head sentence for the following reasons:
 - (i) the defendant has young children and a family who depend on him;
 - (ii) despite his long history of criminal offences, it has been 6 years since his last conviction;
 - (iii) his previous conviction in 2000 for cannabis was a 'very long time ago'; and
 - (iv) partial suspension would be used by the defendant to rehabilitate himself.

Starting point

16. The statutory maximum penalties for the subject offences are:
 - (a) possession of methamphetamines – a fine of \$1 million or 30 years' imprisonment or both; and
 - (b) possession of less than 28 grams of cannabis – a fine of \$5,000 or 1 year

imprisonment or both.

17. Here, the head offence is clearly the possession of methamphetamines.
18. In *Ali* [2020] TOSC 94, the court observed that:

“Methamphetamines continue to be a scourge on society, not only here in Tonga, but around the world. Like other class A drugs, methamphetamine is not just a drug of dependence; it is a drug of destruction, causing untold damage to countless individuals, their families and their communities. The courts play an important role in the fight against the manufacture, importation, supply and use of insidious illicit drugs like methamphetamines...”
19. As such, the Court’s repeated stance on illicit drugs, particularly methamphetamines, and the approach taken to sentencing, has been described as follows:²
 - (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; and
 - (d) therefore, those involved with methamphetamine in any capacity, and even small amounts, can expect to receive custodial sentences.
20. Therefore, the Court’s responsibility in addressing drug-related offending involving methamphetamine is to ensure that sentences imposed are:³
 - (a) adequate and effective in denouncing and punishing such crimes;
 - (b) provide a strong deterrent effect, not just for individual offenders but also for the general community and those who may contemplate succumbing to the toxic allure of illegal drugs; and
 - (c) to provide incentive and opportunity for rehabilitation of those who have succumbed.
21. The amount of methamphetamines in the instant case:
 - (a) falls within the second band of the guidelines for Class A drugs set in *Zhang v R* [2019] NZCA 507. The guidelines have been applied regularly by the courts in Tonga.⁴ They indicate for between 5 and 250 grams, a sentence of 2 to 9 years’ imprisonment; and
 - (b) approximates the amount in *Latu*, *ibid*, where a starting point of 7 years’

² Most recently, see *R v Moala* [2021] TOSC 151 at [17] and cases referred to therein.

³ *Ali*, *ibid*, at [26].

⁴ *R v Fekau*, *ibid*, at [17].

imprisonment was set for 50 grams, and where it was also observed that:

“the Court’s broad discretion in sentencing can rarely, if ever, be reduced to any strict or linear mathematical exercise.”

22. Further, and as in *Afu*, *ibid*,⁵ the amount of methamphetamines involved here are far greater than those usually encountered for personal use. Overall, those amounts, together with the other drug-related paraphernalia and cash seized suggests that the Defendant is a middle tier drug dealer. While the Defendant has been charged with, and found guilty only of possession, the facts here strongly indicate possession for the purpose of supply: *'O Pangai* [2021] TOSC 50.

23. I also take into account the defendant’s antecedent criminal history, both here and in the U.S., in the context, and for the purposes discussed in *Tapueluelu* [2021] TOSC 140 at [19], namely:⁶

“... to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing disobedience to the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender, and other offenders from further offences of like kind. ...”

24. Having regard to the seriousness of the offending by reference to the above factors and the comparable sentences and principles referred to above, I set the following starting points:

- (a) for the methamphetamines count – 6 years and 3 months (or 75 months) imprisonment; and
- (b) for the cannabis count – 2 months’ imprisonment, to be served concurrently with the sentence on the head count.

Mitigation

25. In light of the Defendant’s extensive criminal history, both here and in the United States, and the maintenance of his not guilty plea at trial, I agree with the Prosecution that there are no mitigating factors which warrant any reduction of the starting points.

Suspension

26. Of the considerations for suspension discussed in *Mo’unga* [1998] Tonga LR 154

⁵ At [15] and [16].

⁶ Citing *Rex v 'Unga* [2015] TOSC 51 at [16], per Cato J, referring to *Veen v The Queen (No 2)* (1987-88) 164 CLR 465, at 477.

at 157:

- (a) the Defendant is not young;
 - (b) he has extensive previous convictions, although:
 - (i) the most serious were for violence and dishonesty;
 - (ii) the last of them was in 2008; and
 - (iii) his last convictions in Tonga, for (Class B) drugs, and his last suspended sentence, was almost 20 years ago;
 - (c) in one sense, the Defendant co-operated with police by signing the diary entry by which he admitted to owning the drugs the subject of this proceeding, but then at trial, he attempted to resile from that admission by feigning that he could not read Tongan.
27. I also take into account the seriousness of the offending, the need for effective deterrence, and, to a limited extent, the personal circumstances of the offender or those dependent on him: *R v Hafoka* [2021] TOSC 97.
28. However, in response to Mr Corbett's 'breadwinner plea', the Court can only repeat and remind what the Courts have repeatedly stated, namely, that:⁷
- (a) such a plea carries little weight; and
 - (b) the likely hardship caused by the defendant's incarceration to his family:
 - (i) cannot be an overriding mitigating factor in cases where the objective gravity of the offences and the presence of aggravating factors call for a custodial sentence; and
 - (ii) is not, and is rarely likely ever to be, on its own, a proper reason for suspending a sentence.
29. Ultimately, the main consideration is whether suspension is likely to aid in the rehabilitation of the offender. If it is not, or if for any reason, rehabilitation is not relevant to the sentence to be imposed, suspension of any part of the sentence is unlikely to be appropriate.⁸
30. Having regard to the above factors and principles, I consider it appropriate to suspend the final 15 months of the defendant's head sentence on conditions as set out below.

Result

⁷ Most recently, see *R v Pousima* [2021] TOSC 131 at [35].

⁸ Per 'Asa' [2020] TOSC 72 at [49] referring to *Lolohea* (unreported, CR 58 of 2016, 13 December 2016, Cato J), *Mailau* [2017] TOSC 39 and *Felemi* [2018] TOSC 76.

31. The Defendant is convicted of:
- (a) possession of 43.85 grams of methamphetamine and is sentenced to 6 years and 3 months (75 months) imprisonment; and
 - (b) possession of 2.61 grams of cannabis and is sentenced to 2 months imprisonment, to be served concurrently with the head sentence.
32. The final 15 months of the head sentence is to be suspended for a period of 2 years from the date of the defendant's release from prison on the following conditions, namely, that during the said 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; and
 - (d) complete a course in drugs awareness as directed by his probation officer.
33. Subject to compliance with the above conditions, and any remissions available pursuant to the *Prisons Act*, the Defendant will be required to serve 5 years in prison.
34. 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 balance of his sentence.
35. Pursuant to s 32(2)(b) of the *Illicit Drugs Control Act*, the illicit drugs the subject of these proceedings are to be destroyed.
36. Pursuant to s 33 of the said Act, all cash and other items seized are forfeited to the Crown.

NUKU'ALOFA
15 October 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE