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IN THE SUPREME COURT OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

CR 21 of 2021

REX

-v-

SIAOSI HELU

BEFORE HON. JUSTICE NIU

**Counsel** : Mr. F. Samani for the Crown.

: The accused for himself.

**Plea** : Not guilty but convicted on 28 July 2021.

**Submissions** : by Mr. Samani filed on 9 September 2021.

: by letter filed 6 September 2021 and oral submission by the accused on 21 September 2021.

**Sentencing** : 27 October 2021.

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## SENTENCING

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### Offence

[1] In the evening of 5 August 2020, the police arrested you, Siaso Helu, for being drunk in a public place. When you were searched at the police station, as was routine before putting you in the cell, it was found that you had a pack of methamphetamine, 2 test tubes and a straw inside your under pants between

your legs. The weight of the meth was 0.04 gm. \$52 in cash were found in your short's pocket.

### **Previous convictions**

[2] You have previous convictions:

1.	no.210/2003	Magistrate Court	Theft	\$200 fine or 3 months
2.	no.378/2005	Magistrate Court	Drunkenness	\$25 fine or 3 days.
3.	no.29/2006	Magistrate Court	Intoxicating liquor	\$70 fine or 1 month.
4.	no.4/2009	Supreme Court	h/breaking	12 months 6 months suspended 2 years.
5.	no.377/2011	Magistrate Court	Assault	\$200 fine or 2 months & \$100 compensation.
6.	no.83/2017	Supreme Court	39.65 gm cannabis	1 year 6 months.

### **Report**

[3] I directed that the probation officer prepares a report on you but you did not attend to enable that report to be done.

### **Crown submissions**

[4] Mr. Fatai, counsel for the Crown, says that the aggravating factors against you are that:

- (a) you are not remorseful for what you did,
- (b) you did not cooperate with the police,

- (c) you have a previous conviction for illicit drug, and
- (d) You do not appear to demonstrate any attempt to rehabilitate.

[5] He refers to 2 cases:

- (a) **R v Afu** (CR177/2020) where the accused possessed 0.11 gm of meth. He had previous convictions but not for illicit drug back in 2005. He pleaded guilty right away. He cooperated with the police. He was sentenced to 6 months imprisonment but fully suspended for 12 months and to complete the drug awareness course.
- (b) **R v Satini** (CR277/2019) where the accused was convicted after trial of possessing 1.32 grams of meth and 4.10 grams of cannabis, and had previous convictions for illicit drugs. He was sentenced to 2 years 3 months but it was fully suspended to allow him access to treatment for his addiction.

[6] Mr. Fatai submits that you should have a starting point of 12 months and because you have no mitigating factors, your sentence should be 12 months. As to suspension, he says you do not qualify under **Mo'unga's case** to any suspension of those 12 months.

[7] He requests that the meth be destroyed and that the paraphernalia and \$52 found on you be forfeited to the Crown.

### **Your submissions**

[8] You wrote your submissions and although you said that you maintained that you were innocent of this offence, you were content to accept the conviction which has been ordered against you.

[9] You say that you are married and that you have 3 young children and that your wife works as teacher at 'Ahopanilolo College and you are the house husband looking after the children and the home.

- [10] When you appeared and made your submissions, you referred to the case of **Ma'ata Pouono** who had 0.08 gm meth, and to the case of **Wesley Fifita** who had 0.04 gm of meth, where both sentences of imprisonment were fully suspended.
- [11] You told me that you are 36 years old and that you have been to Australia 5 times on 3 months visas, and that in 2016 you married your wife who was teaching and receiving \$300/2 weeks while you worked at home unlocking phones and laptops for which you said you received \$500 or so per week. You said your wife now receives \$427/2 weeks.
- [12] You said that you are paying rent of \$300 per month for the house of Keneti Mafi at Ha'amoko. You said that when you were in prison for the previous drug offence, your wife and children were living with your parents.

### **Consideration**

#### **Own use**

- [13] In considering your sentence, it is relevant to consider whether or not you had the meth for your own use or for supply. First, you were not charged with supplying or possession for supply. Second, there was no evidence that you possessed the meth for supply. Third, the quantity you possessed was such that it was more likely that it was for your own use.

#### **Class A drug**

- [14] I also have to consider that meth is a class A illicit drug and it is regarded as a much more serious and dangerous substance and that a heavier penalty must be imposed for even possessing it for one's own use.

#### **Previous drug offence**

- [15] I also consider that you have a previous record for cannabis of 39.65 grams which exceeded the maximum of 28 gram considered as normal amount for personal use, for which you were sentenced to 1 year 6 months.

### **Pouono and Fifita cases**

[16] You referred to the cases of Pouono and Fifita where they were convicted, like you after trial of possession of meth of 0.08 and 0.04 grams, and to their sentences being fully suspended, but I wish to point out that in both those cases the two accused made determined efforts to rehabilitate themselves by going seriously into farming as was with Pouono, and by finding responsible employment and working well there as was with Fifita. You on the other hand have not made any effort to make a change in your life or show evidence of it.

### **Sentence duration**

[17] I consider that the sentence of 12 months proposed by the Crown, in view of your previous drug conviction and having pleaded not guilty and thereby not being credited any deduction, is appropriate.

### **Suspension**

[18] As to suspension of that 12 month sentence, or of part of it, Crown counsel says that you do not qualify for any suspension under the criteria set out in the **Mo'unga case**, because you are not young, you have a previous conviction for illicit drug, as well as other offences, you were not provoked or coerced into committing this offence, you did not cooperate with the police, you are not remorseful and you have not shown any likelihood of rehabilitation.

[19] However, I also have to consider the recent decision of the Court of Appeal in **Attorney General v Leka** (AC4/2021) on 28 September 2021, in which the Court referred to its decision in **Rex v Misinale** [1999] TOCA 12, and said:

“14. However, in **Misinale**, after reciting the considerations for suspension discussed in **Mo'unga**, this Court observed that:

“These, as the reference makes clear, are not the only factors. Also relevant may be the seriousness of the offending, the need for an effective deterrence, the effect on the victim, and the personal circumstances of the

offender or those dependent on him or her. There may well be others ....”

- [20] Your personal circumstances and those dependent on you may be considered. In your case, your wife has to work and you have to stay home and look after your 3 young children, the youngest being only a couple of months old. In 2017 when you had to serve your prison sentence, your parents had to look after your one child at the time. But now you have 3 children. Not only do they depend on your personal care, they also need the extra money you make by unlocking telephones and laptops as you told me.
- [21] I also consider that you may need help with any addiction you may have to methamphetamine, as may be indicated by the fact you had the meth with you at the time of your arrest together with pipes for using it.
- [22] However, I must still bear in mind the seriousness of the offence which you have committed, namely the possession of a class A drug, and the need for an effective deterrence in the sentence I have to impose, and in particular, the statement of *Eichelbaum CJ in R v Peterson* [1994] 2 NALR 533 (CA) that the suspended sentence is intended to have a strong deterrent effect, so that if the offender is incapable of responding to a deterrent, it should not be imposed.
- [23] That statement is, in effect, the second of the grounds upon which an imprisonment sentence may be suspended. It says: “Where the offender is likely to take the opportunity offered by the (suspended) sentence to rehabilitate himself or herself.”
- [24] In your case, you have shown that it is **not** likely that you will be likely to take the opportunity offered by a suspended sentence to rehabilitate yourself. First, you did not carry out the direction I had given you to attend at the probation office for the preparation of a report on your circumstances. Second, you did not come to Court on 5 October 2021 in accordance with the bail you had, to appear on that day for your sentence. Third, you were personally served with

notice to come to Court at 9:00 am 14 October 2021 for your sentence but you did not attend and you did not contact the Court to say why you did not. I then had to issue a warrant for your arrest. Your bail was thereby cancelled.

[25] You told me in Court yesterday that you were arrested in the Magistrate's Court on the previous day, 25 October 2021, when you went there on a charge of possession of methamphetamine of 1.57 grams jointly with another person. You told me that you had not been notified at all to come to court up to now.

[26] I am afraid I do not believe that. I have the certificate of service which the bailiff officer, Mosese Manufekai, dated 12 October 2021, in which he stated that he personally served you at 11:20 am on that same day at the Central Police Station to come to Court at 9:00 am 14 October 2021, and you did not come and you did not inform the Court why you had not come. You made no inquiry as to what has happened to your sentencing which was to be given on 5 October 2021.

[27] To me that did not show any sign of responsibility on your part or of a desire to rehabilitate and to change. In fact the charge now made against you in the Magistrate's Court indicates the opposite. It shows that you still associate with persons who possess illicit drugs.

[28] I therefore do not consider that you would be likely to rehabilitate yourself. I agree with Crown counsel that you do not qualify for suspension of your sentence but I consider that you do need help with your addiction and I am prepared to grant you a partial suspension to enable you to do that.

### **Sentence**

[29] Accordingly, for possessing 0.04 gram of methamphetamine on 5 July 2020, you are sentenced to 12 months imprisonment with the last 6 months being suspended for a period of 18 months, on the condition that:

- (a) you undertake and complete the drug awareness course of the Salvation Army;

- (b) you be placed on probation and that you live and work where directed by the probation officer;
- (c) you do not commit an imprisonable offence within the period of suspension;
- (d) you are to report to the probation service within 48 hours after your release from prison on having served the first 6 months of your sentence.

**Orders**

- [30] The drug and paraphernalia found by the police in respect of this case shall be destroyed by the police.
- [31] The \$52.00 that was found in the pocket of the accused be returned to him.

**Nuku'alofa: 27 October 2021.**



A handwritten signature in blue ink, appearing to be "Niu J", is written over the seal.

Niu J

**JUDGE**