

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

ATTORNEY GENERAL'S OFFICE	
INITIALS: <i>JH</i>	DATE: <i>28/10/21</i>
<input checked="" type="checkbox"/> File	<input checked="" type="checkbox"/> Website
<input checked="" type="checkbox"/> Database	<input type="checkbox"/> Social Media
<input checked="" type="checkbox"/> Email internal	<input type="checkbox"/>

CR 140 & 141 of 2021

REX

-v-

[1] MAIKA NAMOA

[2] SIONE MOLI

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mrs A. 'Aholelei for the Prosecution
The Defendants in person
Date: 28 October 2021

The charges

- On 2 September 2021:
 - Maika Namoa pleaded guilty to destruction of evidence contrary to s 37A(1) of the *Illicit Drugs Control Act*; and
 - Sione Moli pleaded guilty to possession of 6.91 grams of methamphetamine, 0.88 grams of cannabis and utensils, contrary to ss 4(1)(a)(iv), (i) and 5A, respectively, of the Act.

The offending

- On 27 April 2021, Police received information that Sione was selling drugs from his residence in Nukunuku. Police arrived and conducted a search of the premises. As Maika was being detained, he threw a test-tube towards the bathroom area and broke it. Sione co-operated with the police and showed them where drugs were kept in his house. During the search, police found various small packs of methamphetamine, cannabis, empty dealer bags, drug-related utensils, and a total of \$1,415 in cash. When questioned, Maika chose to remain silent while Sione admitted to the offending.

Sione Moli

Crown's submissions

- In relation to the Sione's offending, the Crown submitted the following as aggravating features:
 - drugs are a serious issue in Tonga;

- (b) the substantial amount of methamphetamine seized at his residence;
 - (c) the dealer bags and other drug-related utensils and cash found indicates that he is involved in a small commercial supply of drugs;
 - (d) the presence of drug utensils used for smoking indicates that he is also a drug user; and
 - (e) Sione has relevant previous convictions, including in CR 215 of 2020 where, on 27 November 2020, he was sentenced to 9 months imprisonment for possession of methamphetamine and cannabis. That sentence was fully suspended for a period of 2 years on conditions including that he not commit any further offence punishable by imprisonment and that he complete rehabilitation courses and 70 hours of community service.
4. The only mitigating factor is his early guilty plea.
5. The Crown referred to the following comparable sentences:
- (a) *'Amusia Mateni* (CR 213/20) – the Defendant was charged with possession of 8.08 grams of methamphetamine and interfering with evidence. A starting point of 4 years was set for the drug charge and 2 years for interfering with evidence, reduced by 6 months, resulting in a head sentence of 3 ½ years for the drug charge and 18 months for interfering, to be served concurrently. The final 12 months of the head sentence was suspended for 2 years on conditions.
 - (b) *Fineasi Hafoka* (CR 205/19) – the Defendant pleaded guilty to possession of 7.7 grams of methamphetamine and 445.91 grams of cannabis. A starting point of 4 years was set, reduced by 12 months for mitigation, resulting in a sentence of 3 years' imprisonment for the methamphetamine charge and 18 months' imprisonment for the cannabis, 6 months from the cannabis sentence is added to the methamphetamine sentence, resulting in a total sentence of 3½ imprisonment, with the final 9 months suspended.
 - (c) *Fetu'u'aho* [2021] TOSC 83 - the Defendant was charged in two proceedings for possession of cannabis, cannabis seeds and utensils. On the head count of possession of 183.33 grams of cannabis, a starting point of 2 years and 9 months (33 months) was set, which was reduced by 11 months for mitigation, resulting in a sentence of 22 months' imprisonment. On the count of 37.7 grams of cannabis, he was sentenced to 12 months' imprisonment. For possession of utensils, he was sentenced to 12 months' imprisonment.
 - (d) *Manu Huni* (CR 76/21) – the Defendant was found guilty of possession of utensils and permitting the use of premises for the commission of an

offence. Starting points were set of 12 months' imprisonment for the utensils and 18 months' imprisonment for permitting the use of premises. They were then reduced to 10 months and 15 months for his clean record, and fully suspended for 2 years on conditions.

6. Here, the Crown submits the following sentence formulation:
 - (a) a starting point count 1 of 4 years' imprisonment, reduced by 6 months' imprisonment;
 - (b) a starting point of 3 months' imprisonment for count 2, reduced by 1 month for mitigation;
 - (c) a starting point of 12 months' imprisonment for count 3, reduced by 3 months for mitigation
 - (d) the sentences on counts 2 and 3 to be served concurrently with that for count 1; and
 - (e) no suspension.
7. Further, the Crown submits that as the instant offending was committed only 5 months into the suspension period for his sentence in CR 215/20, pursuant to s 24(3)(c) of the *Criminal Offences Act*, the suspension should be rescinded and that sentence activated, to be served together with the sentence to be imposed in the present case.

Presentence report

8. Sione is 35 years of age. He is the second of three children. When he was 11, his family migrated to New Zealand for better opportunities. Once there, as result of both his parents working, Sione started hanging out with other youth in the streets. At 16, he dropped out of school. He married and fathered two sons. Shortly after his marriage, he was sentenced to five years imprisonment for drug related offences. Thereafter, he was deported to Tonga, after completing drug treatment. According to information from police, he was deported in August 2012 for committing grievous bodily harm.
9. Sione found life in Tonga difficult. Eventually, he became estranged from his wife and sons when, in 2019, they travelled to New Zealand and did not return. He is currently in a de facto relationship and hopes to one day re-marry.
10. He is reported to be suffering from a range of health problems including recurring heart failure and other comorbidities. He is currently on several medications. However, he requires surgical correction of a damaged mitral heart valve, which is not currently available in Tonga.
11. Sione admitted his offending to the probation officer and confirmed the

information originally provided to police that he was indeed selling drugs. He knew what he was doing was illegal, but he said he knew of no other 'decent work' where he could earn so much money in a short period of time. He also chose to sell drugs because he believed no one would employ him because he is a deportee.

12. The probation officer reported Sione to be remorseful and that he is prepared to take responsibility for his actions.
13. However, the probation officer opined that as Sione is a repeat drug offender, with a 'defensive attitude', he poses a 'high risk' to the community. Partial suspension was recommended due to his medical conditions.

Starting point on count 1

14. The maximum statutory penalty for the head count, count 1 – possession of 1 gram or more of methamphetamine – is a fine not exceeding \$1,000,000 or imprisonment for life or both.
15. Even though the Defendant has only been charged with possession, the amount of methamphetamines found together with the other drug-related paraphernalia and his candid admissions to the probation officer make plain that the possession was for the purpose of supply. Further, and in any event, as the amount of methamphetamine was in excess of 0.25 of a gram, ss 4(2)(b) of the Act now deems the Defendant to have been supplying it. Sentences for supplying will generally be more severe than mere possession for personal use: e.g. *Wolfgramm* [2020] TOSC 78; *Fekau* [2021] TOSC 108; *Pangi* [2021] TOSC 118.
16. The Courts' denunciation of, and approach to deterrence sentencing for methamphetamine offences has been repeated numerous times and has been recently confirmed by the Court of Appeal in *Attorney General v Fua'eiki* [2021] TOCA 20 at [14]. Suffice to say that in the instant case, custodial sentences are required.
17. The guidelines in *Zhang v R* [2019] NZCA 507 place the head offence here within band 2 - between 5 and 250 grams – for which a sentence of 2 to 9 years imprisonment is indicated.
18. In determining the appropriate starting point, I also take into account the Defendant's previous convictions both here and in New Zealand for the purposes explained in *Veen v The Queen (No 2)* (1987-88) 164 CLR 465 at 477, namely:¹

"... the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot

¹ Referred to by Cato J in *Rex v 'Unga* [2015] TOSC 51 at [16] and recently applied in *R v Tapueluelu* [2021] TOSC 140.

be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences;..... The antecedent criminal history is relevant, however, 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. ..."

19. Here, the fact that the Defendant served a lengthy prison sentence in New Zealand for drugs, following which he was deported to Tonga, and where he committed further drug-related offences in 2020 for which he received a fully suspended sentence, and then this year, continued on committing even more serious offences, clearly shows his moral culpability, continuing disobedience to the law and his dangerous propensity. In those circumstances, a more severe penalty is warranted than might have been the case for a defendant without such a poor record.
20. Having regard to the seriousness of the offending, the amount of methamphetamines seized, the comparable sentences, principles and other factors referred to above, I set a starting point for count 1 – possession of 6.91 grams of methamphetamines – of 4 years imprisonment.

Mitigation

21. For the Defendant's co-operation with police and early guilty plea, I reduce that starting point by 12 months, resulting in a sentence for count 1 of 3 years imprisonment.

Other counts

22. The maximum statutory penalties for the other offences are:
 - (a) count 2 – possession of less than 28 grams of cannabis - a fine not exceeding \$5,000 or imprisonment for a term not exceeding 1 year or both; and
 - (b) count 3 - possession of utensils - a fine not exceeding \$10,000 or imprisonment for a term not exceeding 3 years or both.
23. By commensurate application of the reasons given in respect of the methamphetamine count, I sentence the Defendant on:
 - (a) count 2 – possession of 0.88 grams of cannabis – to 1 month imprisonment; and

- (b) count 3 - possession of utensils (used for deemed supply) – to 12 months imprisonment.

24. Those sentences are to be served concurrently with the sentence on count 1.

Suspension

25. With the exception of his co-operation with the authorities, none of the other criteria for suspension as discussed in *Mo'unga v R* [1998] Tonga LR 154 apply to the Defendant. His flagrant violation of the opportunity offered by his fully suspended sentence in CR 215/20, motivated no doubt by his addiction to drugs and/or the ill-gotten financial gains they generate, demonstrates that the Defendant is presently incapable of responding to a deterrent. I do not accept that the Defendant's medical conditions justify even partial suspension of his sentence. His condition is currently being managed by medication. Receipt of that medication will be ordered to continue for as long as it is prescribed during his incarceration.

26. For those reasons, I decline to order suspension of any part of the sentence.

Result

27. Sione Moli is convicted of possession of:

- (a) 6.91 grams of methamphetamines and sentenced to 3 years imprisonment;
- (b) 0.88 grams of cannabis and sentenced to 1 month imprisonment; and
- (c) utensils and sentenced to 12 months imprisonment.

28. All sentences are to be served concurrently.

29. Pursuant to s 24(3)(c) of the *Criminal Offences Act*, the suspension of the head sentence imposed in proceeding CR 215 of 2020 on 27 November 2020, of 9 months' imprisonment, is rescinded and that term is to be added to the head sentence in the present case, resulting in a total effective sentence of 3 years and 9 months imprisonment.

30. The Defendant is to be given credit for any time served on remand in relation to this proceeding.

31. Further, I direct that during his imprisonment the Defendant is to be provided with:

- (a) such drug rehabilitation counselling as may be available; and
- (b) all medication and treatment as prescribed by Dr Sung Sik Kim of the Vaiola Hospital or such other physician as may attend on the Defendant from time to time.

32. Pursuant to:

- (a) s 32(2)(b) of the *Illicit Drugs Control Act*, the drugs the subject of this

proceeding are to be destroyed; and

- (b) s 33 of the said Act, all other drug-related paraphernalia and cash seized during the search of the Defendant's premises in this proceeding are forfeited to the Crown.

Maika Namoa

Crown's submissions

33. The Crown submitted, as an aggravating factor of his offending, that Maika deliberately threw the test tube to avoid getting caught and being charged with possession.
34. Mitigating factors are his early guilty plea and lack of previous convictions.
35. The Crown referred to the decision in *Maka Latu* [2021] TOSC 81, where the Defendant, who had a substantial criminal history, pleaded guilty to multiple drug-related offences across four separate proceedings, including, relevantly, destruction of evidence. On that count, a starting point of 2 years' imprisonment was set, which was reduced by 6 months for mitigation, resulting in a sentence of 18 months' imprisonment.
36. Here, the Crown submits that:
- (a) an appropriate starting point is 2 years' imprisonment;
 - (b) reduced by 12 months for mitigation; and
 - (c) the resulting sentence of 12 months imprisonment fully suspended.

Presentence report

37. Maika is 29 years of age. He is the fourth of 11 children. He was educated to form 4. He comes from a good family. He is married with three young children.
38. In relation to the offending, Maika told the probation officer that he was visiting Sione at his house when the police arrived. He said he was holding Sione's smoking test-tube, and that he panicked and threw the test-tube away. I note he did not explain why he had the test-tube in the first place.
39. The probation officer reports that Maika is genuinely remorseful. As he has no previous convictions, and has a young family for whom to provide, a non-custodial sentence is recommended.

Starting point

40. The maximum statutory penalty for destruction of evidence is 15 years' imprisonment.
41. Having regard to the seriousness of the offending as reflected in that statutory maximum penalty and the comparable sentence referred to above, I set a starting

point of 2 years imprisonment.

Mitigation

42. On account of the Defendant's early guilty plea and lack of previous convictions, I reduce that starting point by one third or 8 months, resulting in a sentence of 16 months imprisonment.

Suspension

43. As is so often stated by the Courts, the fact that Defendant provides for his family (the 'breadwinner plea') is not, and is rarely likely ever to be, on its own, a proper reason for suspending a sentence: e.g. *R v Pousima* [2021] TOSC 131 at [35].
44. However, of the considerations for suspension discussed in *Mo'unga*, *ibid*, the Defendant is still relatively young and has a previous good record. I consider his decision to be involved with, and to have likely been influenced by, Sione Moli, a self-confessed drug dealer, to have been a grave error of judgment, and as such, represents some diminution in culpability. His stated remorse and commitment to his young family provide some basis to expect that he is likely to take the opportunity offered by a suspended sentence to rehabilitate himself.

Result

45. Maika Namoa is convicted of destruction of evidence and is sentenced to 16 months imprisonment.
46. The said sentence is to be fully suspended for a period of 2 years on the following conditions, namely, 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 a drug rehabilitation course as directed by his probation officer; and
 - (e) perform 40 hours community service as directed by his probation officer.

NUKU'ALOFA
28 October 2021



M. H. Whitten QC
LORD CHIEF JUSTICE