

**IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE**

**CRI-2016-029-000652
[2018] NZHC 3362**

THE QUEEN

v

**ULAKAI FAKAOSILEA
JEREMIAH IUSITINI**

Hearing: 17 December 2018

Appearances: Richard Annandale and Trelise Needham for the Crown
Maria Pecotic for Ulakai Fakaosilea
David Niven for Jeremiah Iusitini

Judgment: 17 December 2018

SENTENCING NOTES OF MOORE J

Introduction

[1] Ulakai Fakaosilea and Jeremiah Iusitini, you appear for sentencing on charges of importing methamphetamine,¹ and participation in an organised criminal group.² You both pleaded guilty to those charges on 12 July 2018 in this Court.

[2] As you will know, the maximum penalty for importing a Class A drug such as methamphetamine is life imprisonment. Whether I should impose that sentence is a central question I must answer today.

[3] In sentencing you both, and as part of answering that question, I shall follow these three steps:

- (a) first, I shall set a “preliminary starting point” based on the seriousness of your offending;
- (b) next, I shall adjust this starting point to reflect your particular role in the offending, and your personal circumstances, before considering what discount is available for your pleas of guilty; and
- (c) finally, I shall step back and consider whether the end sentence I have reached appropriately reflects the totality of your offending, and whether it is necessary to impose a minimum period of imprisonment (“MPI”).

[4] In sentencing you, I am guided by the purposes and principles of sentencing. I have regard to the gravity of the offending and your culpability, the seriousness of these offences when compared to others, the need to ensure the sentences are consistent with other sentences for this sort of offending, the particular circumstances, your backgrounds and the requirement to impose the least restrictive outcome appropriate in the circumstances.

¹ Misuse of Drugs Act 1975, s 6(1)(a) and (2).

² Crimes Act 1961, s 98A.

[5] Unsurprisingly the need to deter others from committing the same or similar offences is said to be an important purpose in sentencing for drug-related offences. Indeed, as the Court of Appeal has observed, it is a “fundamental requirement” and a “primary sentencing objective”.³

[6] Plainly, your offending requires a stern sentencing response. Methamphetamine is an appalling drug. Its addictive powers are well-known and the ravages and consequences of the harm it wrecks causes ripples into every corner of our society. The Courts have a duty to do all they can to dissuade the peddlers of this poison. And when they can, it is the Courts’ task to signal its abhorrence of this pernicious and ugly trade by imposing hefty deterrent sentences. That said, there have been some recent comments based on academic research suggesting there is a certain futility in imposing ever-increasing sentencing levels as a deterrent.⁴ That may be so, but it seems to me, at least for those who are tempted to engage in this business, they should have no room for doubting what will happen to them when they are caught.

[7] I must also have particular regard to the need to hold you accountable for the harm your offending has caused to the community, the need to promote in you a sense of responsibility for, and acknowledgement of, that harm, the need to denounce the conduct in which you were involved, and the need to protect the community from your offending in future.

[8] Finally, I must also sentence you with an eye on the principle of parity. What that means is making sure your sentence is consistent with those imposed on your co-offenders, but adjusted to take into account your respective roles and degrees of involvement in the operation. On that topic I note four of your co-offenders have already been sentenced. They are M,⁵ Amoki Fonua,⁶ Ka Yip Wan,⁷ and Malachi

³ *R v Terewi* [1999] 3 NZLR 62 (CA) at [13].

⁴ *R v Wellington* [2018] NZHC 2196 at [8].

⁵ *R v M* [2016] NZHC 2881.

⁶ *R v Fonua* [2017] NZHC 718 [Fonua Sentencing Indication] and *R v Fonua* [2017] NZHC 1193 [Fonua Sentencing Remarks].

⁷ *R v Wan* [2017] NZHC 1255.

Tuilotolava.⁸ A key consideration I must take into account is the sentences they received, and your relative culpability compared to them. [...]⁹

Facts

[9] Before returning to those matters, I need to set out the facts which have brought you before the court today. You will both be familiar with them, but as sentencing is a quintessentially public function which must be undertaken in open Court, I repeat those facts now for the benefit of the public.

[10] As I have noted, you both pleaded guilty to an agreed summary of facts on 12 July 2018. You were originally due to be sentenced on 29 August 2018, but that was adjourned after it became apparent the Crown was basing its sentencing submissions on a different summary from the one you had both pleaded guilty to. Changes were made by way of addenda. It is those facts I now turn to discuss.

[11] Your involvement is in the largest known importation of methamphetamine into New Zealand; 501 kilograms to be precise. It was found in Northland on 12 and 13 June 2016. This dwarfs the 96 kilograms which until your efforts held this dubious and unenviable record.

[12] On any analysis this was a very significant and sophisticated commercial operation with huge amounts of money at stake. It is estimated 501 kilograms of methamphetamine has a price range, if sold in kilograms, of between \$130 million and \$150 million. Obviously it would have attracted a significantly greater value when sold further down the retail chain in smaller amounts. If this quantity of methamphetamine had been distributed it would have flooded the market. The human cost and the misery and havoc such massive quantities would have wrought in communities throughout our land does not bear thinking of. How many lives might you have ruined? How many families would you have destroyed? You both know what this drug does to those who are caught in its grip and how it destroys not only those gripped by addiction but also their families and loved ones. When you agreed

⁸ *R v Tuilotolava* [2017] NZHC 2621.

⁹ This material is suppressed.

to get involved in this business you knew all of those things. But your greed and self-interest led you to forge on regardless.

[13] I return to the summary. On those facts, there is no clear indication that either of you was involved from the early stages of this operation. Rather, in the weeks leading up to the day the drugs were imported, various combinations of your co-offenders were involved in different phases and those phases involved:

- (a) booking a campervan, which would later be used to transfer the bulk of the drugs. Other items were obtained such as gloves to handle the toxic drug and sports bags for storing it;
- (b) purchasing a Bayliner for \$40,000 in cash, and transporting it to Kaitaia, where work was undertaken on it;
- (c) on 9 June 2016 unsuccessfully attempting to launch that boat at Ahipara beach, presumably to collect the drugs in an off-shore rendezvous;
- (d) arranging the boat's repair after it was damaged during the hapless launching attempt;
- (e) quickly arranging the purchase of a replacement boat in East Tamaki, carrying \$98,000 in cash to make the purchase, and then transporting the boat back to Ahipara beach; and finally
- (f) launching the new boat that same day and collecting the drugs off-shore to deliver them to dry land.

[14] I note that neither of you was involved in transporting the methamphetamine itself. One of your co-offenders took the bulk of the drugs in the campervan (approximately 440 kilograms). He was apprehended at 8:00 pm that same day.

[15] So, what then can we say about your individual involvement in the operation? First, I begin with you, Mr Fakaosilea.

Mr Fakaosilea

[16] You entered New Zealand on 2 June 2016, after being deported from Australia. Three days later, on 5 June 2016, you collected your co-defendants Mr Wan and Mr Tsai from an address in South Auckland, and drove them to Kaitaia. On 7 June 2016, your uncle hired a silver Toyota Rav 4 for you and another, which you used to transport two satellite cellphones to other co-defendants who were already in Kaitaia.

[17] Once in Kaitaia, on the evening of 8 June 2016, you met with four of your co-defendants at a motel, presumably to hand over these phones.

[18] You only entered the picture again on 12 June 2016. You were part of the team which helped to unload the boat after it beached sometime between 1:00 am and 2:00 am. The following day, the Police discovered about 50 kilograms of methamphetamine concealed in sand dunes near where the boat had beached. You were involved in hiding the drugs in the dunes. For completeness, I note two of your co-defendants used the Toyota Rav 4 to return to Auckland.

[19] Your lawyer, Ms Pecotic, describes your role as that of a mere mule. I cannot accept that characterisation. You were there at the most critical point in the operation. This indicates you were a trusted member of the group. You were allowed to receive the drugs on shore, transfer most into the campervan, and hide the rest. Those are not the actions of a mule.

[20] You and a co-offender were arrested that day. On searching the vehicle you were driving, the Police uncovered various incriminating items. These included multiple cell-phones (including a bag of new disposable cell phones), a handheld GPS, shovels covered in sand, receipts for the purchase of both boats, weather reports, and maps of the coastline.

Mr Iusitini

[21] I turn now to discuss your role Mr Iusitini.

[22] On 29 February 2016 you and two associates flew from Auckland to Bangkok, Thailand. You returned on 6 May 2016. The summary does not record the reason for your travel. But given the timing of the trip and who you travelled with, there is a strong inference your purpose was related to the pending drug operation. Downs J drew the same inference when he sentenced your co-offender, Mr Tuilotolava, who travelled to Bangkok with you.¹⁰

[23] Aside from your trip to Thailand, it is accepted you were not physically present in Northland during the operation on 12 and 13 June 2016, nor during the weeks of preparation leading up to it. However, the addendum to the summary records that you communicated with those in Northland prior to, during, and following the actual import via encrypted messaging over Blackberry cellphones. In those communications you used the code name “Thugga”. These communications related to the organisation of the importation. You sent members of the group specific taskings to carry out. Examples include:

(a) In mid-May 2016, you instructed M to purchase a number of metal tool boxes with a 50 kilogram or 50 litre capacity. M purchased nine of these tool boxes. He was also instructed by you to hire the camper van.

(b) At 2:28 am on 12 June 2016 (shortly after the drugs had been off-loaded from the boat), M, texted you:

“We algood uso! Everything is sweeeet!”

(c) Later that morning, at 7:55 am, an unknown person texted you:

“yeah uce, I sent you an update on the other b.b [Blackberry], the boys have gone to grab the trailer and sort out someone that will pull it out of the water, I’m still on watch of the stuff, theres been no activity at all since last night”

(d) Between 6:16 and 6:33 pm that evening, you and M had the following exchange:

M: Sup uce, I tried replying to your text message on the other b.b but it keeps saying the PGP Universal Server

¹⁰ *R v Tuilotolava*, above n 8, at [21].

is out of date and could not be updated. But yeah I still haven't heard from the boys, they went to pick up the boat and haven't been back nor have they been relying to my texts, you know if mack has heard from them yet?

You: Fuck me okay uce all good, how long have they been gone? And they didn't have anything else on them yeh like the car was clear and the boat was clear?

M: They've been gone since 3pm and yeah it was all clear uce.

You: sweet thanks uce listen up, how much gear is in the camper? So they have been gone ruffly 3 hours?"

[24] These texts reveal how others in the group were reporting back to you as to how things were going. That can only be because they regarded you as an important and influential cog in this enterprise. You were involved in the plans for at least the month leading up to the events of 11 and 12 June 2016. You clearly had detailed knowledge of the plan, and I accept you acted, at least at times, as a coordinator. I consider it significant you communicated from the safety and security of distance. It is a feature of higher ranked operatives that they will often co-ordinate and direct remotely.

[25] The Crown submits you played a leadership role throughout the operation. You were its 'senior figure'; providing orders to the others prior to, during, and following the actual importation. Aside from your trip to Thailand, I assume the Crown also relies on the cellphone evidence to make that submission. However, there is something to Mr Niven's submission that the messages do not follow a strict or clear hierarchical pattern. While I am not satisfied these messages prove you were the overall leader or director, or even more senior than all your other co-offenders as the Crown submits, I am satisfied you were an important and influential member of this operation. That finding is material in setting the sentence you will receive today.

[26] There is one final adverse fact for you, Mr Iusitini. You attempted to escape New Zealand by flying to Thailand on 14 June 2016. You failed. The authorities denied your entry into Bangkok. You were detained, returned to New Zealand on 17 June 2016, and arrested on those charges by the Police on arrival.

Setting a starting point

[27] You both face a maximum penalty of life imprisonment for the lead charge of importing methamphetamine. In setting a starting point, substantial assistance is derived from the Court of Appeal's guideline judgment in *R v Fatu*.¹¹ I note the President of that Court has very recently advised that in April next year a full Bench will reconsider aspects of *Fatu* in consolidated, joint appeals. But for the moment the principles set out in *Fatu* remain the law and are binding on me. I am in particular guided by the need for parity with your comparable co-offenders. I have also had some regard to *Chen v R*,¹² which, as Mr Niven submitted both in writing and orally, also involved significant quantities of methamphetamine.

[28] Within the *Fatu* framework, the quantity of methamphetamine is "of prime importance" in fixing starting points.¹³ But it is not the only consideration.¹⁴ As was recently stated after reviewing the relevant authorities it was observed:¹⁵

"The culpability of an offender is influenced not only by the quantity of methamphetamine they supply but also by their role in a drug dealing operation and other aggravating or mitigating factors including whether they are addicted to drugs themselves."

[29] That judicial observation must be correct. The Courts are required to distinguish between the individual roles of offenders. Where, as in this case, multiple parties carry out different functions in successfully importing a large quantity of drugs, the sentences imposed must reflect the respective culpability of the players. The "brains" and directors carry a greater level of culpability than the "hands". And the assessment of the culpability of the "hands" will depend on their particular role and involvement.

[30] In any case, this is not the sort of borderline case warranting a more fluid approach to the *Fatu* bands. Your offending palpably falls within the uppermost end

¹¹ *R v Fatu* [2006] 2 NZLR 72 (CA).

¹² *Chen v R* [2009] NZCA 445, [2010] 2 NZLR 158

¹³ *R v Arthur* [2005] 3 NZLR 739 (CA) at [19] cited in *R v Wellington*, above n 4, at [18].

¹⁴ *R v Fatu*, above n 11, at [9] and [33].

¹⁵ *R v Wellington*, above n 4, at [21].

of Band Four, which is described as “importing very large commercial quantities (500 grams or more)” and carries a sentencing a range of “12 years to life imprisonment”.¹⁶

[31] Mr Niven submits this band is so broad that it provides little real or practical assistance in the present case. I cannot agree. As I have already mentioned, this operation involved the single largest importation of methamphetamine in New Zealand’s history. That is an unenviable statistic. By law I am required to “impose the maximum penalty prescribed for the offence if the offending is within the most serious cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate.”¹⁷

[32] That principle brings you into the territory of the statutory maximum, that is life imprisonment. I thus adopt life imprisonment as a “preliminary starting point” in both your cases. The same approach was adopted in respect of almost all of your co-offenders.¹⁸

[33] Next I must consider whether life imprisonment should be reduced to a finite sentence in light of your particular role in the offending, parity with your co-offenders, and your wider personal circumstances.

Is life imprisonment appropriate?

Mr Fakaosilea

[34] I start with you, Mr Fakaosilea.

(a) Parity

[35] The Crown says your culpability is on par with your co-offender, Mr Fonua. When sentencing Mr Fonua, Lang J was of the view his particular role made a starting point of 30 years’ imprisonment appropriate. Both you and Mr Fonua helped unload the drugs from the boat on the morning of 12 June 2016. Together you drove away and were both arrested in the same vehicle along with various incriminating items.

¹⁶ *R v Fatu*, above n 11, at [36].

¹⁷ Sentencing Act 2002, s 8(c).

¹⁸ *Fonua Sentencing Remarks*, above n 6, at [3]; *R v Wan*, above n 7, at [14]; [...].

[36] Lang J described Mr Fonua as “a trusted lieutenant who was required to carry out physical tasks at the behest of those superior to him”, but went on to observe:¹⁹

“He was not involved in financing the operation, or in the overall planning of it. There is no suggestion that he was responsible for, or involved in, the sourcing of the product. It is highly unlikely that he would have shared in the profits that the enterprise would have generated.”

[37] I would make similar remarks about you, Mr Fakaosilea. It would be both disingenuous and frankly wrong to describe your role as of little significance. You were present during one of the most critical, sensitive stages of the whole operation.

[38] However, I accept Mr Fonua was involved in more stages of the operation than you. He collected the Bayliner, bought the second boat and helped launch it on 12 June 2016. He purchased the sports bags in which the methamphetamine was transported. I thus assess your culpability as slightly less than his.

(b) Personal circumstances

[39] I have read references from your sister-in-law, Ms Carroll; your former Minister, Reverend Lavaki; and a close friend, Mr Lee. All speak to your good character. They say you are a family man. They say you have a generous spirit. They speak of the tough times you went through during your parents’ divorce, and your break up with your partner. It seems that you fell in with the wrong crowd. But you retain strong family and community support. Reverend Lavaki has generously offered to counsel and mentor you.

[40] You have 13 convictions out of Australia. You received a term of imprisonment there in 2014. But your present offending is simply in a different league. Having said that you show positive rehabilitative prospects. In these circumstances life imprisonment is not appropriate.

[41] Taking the foregoing into account, I adopt a slightly reduced starting point of 29 years.

¹⁹ *Fonua Sentencing Indication*, above n 6, at [24]-[25].

[42] On your counsel's urging, I will also allow a further discount of six months on account of your personal factors, especially your good prospects for rehabilitation.²⁰

(c) *Guilty plea*

[43] Next I must account for your guilty plea, which you entered on 12 July 2018. In no way can that be classed as at the earliest opportunity. But neither was it in the cases of *Wan* or *Tuilotolava*, and despite that the full 25 percent discount was still granted. Even so you pleaded guilty some nine months after Mr Tuilotolava. [...]

[44] Given this, and the strength of the prosecution case, a full guilty plea discount is simply not available to you. Despite this there are some reasons supporting a generous discount. You have still spared the prosecution and judicial system the burden of a long, complicated and expensive trial. I also note you pleaded guilty after instructing new counsel. On that basis I conclude a 20 per cent discount is warranted. Factoring that into the analysis I arrive at a final sentence of 22 years and nine months' imprisonment.

(d) *Minimum period of imprisonment*

[45] I consider an MPI is appropriate in your case. It is imposed to reflect the inadequacy of ordinary parole provisions to hold you accountable, denounce your conduct, and deter other offenders.²¹ Courts routinely impose MPIs in the region of 50 per cent in drug cases, but that is not possible here, given the maximum MPI that can be imposed is ten years. As Ms Pecotic urged something slightly less than ten years is warranted in your circumstances. Following Lang J in *Fonua*, I impose an MPI of eight years and nine months.

(e) *Final sentence*

[46] I now impose your final sentence.

[47] Mr Fakaosilea, please stand.

²⁰ Lang J granted Mr Fonua a similar discount: see *Fonua Sentencing Remarks*, above n 6, at [12].

²¹ Sentencing Act 2002, s 86(1).

- (a) On the charge of importing methamphetamine, you are sentenced to 22 years and nine months' imprisonment.
- (b) You must serve a minimum period of imprisonment of eight years and nine months.

[48] On the charge of participating in an organised criminal group, you are sentenced to five years' imprisonment to be served concurrently, in other words at the same time as your other period of imprisonment.

[49] Very shortly before I came into Court I had the opportunity to read a letter written by you explaining your circumstances and your background. The tragedy in all of this is that you are obviously a man with considerable potential. If you had applied your energies in a positive way instead of allowing yourself to be drawn into the maelstrom of this dreadful business you would have succeeded in life. You are plainly hard working and you have a strong family commitment but you allowed greed take over.

[50] You now have a long road ahead of you. The sentence I have imposed is a long one but it need not be crushing. I hope you will use your time in prison usefully and reflect on what you have done, undertake courses for self-improvement because, it seems, you have the insight and positive potential to change.

[51] Stand down, Mr Fakaosilea.

Mr Iusitini

[52] I turn now to discuss your, Mr Iusitini.

(a) Parity

[53] The Crown puts your culpability as sitting at a more serious level than any of your other co-offenders. Mr Niven counters this by saying a fairer comparison would be with Mr Wan or Mr Tuilotolava. Lang J found that the entry of a plea of guilty, coupled with Mr Wan's lack of prior convictions, was sufficient to render a sentence

of life imprisonment inappropriate. Instead he indicated a starting point of 32 years. Sentencing Mr Tuilotolava, Downs J remarked that but for the principle of parity, he would have sentenced Mr Tuilotolava to a term of life imprisonment. But because he considered Mr Tuilotolava's culpability was on par with Mr Wan's, he adopted a 32-year starting point.

[54] Mr Wan was involved in purchasing the second boat and helping launch it. He also acted as an interpreter on both occasions. But critically, he also met with those more senior in the hierarchy in Hong Kong,²² and was "sufficiently trusted to be part of the crew that left the shore and went to sea to pick up the drugs".²³ This meant he was one of only two people who saw where the drugs were obtained, and perhaps dealt with those delivering the drugs. And then he fled the scene as soon as the boat landed, thereby insulating himself from the risks of being caught red-handed in possession of methamphetamine.

[55] Mr Tuilotolava also travelled to Bangkok with you in preparation for the offending. Moreover, he was involved in almost all the key stages of the operation. He collected the Bayliner, unsuccessfully attempted to launch it, and subsequently oversaw its repairs. He purchased the second boat, helped launch it and unloaded the drugs when it returned to shore. Mr Tuilotolava admitted he would have received some financial compensation from his involvement the operation. He pleaded guilty on the basis he was the leader of the group deployed in Northland.

[56] On the facts before me, I cannot accept the Crown's submission your culpability is higher than either of those two. It seems to me that Mr Niven's submission is accurate. Each of you, Mr Wan, and Mr Tuilotolava, played important leadership roles at various points in the operation. A marked feature of this operation was the division of labour and organisation at various discrete stages. As I have said, I am prepared to draw the inference from your trip to Bangkok, and your co-ordination efforts from afar, that you held some level of seniority in the group and that your culpability is on par with these two co-offenders.

²² *R v Wan*, above n 7, at [20].

²³ At [23].

[57] Mr Iusitini, your offending is more serious than Mr Fakaosilea's. You come closer to a sentence of life imprisonment. But given my finding that your culpability is most closely mirrored by your co-offenders, Mr Wan and Mr Tuilotolava, I impose a 32-year starting point. That is the same starting point they each attracted. In arriving at this number, I also take into account your guilty plea, your fairly limited criminal history, and the fact you remain connected to your family. That is a positive sign.

(b) Guilty plea

[58] For the same reasons I have just stated, I consider a discount of no more than 20 per cent is warranted for your guilty plea. In your case, I note there were issues around disclosure of evidence and instructing new counsel that may explain your delay. These may be slightly more significant factors than those in Mr Fakaosilea's case. But I nevertheless consider 20 per cent as a generous discount. These charges have been on foot since 2016. A discount greater than 20 per cent cannot be justified. Adding this discount to the mix produces an end sentence of 25 years and seven months' imprisonment.

(c) Minimum period of imprisonment

[59] Unlike in Mr Fakaosilea's case, I find the maximum available MPI is justified in your case, as it was for Mr Tuilotolava. I impose a minimum term of 10 years.

(d) Final sentence

[60] Mr Iusitini, please stand.

- (a) On the charge of importing methamphetamine, you are sentenced to 25 years and seven months' imprisonment.
- (b) You must serve a minimum period of imprisonment of 10 years.
- (c) On the charge of participating in an organised criminal group, you are also sentenced to five years' imprisonment, to be served concurrently.

[61] Mr Iusitini, based on the pre-sentence report and the submissions Mr Niven delivered to me this morning, you, too, seemed to have some insight into the seriousness of what you did. As Mr Niven pointed out the pre-sentence report reveals some remorse and is generally positive. You are an Australian-born Samoan with relatively few, if any, New Zealand connections. You have indicated your desire to return to Australia when your sentence is complete. Without those immediate family connections it is likely that your time in prison will be harder than most although I note the commendable efforts your parents have made to keep in touch with you regularly since your arrest and the likelihood that they may even move here permanently from Queensland to support you. You are and should yourself as extremely lucky to have that level of support.

[62] You will probably be in your 40s by the time you are released. As with Mr Fakaosilea, I hope you will use your time in jail profitably, rather than return to a life of crime.

[63] Stand down, Mr Iusitini.

Moore J

Solicitors:
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