

**IN THE DISTRICT COURT  
AT ROTORUA**

**CRI-2016-063-000385  
[2017] NZDC 5447**

**THE QUEEN**

v

**LEONARD FRANK FONUA**

Hearing: 22 February 2017

Appearances: A Hill for the Crown  
Defendant appears in Person supported by R Laybourn as  
Amicus Curiae

Judgment: 22 February 2017

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**NOTES OF JUDGE A J S SNELL ON SENTENCING**

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[1] Leonard Frank Fonua, you are for sentence today on one charge of possession of methamphetamine for supply. This carries with it a maximum penalty of life imprisonment. You were found guilty of this charge at the conclusion of a trial that was heard between 22 and 24 November here in this Court in Rotorua.

[2] The factual circumstances were that on 5 February 2016, you were driving in Taupo. The police attempted to stop you, but you attempted to evade them. You were located in a cul-de-sac carrying a backpack. Police took steps to search your vehicle, pursuant to the Search and Surveillance Act 2012. You refused to hand over your keys, but did so when warned of obstruction. As the police opened the boot of that vehicle, you fled on foot. You were subsequently apprehended.

[3] The police found a significant quantity of methamphetamine. This was split between snap lock bags and containers in the vehicle, as well as the sum of \$5690 in

cash in a green backpack. Police found a further black bag, which had been placed under the vehicle, containing a set of electronic scales, a pipe, a tick book and a cellphone. The cellphone was yours and had pictures of you and your partner on it.

[4] The ESR analysis which has been undertaken confirmed that the final weight of the powder that was found was 48.6 grams of methamphetamine. You indicated at the conclusion of the trial that there was an issue as to purity and that had been one of the defences that you raised at trial was as to purity. The Crown have had the powder analysed and it is 76 percent pure, which is over the 60 percent threshold established in *R v Fatu*<sup>1</sup> at paragraph [30].

[5] You come before this Court with a very modest list of previous convictions and the only relevant drug related conviction is a conviction in 2014 for cultivating cannabis.

[6] There were two pre-sentence reports provided to the Court. The first, dated 13 January 2017, was inadequate and I directed that your sentencing was not to proceed, that it required you to be interviewed and a second report was prepared, dated 8 February 2017. That report indicates that while you were co-operative, you declined to discuss with them the police summary of facts because you did not want to potentially incriminate yourself. You did maintain that you did not use drugs yourself and that you were not into the gang scene or gang affiliated. Because of the limited nature of the discussion that was available with you, they do not recommend any counselling or anything of that nature and you do not meet the criteria to attend any departmental programmes. They comment that the final recommendation that they give is one of imprisonment in all of the circumstances.

[7] I have written submissions from the Crown and I have written submissions supplied by your wife, which I have confirmed are on your behalf today. Those submissions reached me yesterday and as I confirmed to you, I have read those in full. Today in Court I have given you an opportunity to speak and you have taken that opportunity. You have asked that a person speak on your behalf, a Mr Warne, and he did speak on your behalf, but persisted in raising matters that you wished to

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<sup>1</sup> *R v Fatu* [2006] 2 NZLR 72

raise in appeal, which is totally inappropriate, and on that basis I had to get him to stop eventually.

[8] I note by way of background that as you have indicated in a significant amount of written material that you have supplied today and that I have read prior to commencing the sentencing exercise, that you were originally represented by a lawyer. Through circumstances outside of your control, that lawyer could not carry on. You lost faith in the next lawyer that you hired and you then, for your own reasons, elected to represent yourself at your jury trial. I am acutely aware that leading up to that jury trial you were given a number of opportunities to have other lawyers on legal aid and the like, but you declined to have them. I am aware that during the course of your jury trial you were very clear that you wanted to represent yourself because, as you put it, nobody could deal with it as well as you could, given what was at stake.

[9] An Amicus was in attendance at Court to assist the Court and the primary reason that that Amicus was present, Mr Laybourn, was so that during the course of your trial, both before the trial, at the adjournments and after each day of trial, he could give you direction and assist you with any legal points as to how you would conduct your defence.

[10] I am aware that you took some advice from him from time to time as to the processes. He was not acting as your lawyer, he did not conduct your defence and he simply provided you advice as to process and that advice was provided on an ongoing basis throughout the trial to you. He was there engaged by the Court in acting to assist the Court by providing that advice as to administrative matters to you so that you were able to understand the process that you were going through as an unrepresented litigant.

[11] The Crown submissions have been filed and essentially the Crown is seeking a starting point of five years imprisonment based on the quantum of methamphetamine, coupled with the decision of *R v Fatu*, which is a tariff decision for this type of offence which this Court, the District Court, is required to follow the principles of.

[12] Your submissions, on the other hand, have requested that the Court take a different approach, which is to ignore *R v Fatu*, to look at personal circumstances that exist for you, in particular, relating to your attitude, your positive home life and support of your wife and family, your personal circumstances in relation to being a father of your child and the fact that you have accepted now responsibility and are remorseful for your offending, as well as the fact that you have done well in prison. What you ask me to do is to contrast that against the negative factors, which you see as the offending itself that you have been found guilty of, and you ask the Court to take into account that you do not have any previous convictions relating to methamphetamine. You submit that an end point of around six months imprisonment from today would be appropriate, taking into account the time that you have spent in custody since your conviction.

[13] When I sentence you, I need to hold you accountable for the offending that the jury found you guilty of. I need to promote in you a sense of responsibility for that offending and whenever it comes to offences for drug dealing, a significant aspect of sentence needs to relate to denunciation and deterrence. There is both deterrence for you personally and deterrence in a more general sense for others who may consider drug dealing offences, particularly with Class A drugs.

[14] I remind myself that I need to sentence you consistently with appropriate sentencing levels for similar offending and towards that end, I have been referred to a number of cases by yourself and indeed the Crown and I have read each of those cases and the circumstances relating to them. I also must impose the least restrictive outcome that is appropriate in all of the circumstances in accordance with the hierarchy of sentences available to me for this matter.

[15] The starting point for this sentencing exercise is the establishment of what is called a starting point relating to the offending itself. In this particular case, there is a tariff case that is called *R v Fatu* and I am bound to follow the direction in *R v Fatu*. That case provides bands for the offence of possession for supply or for selling methamphetamine. Band 2 covers where there is five to 250 grams involved and it sets out a starting point between three and nine years imprisonment. In my view, relating to your specific offending, there were commercial indices, including

the multiple plastic deal bags, the two tick books, the electronic scales, the cash and such like.

[16] When I look at these matters, there is no doubt that your offending falls squarely within band 2 of *Fatu*. I have been referred to numerous cases in relation to dealing and where in band 2 this would fall. In *R v De Serville*,<sup>2</sup> which is a High Court decision, Lang J considered a review of sentences in relation to amounts of methamphetamine and he said that he had discovered that offending in that realm involving around 30 grams of methamphetamine would involve a starting point of between four and four and a half years imprisonment.

[17] In relation to *R v Jones*,<sup>3</sup> which was a High Court decision of Brewer J, in dealing with Mr Jones, had a starting point of four years imprisonment for 28 grams of methamphetamine.

[18] I have read a number of other cases and it is my view that here where we are dealing with a sum of methamphetamine which weighed 48.6 grams and was of 76 percent purity, that a starting point in the vicinity of somewhere between four years, 10 months and about five years, two months is appropriate. I assess the lowest of those starting points and start at four years and 10 months as the starting point for you for this offending.

[19] I turn then to assess whether there are any aggravating circumstances of a personal nature that would uplift your sentencing. While you do have a drug related conviction in 2014, I do not think that that uplifts your sentence in any way at all and so there is no uplift to that starting point.

[20] I turn then to personal mitigating factors. They are matters that reduce your starting point. There is an acceptance by you of your conviction at trial. There is, clearly, remorse for your involvement with methamphetamine. That is a limited amount of remorse because I do not think that you accept the finding of possession for supply at all and your own handwritten submissions confirm that.

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<sup>2</sup> *R v De Serville* HC Auckland CRI-2006-004-18441, 29 August 2008

<sup>3</sup> *R v Jones* [2016] NZHC 424

[21] In this case, you have submitted that a number of other factors can be taken as indicative of matters which could lead to a personal discount. They include the absence of previous methamphetamine convictions. That is not a mitigating matter. It is an absence of an aggravating feature, so what would occur if you had had those convictions is there would have, in all likelihood, been an uplift.

[22] I give you as much discount as I can for the personal matters that you have raised. That is particularly what can be described only as very limited remorse, given you do not really accept the conviction. There is your previous good behaviour and you have provided written testimonials, references and you have led what is a very wide expansive life through occupations and sporting and domestically in terms of your family. Your life has been one where it is surprising to see you before the Court for this type of offending.

[23] So far as I can I give you as much discount as I can, but given the fact that you really do not accept the conviction or that you were dealing in methamphetamine, which is what the conviction is for, I make that discount one of four months. That reduces the starting point to one of four years and six months.

[24] I then turn to whether there is any further discount. There is no further discount in terms of any credit for a guilty plea. You took the matter to trial and you were found guilty at trial. The final sentence that will be imposed on you is one of four years and six months imprisonment.

[25] There is then the issue of forfeiture. The Crown applies for forfeiture of the property relating to the drug offending, which are the drugs themselves, the pipe, the plastic bags and backpacks that they were in as well as for the cash. This application is under s 32 Misuse of Drugs Act 1975. That requires me to be satisfied that the money was obtained essentially as either proceeds of the selling of the methamphetamine or that it was in your possession for the purpose of facilitating the commission of an offence against that section.

[26] You have put before the Court an explanation for the first time today. That explanation is that the money was possessed by you as a result of an inheritance

from your father, who had died midway through 2015, some seven or so months before the alleged offending on this occasion. I have not heard any evidence as to that. I understand that the Crown do not accept that and the suggestion in the circumstances that the Crown has made, and it is a very fair one, is that the forfeiture or otherwise of the cash sum be put to one side until there is an evidential hearing in relation to that. That will give you the opportunity to establish when you obtained that money, where it was from and why you would have had it on the occasion that you did.

[27] I make an order for the forfeiture of all of the drug related paraphernalia which I have listed and the destruction of that. I put to one side any final determination under s 32 in relation to the money, but ask that that still be held by the Crown, and there is to be scheduled a formal hearing as to how you came into possession of that money. That hearing is one that will be a factual assessment under s 32. Given the nature of the sentence that you have received today, you will be notified in due course when that hearing can be allocated. That will be in plenty of time for you to get your resources together so that you can present your case in terms of that money.

[28] On the charge of possession of methamphetamine for supply, you are currently sentenced to four and a half years imprisonment.

A J S Snell  
District Court Judge