

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

**CRI-2009-092-7420**

**QUEEN**

v

**SITIVENI AHOTAU**

Hearing: 23 June 2009

Appearances: H Retzlaff for Crown  
I Sapolu for Offender

Judgment: 23 June 2009

Sentence imposed: **Possession of precursor substances**  
14 months' imprisonment  
**Wilful neglect of a child under 16**  
2 months' imprisonment (cumulative)  
Total sentence: 16 months' imprisonment

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**SENTENCING NOTES OF ASHER J**

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Solicitors:  
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Sapolu Law, PO Box 75420, Manurewa, Auckland

[1] Mr Ahotau, you appear today for sentence on two counts:

- a) possession of precursor substances, intending those substances to be used for the manufacture of methamphetamine, which carries a maximum penalty of five years' imprisonment; and
- b) wilful neglect of a child under 16, which also carries a maximum penalty of a term of imprisonment of five years.

[2] The charges arise from you being stopped by the police while driving your vehicle on 5 March 2008. An inquiry of the police intelligence database revealed that you had several warrants outstanding for your arrest. You were arrested and transported to the Otahuhu police station. Your belt-bag was searched and in it there were two pill containers and a further small container, which contained iodine balls. Iodine is used to assist in the manufacture of methamphetamine. Also in the belt-bag was a recipe for the manufacture of methamphetamine.

[3] A search warrant was executed on your home at 62B Station Road, Papatoetoe. There were three children living there at the time. Two of them are the subject of the wilful neglect count. The police search resulted in a large container of acetone acid being located. That is a precursor chemical used in the manufacture of methamphetamine. Also located was a glass bottle containing hydrochloric acid, also in this category, and a small garden spray bottle of the type frequently used in the manufacture of methamphetamine.

[4] When you were spoken to you said that the acid was for removing nail polish and the acetone was for taking paint off the driveway, and the sprayer was for the garden. You stated that you had found the recipe for manufacturing methamphetamine and the iodine bottle in a local park. You initially denied the charges, but during depositions you changed your plea to one of guilty.

## **Approach to sentencing**

[5] The maximum penalty on each count is five years' imprisonment. The offending relates to methamphetamine, which is a terrible drug which causes great damage in our community. Your offending must be denounced, but the Court must also arrive at the least restrictive sentence appropriate in the circumstances.

[6] There are two relatively recent Court of Appeal decisions which relate to possession of precursor substance. In the first, *R v Johnston* CA448/05 16 May 2006, a starting point for penalty imposed by the District Court of two-and-a-half years' to three years' imprisonment was considered appropriate. The final sentence was 18 months' imprisonment. There, considerably more precursor substances were found than when you were arrested, and also two plastic soft-drink bottles containing two-layer liquids which were believed to be a by-product of the extraction of pseudoephedrine from cold and flu tablets. The offending, therefore, was more serious than your offending.

[7] The other case is *R v Anderson* [2007] NZCA 146. There, the respondent was found with 500 pseudoephedrine tablets, hypophosphorous acid and two pipes for smoking methamphetamine. There was the potential from the material found to produce 14 to 21 grams of methamphetamine. The total value of the materials found there exceeded \$30,000. In overturning a District Court decision, which had not imposed a custodial sentence, the Court of Appeal considered that a starting point of two-and-a-half years was the lowest available starting point in the circumstances. There is, however, no tariff case in relation to possession of precursor substances or in relation to wilful neglect.

## **Submissions**

[8] I turn to the submissions that I have received. The Crown has submitted that the starting point should be 18 to 24 months' imprisonment with an additional cumulative sentence in relation to the wilful neglect charge of six to eight months' imprisonment. Mr Retzlaff, for the Crown, accepts that it is appropriate for there to

be a deduction for your guilty plea but points out that this occurred during depositions. The Crown opposes home detention or any other community sentence.

[9] Ms Sapolu submits that a 15 to 21 month starting point for the drugs charges, increased to 18 to 22 months taking into account the wilful neglect charge, would be appropriate. However, she points to your sound personal circumstances at present and to the positive report on the suitable address for home detention, and submits that home detention is the appropriate sentence.

### **The starting point in relation to possession of precursor substances**

[10] I consider your offending to be of a less serious category than the offending in *R v Johnston* and *R v Anderson*. The quantities found were less, and what was found could not be immediately converted into methamphetamine as there were no pseudoephedrine products. I have considered a number of High Court decisions including *R v Andersen* HC AK CRI-2005-084-577 21 February 2006 Allan J; *R v Saunderson* HC WN CRI-2005-085-3489 8 February 2007 Mallon J; *R v Gibbons* HC HAM CRI-2006-019-617 14 August 2007 Asher J, and *R v Meyer* HC HAM CRI-2005-068-000555 30 October 2008 Courtney J. These cases show a range of sentences from between 15 months and four years' imprisonment depending on the circumstances.

[11] The starting point reflects the culpability and blameworthiness of the offending. If the facts show an ability to produce methamphetamine from the substances found, that will place the offending into a more serious category, in contrast to situations where there are just some isolated chemicals found. The volumes and the level of commerciality indicated are also highly relevant.

[12] There is no particular indication of commerciality and there was no present ability at the time for you to actually produce methamphetamine. I consider that your offending is at the lower end of the scale, although it certainly could not be categorised as in the least serious type of offending. Your offending was more serious than in *R v Gibbons*, where the possession of the precursor substances was

for only a momentary period of time, but, as I said, it was less serious than the Court of Appeal decisions to which I have referred at [6]-[7].

[13] I consider in all the circumstances that the appropriate starting point for the possession of precursor substances charge is 18 months' imprisonment.

### **The starting point in relation to the wilful neglect charge**

[14] The wilful neglect charge relates to two of your children who were living with you during the period leading up to your apprehension by the police. You were, through that period, a very active user of methamphetamine. The health of your two boys suffered during that time. Your oldest son wet the bed every night and was in a stressed condition. Your youngest son suffered serious skin problems, suffering from persistent rashes on his arms and legs which he would scratch until he bled. Your oldest son missed many days off school. It seems that through this period you were aware of your problem but you persisted despite the presence of your children.

[15] I have considered two other cases where starting points have been fixed in relation to wilful neglect. The first is *R v Meyer* HC HAM CRI-2005-068-000555 30 October 2008 Courtney J. There the offender was sentenced to eight months' home detention for permitting premises to be used for the manufacture of methamphetamine, and a sentence of two months was imposed in respect of the wilful neglect of the child. This sentence was imposed concurrently. The offender had lived there with her son. There was no evidence of any actual harm being suffered by the child. In *R v W* HC AK CRI-2007-092-7651 11 September 2008, Potter J adopted a starting point of eighteen months to two years' imprisonment in respect of one charge of permitting premises to be used, and reached a final starting point of two years' imprisonment to reflect four additional charges of wilful neglect of children who had lived or stayed at the address. Again, there was no evidence of actual harm.

[16] Your culpability is greater than the culpability of the offenders in those cases. Your offending lasted over quite a period of time and the children actually suffered physical harm, particularly your youngest son, as a consequence. That culpability is

best reflected, in my view, by a cumulative sentence of imprisonment. While the offending arises out of your methamphetamine offending, it is a different type of offending from using methamphetamine and involves its own particular type of culpability.

[17] I do, however, take into account the totality principle when I consider the appropriate cumulative period for sentence. I consider that the appropriate sentence for the wilful neglect count is three months' imprisonment, to be cumulative with the sentence in relation to the precursor substance charge.

### **Matters relating to you personally**

[18] I have the benefit of a detailed pre-sentence report. It must be first said that you have no previous convictions for drug offending. However, you have a bad record involving some nine pages of previous convictions. These involve some burglary and shop lifting charges, a large number of driving offences, and some assault convictions. There are many convictions for failing to answer District Court bail.

[19] You were born in Tonga and have lived in New Zealand since 1986. You have at times had regular work. However, it seems that in the period before you were apprehended you were unemployed. You are recorded in the pre-sentence report as displaying no remorse, and are assessed at a medium risk of re-offending, although in relation to drug offending your risk is assessed at low because of your lack of history for drug related offences. You are described as being "moderately" motivated to address your offending behaviour.

[20] The pre-sentence report does not consider in detail your present situation. However, I have had submissions from Ms Sapolu about your present stable home life. You have a new partner who appears to be of good character and who is very supportive of you. You live with her and between you both you have eight children living with you ranging from 19 months to 21 years old. It seems that you have been working in your partner's business. You were remanded in custody for approximately eight months, but you have been on bail more recently.

[21] I am not going to treat your record as an aggravating factor. However, I am unable to give you any credit for remorse given your lack of expression of remorse and your initial plea of not guilty. The guilty plea was not at the first possible opportunity and the appropriate discount is approximately 25 percent. I have to then relate this discount to the sentences of 18 months' imprisonment and three months' imprisonment I have imposed, a total of 21 months' imprisonment. I propose giving approximately a 25 percent discount in relation to that, which leaves a net sentence of 16 months' imprisonment.

### **Home detention**

[22] Ms Sapolu submitted that home detention was appropriate given your excellent home environment at present, and your supportive partner. That is a powerful submission and I recognise its force. However, two factors have to be balanced against it. First, your offending took place at home. That was with your previous partner, but it must be said that she appears to have done all that she could do to stop you using methamphetamine. She was unsuccessful. The fact that you have offended in the past at home indicates that you could offend again, although I do suspect that your new partner is a very strong person who will do her best to ensure that it would not happen.

[23] Your record indicates that you have responded badly to efforts in the past to impose restrictions on you. As I have already mentioned, you have had numerous convictions for breaches of bail. You have had a number of convictions for resisting arrest. You have been convicted for breach of periodic detention, and there are numerous convictions for driving while disqualified. On any objective view your record indicates a poor response to authority and a poor ability to respond to restrictions. This factor combined with the nature of your earlier offending at home, show that a sentence of home detention is not appropriate.

### **Result**

[24] Mr Ahotau, the result of all that I have said is that you are sentenced to 14 months' imprisonment on the possession of precursor substances charge, and two

months' imprisonment (cumulative) on the wilful neglect of a child charge, a total of 16 months' imprisonment. Despite the submissions of your counsel I must decline home detention.

[25] With good behaviour you probably will not have all that long to serve still in prison. When you come out you will have a choice as to your future. You are clearly a man with ability and you have people who love you and support you. You have a great opportunity to take that up. But if you do not you will start to show the signs of a hardened criminal and you will face a very bleak future. So, I hope you choose the right course.

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**Asher J**